The Evolution of American Culture: The Problematic Place of Race and the Right to Have Rights

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This essay is a reflection on the scholarly work of Judge A. Leon Higginbotham. His writings on American slavery are not only factually detailed, but are driven by the conundrum of our colonial period: the most inhuman of institutions was justified and protected simultaneously with the greatest expansion in human rights that the world had seen up to that time.[1] The historical ubiquity of slavery appears paradoxical, especially if it occurs in those cultures during those times when the self-consciously animating principles of those cultures seem antithetical to that cruel institution.[2]

Thus, the timing of the writing of this essay is propitious. I write in the middle of a Black History Month that is punctuated by a war that has heightened nativist sentiments,[3] by the national coverage of the expulsion of a student from a major university for drunkenly shouting racist and anti-semitic epithets,[4] and by the Minnesota Supreme Court upholding an anti-bias ordinance designed to curb racist behavior.[5] The issue of race and its meaning for our culture remain resolutely unresolved.[6] The best of our

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1. Orlando Patterson, in his great comparative work on slavery makes a similar point. *See generally* Orlando Patterson, Slavery and Social Death (1982).

2. *See generally id.*

3. This essay was written in February, 1991, during the Persian Gulf Crisis.

4. Brown University expelled Douglas Hann for shouting racial epithets in violation of a University anti-harrassment rule. *Student at Brown Is Expelled Under a Rule Barring "Hate Speech"*, N.Y. Times, Feb. 12, 1991, at A17, col. 1 (late ed.)

5. In re Welfare of R.A.V., 464 N.W.2d 507, 509 (Minn. 1991), *cert. granted*, R.A.V. v. St. Paul, 59 U.S.L.W. 3823 (1991).

6. *See, e.g.*, Gary Peller, *Race Consciousness*, 1990 Duke L. J. 758 (challenging the entire structure of the integrationist ideal). In the context of popular culture, Spike Lee's motion picture *Do the Right Thing* was sufficiently ambiguous and

sentiments to the contrary, race continually emerges as a category for regulating our social life.

The work of A. Leon Higginbotham explores why race, rather than class for example, has been, and continues to be, the central divide in our history. As a historian he has a perspective informed by deep involvement with the legal process. He is careful, however, not to let the law and its manifold justifications obscure the historical record nor to hide the cultural institutions supporting the rules. The law may provide the structure, but the culture supplies the design.

In reviewing the work of Judge Higginbotham one is struck by the intensity of his focus: race is the lens through which he views the evolution of the law.[7] Higginbotham demonstrates how the law participated in the process of social legitimation of slavery.[8] He is sensitive to the nineteenth century theoretical substrate underlying many of the racial attitudes he chronicles and which spawned the racially loaded legal institutions that he criticizes. The firmly held—and for its period, respectable—belief in the polygenesis of humanity allowed racialist attitudes to flourish free from moral taint.[9] The science justified the social relations.[10]

It remains unclear whether the "science" supporting those views degraded before the patent immorality of human slavery was inescapably evident. The science, of course, was expressed as the explanation and description of the natural order of things. What is meet and just must similarly comport with the "natural order of things." To move away from the patterns of nature is to invite chaos and immorality. To restructure society contrary to the rules of nature and motivated by purely human norms was to arrogate to humanity a role reserved for a higher power. This con-

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troubling to inspire a widespread public debate over the meaning of the movie and the "despair" that it depicted. What was amusing about much of the commentary was its focus on the despair contained in the loss of hope of the capacity of our culture to resolve racial conflict rather than the despair reflected in the stunted lives actually lived in the mythical Bed-Sty neighborhood. This was compounded by Lee's decision to people the movie with symbols rather than characters.

7. Judge Higginbotham is careful to note that race is not the only issue of importance, nor is it necessarily the most profound source of the problems facing our society. He does note, however, that the problems arising from race and racist uses of the law are still with us. They are just as malignant, if not as potent, as they used to be. *See* A. Leon Higginbotham, Jr., *Race, Sex, Education and Missouri Jurisprudence: Shelley v. Kraemer in a Historical Perspective*, 67 Wash. U.L.Q. 673 (1989).

8. *See generally* A. Leon Higginbotham, Jr., In the Matter of Color.

9. *See generally* Miles, Racism 42-49, 73-77 (1989).

10. *See generally* Hannah Arendt, The Origins of Totalitarianism 158-84 (1966)(discussing the rise of "race-thinking" in Western Countries during the nineteenth century).

stellation of beliefs, whether held implicitly or explicitly, was reflected in the law.

Judge Higginbotham observes that the treatment of African-Americans, aboriginal peoples, and women has not traced an unbroken line to a higher ground. Instead, it has revealed the slow progress towards a re-understanding of the natural order of things. For Judge Higginbotham, the history of African-Americans in Missouri jurisprudence reflects the moral evolution of American law. He is careful to note, however, that our moral development did not occur in a vacuum, but was part of the evolving enlightened sentiment in the international discourse on human rights. When assessing the law of Missouri prior to the landmark case of *Shelley v. Kraemer*,[11] Judge Higginbotham notes that *Shelley* is in a line of cases stretching back to *Dred Scott v. Sanford*.[12]

Dred Scott stated the premise that had to be challenged continually: blacks had "no rights which the white man was bound to respect."[13] As a rhetorical device, the severity of that formulation leaves the reader incredulous. Anticipating such a reaction, Judge Higginbotham constructs a historical test. The test is in the nature of a criminal prosecution of a slave named "Celia."[14]

In *State v. Celia*,[15] a slave was accused of first degree murder for killing her owner when he ventured to her cabin to have sex with her, as was his habit, after being warned by her that if he did so on that night she would hurt him. The lawyer for Celia asked that the Missouri statute excusing homicide when committed by a women in the act of resisting rape be applied to Celia.[16] The language of the operative statutes was phrased in terms of "any woman."[17] The questions faced by the judge in deciding how to instruct the jury were whether Celia was resisting "rape" and whether she was a "woman" for purposes of the mitigating statute.[18]

The judge chose to instruct the jury that if Celia struck the

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11. 334 U.S. 1 (1948).

12. 60 U.S. (19 How.) 393 (1857). Higginbotham, *supra* note 7, at 679-80.

13. *Dred* Scott v. Sanford, 60 U.S. (19 How.) 393, 407 (1857). That phrase gained wider currency in our culture as expressed by Eldridge Cleaver in his book, *Soul on Ice* (1967). While the statement was never completely true as a legal matter when uttered either by Justice Taney or by Mr. Cleaver, they might be understood to be making a descriptive, phenomenological statement that could be true in either epoch.

14. *See* Higginbotham, *supra* note 7, at 680-85.

15. State of Missouri v. Celia, Vol. 2 Index to Court Cases of Callaway County, File No. 4,496 at 13 (1855), *cited in* Higginbotham, *supra* note 7, at 680.

16. Higginbotham, *supra* note 7, at 687.

17. *Id.*

18. *See id.* at 682-83.

blow that killed her master, even if she did it fighting off his attempt to force her into sexual intercourse, she should be found guilty of first degree murder.[19] Analyzing the Judge's reason for choosing that instruction could take any number of paths. First, he could have decided that the rape defense could not stand because no rape was possible. As the testimony revealed, Celia's master was in the habit of forcing her to have sex.[20] They had sex often. This "habit" of her master rested on implicit consent. Consent vitiates the charge of rape.[21] Thus, no substantial claim could be made that the blow was made in defense of her person.

Yet, to assert that defense, even if it was ineffective, is to concede that Celia had a claim that she had surrendered. To say that her consent had been waived is to imply that she had the legal power to resist. Such a concession would yield to the slave some power to define the social relations between her and her owner. Even the construction of that hypothesis reveals its weakness: slave/master, owner/owned.[22] Admittedly, the Missouri Constitution of 1820 directed the legislature to "oblige the owners of slaves to treat them with humanity, and to abstain from all injuries to them extending to life or limb."[23] Yet the obligation was to treat the slaves humanely, not to recognize their humanity.

Judge Higginbotham supposes that there was another reason for the judge to reject the instruction proffered by the defense. The reason is that the mitigating statute did not apply.[24] For the statute to be used by Celia, the state would have to recognize her as a member of class that the statute was designed to protect. The statute was aimed at protecting women. The operative question then was whether Celia was a woman? The answer seems to sug-

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19. *Id.* at 683.

20. *Id.* at 681.

21. See, for example, Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 Harv. L. Rev. 1255 (1986), for a discussion on the debate surrounding the marital rape exception.

22. I should make it clear that the owner/owned dichotomy as a conceit must not be taken too far. Ownership is a legal conclusion. Ownership is merely shorthand for a particular set of relations with regard to a particular thing or class of things. The descriptive and normative tasks of spelling out the relationships that comprise ownership within any particular property system is the objective of the legal system. The legal system does not, however, describe all of the possible object-relations in any society or culture. There is evidence that the legal institutions of the antebellum South recognized, within limits, the humanity, that is the non-object character of slaves, even as those same institutions protected the prerogatives of the slave owners. Higginbotham makes just the same point. *See infra* text accompanying notes 27 - 32.

23. Mo. Const. of 1820, art. III, § 26, *quoted in* Higginbotham, *supra* note 7, at 689 n.73.

24. *See* Higginbotham, *supra* note 7, at 683.

gest itself. Yet to have conceded womanhood to Celia would have been to concede gender to slaves.

Gender is a social, not a biological category.[25] Joseph Singer, in a review of Elizabeth Spelman's book, *Inessential Woman: Problems of Exclusion in Feminist Thought*, sums up this distinction and its lineage: "[Aristotle's] differentiation between men, women, and slaves makes clear that one's gender is inseparable from one's 'racial' identity: only certain males and females count as 'men' and 'women.' "[26] Thus the judge need not calculate the degree of consent or the nature of the property interest held by the slave owner. Abstractly stated, the answer is one that makes sense to modern legal ears: Celia could not take refuge behind the statute because it was not meant to protect her.

To claim that the slave was the mere property of the slave owner and thus not entitled to protection is to oversimplify a complex and deeply textured social and legal relationship. American slavery may have yielded Celia, but while she was incapable of demanding full human recognition, she was more than a piece of chattel. The slaves' humanity made them a special form of property, but their humanity was secondary. As Judge Higginbotham notes: "The recognition of the human nature of a person did not inevitably entail . . . the granting of personal rights."[27]

The personal rights they were denied included all of those that would have granted them an existence apart from their master. So, despite the limitations of the property characterization, the slaves' legal existence was defined totally in opposition to freemen, especially their masters. A slave's incapacity to sue was suspended only when he or she was making the claim that he or she was not really a slave at all, but a free person wrongfully held in slavery.[28] Thus the power to sue, while present in a slave, was present in the slave only when the slave occupied the social category denying the incapacity. Liberty was not something a slave could legally demand even when he had purchased his freedom if his owner denied the existence of the agreement.[29] Manumission was the province of the master.

Recognizing the humanity of the slave while simultaneously

25. *See generally* Catharine A. MacKinnon, Feminism Unmodified (1987).

26. Joseph William Singer, *Should Lawyers Care About Philosophy?*, 1989 Duke L. J. 1752, 1778 (quoting Elizabeth Spelman, Inessential Woman: Problems of Exclusion in Feminist Thought 54 (1988)).

27. A. Leon Higginbotham, Jr., & Barbara K. Kopytoff, *Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law*, 50 Ohio St. L.J. 511, 525 (1989).

28. *Id.* at 533-34.

29. *Id.* at 526-28.

denying agency to that humanity was central to the maintenance of the slave's object status. The law, however, was not completely coherent. Recognizing the human capacities of slaves at times enhanced their object value and at other times shielded their owners from liability.[30] Early law also allowed slaves the choice of freedom or slavery when such choice was the gift of the master at death. Over the course of a few decades, however, courts that gave the slaves that choice came to abandon their judgment.[31] Perhaps it was the press of events leading up to the Civil War that led courts to reconsider their view toward fulfilling the testator's intent. In any event, the logic of the case law was at war with itself. Since the humanity of the slaves was distinctly limited by law and public policy, granting the choice for freedom or continued slavery meant not just respecting the intent of the dead slave owner, but granting, even momentarily, the condition of freedom to the slave—a quality their condition could not admit. Like the Union, they could not be both slave and free.

When analyzing the slave codes and the evolution of the legal treatment of slaves, bearing in mind the singular condition of slavery and its opposite, one must not forget the scientific doctrines that underlay the moral arguments for the continued enslavement of an entire race. The notion of polygenesis is critical, because as one could not be both slave and free (the conditions of humanity hinged on the classification) neither could one be both white and black.[32] The vexatious problem of race is at the heart of this tension. Without the fig leaf of racialist theory, the brutality of human slavery would have had to have been confronted directly. There would have been no sanction from heaven. The law would not have reflected the natural order of things, but would have stood revealed as the human creation that it is: not an imperfect reflection of the higher law, but an accurate representation of the basest of human designs.

The embarrassment of imperfection revealed itself in the slave statutes themselves. Slavery was a condition originally defined under Virginia statutes independent of race.[33] Slavery was a

30. *See generally id.*

31. *Id.* at 537-38.

32. This is a familiar theme in the law of American race relations. See, for example, the treatment of Indians, whites and blacks in the legal categories that apply to those groups. *See, e.g.*, Gerald Torres & Kathryn Milun, *Translating Yonnondio By Precedent and Evidence: The Mashpee Indian Case*, 1990 Duke L.J. 625, 650-52.

33. A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 Georgetown L.J. 1967, 1970 (1989).

condition that could be inherited whether one were legally white or black depending upon the status of one's mother.[34]

Similarly, in resolving the question of whether Indians could legally be enslaved, the method of importation was central: if they were brought into Virginia overland they could not be enslaved, but if they were imported by ship they could be.[35] This statute was also, technically, race neutral.[36] This is not to say that race was a legally irrelevant category, instead it merely suggests that the legislature was circumspect about writing statutes in a purely racial way. Other characteristics were sufficient proxies for race.[37] Indians, after all, were later to be included within the class of people who could be enslaved.[38]

Such a system could be workable where the races were kept separate and pure. But, as *State v. Celia* demonstrated, the races though kept separate did intermingle and produce confusion. What was the child of an African and a European? What about an Indian and European or an African and Indian? Could such children be enslaved? Since Indians could be enslaved and the condition of slavery could be inherited through the condition of the mother, would the child of an Indian and African be enslaved if the Indian mother were free? Could they be born into freedom and then enslaved? Would they have access to the courts to demand their freedom? Could the child of such unions ever regain their status as white? Could their status be changed retroactively? What rights hinged on the classifications?

The legislature sought the path out of this confusion by consciously creating categories of rights that were race dependent.[39] The irony of the legislative solution was the that by the time the legislature saw fit to create inflexible categories of rights based upon race, the idea of racial purity was already so far removed from the existing material reality as to make the categories appear delusional.[40]

The ideology of race, however, could not be based upon the real conditions of "purity" since that condition never existed. Instead, the ideology emerged in law as an attempt to cabin and define certain social practices that were found to be destabilizing.

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34. *Id.* at 1973.
35. *Id.* at 1973-74.
36. *Id.* at 1974.
37. *Id.* at 1974-75 (Religion, for example, was often used as a substitute for race.).
38. *Id.*
39. *Id.* at 2000.
40. *Id.*

That the social practices and the laws describing them were contradictory merely made the laws unstable, but did not undermine the power relations that legitimized them. The laws controlling "negroes" and specifically defining blacks, Indians, and mulattoes created the separate institutional supports that buttressed the institution of slavery.

Free blacks would be controlled by the race statutes or be encouraged to leave. Inter-racial sexual relations would be prohibited. Inter-racial marriages would be initially recognized, but would subject the parties to banishment. Those unions would later be declared void *ab initio*. The children of such unions—whether legitimate or not—would devolve to the lower racial category. The subjugation could occur on an individual as well as class-wide basis. The condition of white superiority was reproducible not only through slavery, but by limiting the possibilities of inter-racial community that would be based on some foundation other than white supremacy. As the population became even more racially mixed, the laws against "race-mixing" became harsher and who was or was not white became stricter.[41]

As the definition of whiteness moved towards the "not one drop" of negro blood standard it moved away from the reality of racial mixing in antebellum Virginia and more firmly into the embrace of scientific racialism. Judge Higginbotham comments on the use of "expert" witnesses in trials to determine the racial origin of persons.[42] The experts based their judgments on the notion of ideal racial types and thus supported the view that a married woman who gave birth to a mulatto child (that is one whose appearance raised doubt about its lineage) would presumptively be assumed to have committed adultery. "Among the hundreds of millions of whites in *Europe*, there is no authenticated instance of the produce of the white race being other than white."[43]

Why did the legislature move to narrow the classification of "whiteness"? What was the fear that motivated the change from proportional evaluation to the evaluation based upon presumed racial types? One answer suggested by Judge Higginbotham is that clearly established racial definitions were essential for the mainte-

41. *See generally id.* As Higginbotham points out, the laws against miscegenation were written to preserve racial purity, but even they recognized the so-called Pocahontas exception. The mixing of "races" was a noble part of the mythology of State of Virginia.

42. *Id.* 1997-2000.

43. *Id.* at 2000 (quoting the President of the Court in the case of *Watkins and wife v. Carlton* 37 Va. (10 Leigh) 560 (1840)) *Watkins* was a challenge to one child's share of the estate of Carlton. The claim was that the child claiming the share was a mulatto and thus could not be the child of the decedent, a white man.

nance of white male control. Judge Higginbotham examined the law of inter-racial sexual relations to test his hypothesis and found that the concern with involuntary inter-racial sex was premised almost entirely on the need to maintain white male domination over blacks in general (free or slave) and white women as well.[44]

Thus the cases of rape rarely involved white women of low social status.[45] In fact, in one case, even though the jury felt compelled to convict the black man accused of attempted rape, they also felt called upon to ask the Governor for mercy. In its recommendation for mercy the jury foreman noted:

> 3d. . . . There is no doubt that he repaired to the house of Mrs. Stevens in the belief that she would cheerfully submit to his embraces, as she doubtless had done before, but finding her absent he probably supposed his embraces would be equally agreeable to his daughter [Mary Jane], and in making the attempt the jury considered the offence as differing only *in name* from a similar attempt made upon one of his own color. They also considered that the law was made to preserve the distinction which should exist between our two kinds of population, and to protect the whites in the possession of their superiority; but here the whites had yielded their claims to the protection of the law by their voluntary associations with those whom the law distinguishes as their inferiors.[46]

The reason for the restriction on inter-racial sexual relations is revealed here not as a social control designed to preserve the purity of racial types, but one designed to preserve the differences that those racial types represented.

The symbolism of different racial types was critical to the maintenance of social control. For a white person to debase himself or herself was to forget the reasons for the difference. The difference was natural. The law merely enforced public morality—and social control of the powerful—by enacting codes that made cognizable physical distinctions the basis of legal status and by being harsh about where the line fell. As the case above indicates, the law could judge whites or blacks harshly when they ignored the lines of color that the law made significant, although blacks were almost always dealt with more severely.[47]

By retaining the fiction of racial purity the law could ignore the reality of the continuum of "racial types" and could make color the objective test of a created status. Color could also be a handy substitute for legitimate social status. The law could thus

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44. *See* Higginbotham & Kopytoff, *supra* note 33, at 2008.
45. *See id.* at 2012-13.
46. *Id.* at 2013.
47. *See id.* at 2008-20.

concern itself with protecting the distinction between higher and lower elements. The more white people resembled black people, the less the law had to be concerned with them.

More critical than the law's treatment, however, was the internalization of the norm of racially coded hierarchy that is captured by the jury foreman's remarks. The justification contained in the plea for mercy for the convicted black man was premised upon the natural foundation for the law under which the man was condemned. Where the natural order had been breached by the white person no punishment should come to the black person who treated that white person just like another black.[48] What else could Mrs. Stevens have expected? The domination her daughter experienced was authorized, even if done through a convoluted and incoherent notion of consent.

The authority of slave masters in the antebellum South was maintained by the transformation of "force into right, and obedience into duty."[49] The conditions of subjugation, domination and subordination, was not maintained through brutality alone. If that were true no rural slave master would have been safe. Instead, as Higginbotham's work demonstrates, the slave codes reflected pre-exiting property relations within which the institutions of slavery were made to fit. By appropriating the language of freedom that was at the heart of the property system, the maintenance of slavery became the maintenance of freedom. The existence of free blacks destabilized the system of property relations within which slavery functioned and they necessitated the creation of new codes to accommodate their existence. Thus, the codes shifted from just regulating the relations between white people and black people through the medium of the slave law to overtly regulating behavior on the basis of race.

That transformation is the critical link between the slave codes and the contemporary law of race relations. The existence of codes that legitimized object relations between human beings is the least important artifact of that period in this regard. Tradition, upon which the authority of the law depends, is firmly rooted in the social practice of creating legal categories based upon race, but these categories were created expressly to maintain the subordinated position of the dominated racial category and *those like them*.

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48. This forgets, of course, that the plea for mercy thoroughly debases the status of black women and removes certain classes of white women from the protection of white men.

49. Jean-Jacques Rousseau, A Discourse on Inequality (Maurice Cranston trans. 1984).

The common lineage between the pre-Civil War race codes and the Jim Crow laws of the Reconstruction and post-reconstruction period is found in the insecurity of the ruling elite. Perhaps the dissatisfaction with current affirmative action policy might be found in the same insecurity; perhaps we might find it rooted in the same impulse that created the race codes in the first place. Perhaps the insecurity in founded in the fear that challenging the continuing socially subordinated position of black people might also lead to a challenge to the socially subordinated condition of "those like them" as well.