

RACE AND THE AMERICAN LEGAL PROCESS

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VOLUME I

IN THE MATTER OF COLOR

Race and the American Legal Process:

The Colonial Period

VOLUME II

SHADES OF FREEDOM

Racial Politics and Presumptions

of the American Legal Process

Shades of Freedom

*Racial Politics and Presumptions
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New York • Oxford • Oxford University Press • 1996

Paralleling our written governing documents, they wielded the same authority; they were, in effect, the Shadow Constitution, the Bill of Non-Rights for African Americans, the Anti-Preamble justifying a bifurcation of the society between "We the People" and "We, the *Other* People."¹⁷

THE PRECEPT OF INFERIORITY

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic. . . . This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.—*Dred Scott v. Sandford* (1857).¹

The Most Enduring Precept

CHIEF Justice Roger Brooke Taney's opinion in the *Dred Scott* case did not reflect a unique perception about African Americans in that era. In 1857 it probably represented the views of the vast majority of whites in American society. Even in 1996, it might be argued that the belief that African Americans are of an "inferior order" is an idea some find difficult to abandon. Admittedly, this is a terrible accusation to make, and one that many people will challenge and find downright insulting.

When the majority of white Americans consider the history of this nation, they are apt to conclude that the blood of the Civil War washed clean the sins of slavery and that the marches of the civil rights movement erased the remaining vestiges of segregation and racial oppression. Others not given to excessive historical introspection believe—almost equally sincerely—that they personally have nothing whatever to do with slavery, segregation, or racial oppression because neither they nor—as far as they know—their ancestors ever enslaved anyone, ever burned a cross in the night in front of anyone's house, or ever denied anyone a seat at the front of a bus. And so, between the self-absolving denial of the latter group and the self-

congratulation—which is a deeper form of self-absolution—of the former, it becomes nearly impossible to have an honest discussion about what used to be called “the Negro Problem.”²

Indeed, we do not even agree whether we still have a “Negro problem” or, if we do have a “problem,” what exactly it might be. Some scholars, like Derrick Bell, argue quite eloquently that any discussion of race must acknowledge that America is still at its core the racist country it has always been and that this racism affects life chances for African Americans.³ Others, like Shelby Steele, claim that, considering all the progress made in the last century, that at least in the past thirty years, African Americans’ shortcomings and not racism may have become their own worst problems.⁴ This chapter will not settle the debate concerning the persistence and present-day consequences of racism, but it will try to explore its origins.

Alexis de Tocqueville once observed that, as in the lives of individuals, the circumstances of the birth of nations deeply affect their development.⁵ When this nation was being born, one important circumstance of its birth—if the Declaration of Independence and the Constitution are to be taken seriously—was its theoretical commitment to the principles of human freedom and equality. But another equally significant circumstance—as evidenced by the genocide of Native Americans and the enslavement of African Americans—was its dedication to the doctrine of white supremacy.

That doctrine, much as it contradicted the theoretical principles of the Declaration of Independence and the Preamble of the Constitution, deeply and unalterably affected how America has developed as a nation. It gained us the land on which Native Americans and Mexicans used to live; it produced prosperity for the generations who directly and indirectly profited from the free labor of slaves; it resulted in generations of American apartheid; it allowed us to pretend that we were truly a white European nation; it saddled us with what W.E.B. Du Bois called “the problem of the color-line.”⁶ In other words, the doctrine of white supremacy and its corollary precept of black inferiority made us who we were a very short time ago and, inevitably, who in part we still are today.

In 1953, during oral arguments before the Supreme Court in the case of *Brown v. Board of Education*,⁷ challenging as unconstitutional the intentional segregation of African-American children in public schools, Thurgood Marshall posed the following challenge to the assembled justices: “[T]he only way that this Court can decide this case in opposition to our position . . . is to find that for some reason Negroes are *inferior* to all other human beings.”⁸ In response to Thurgood Marshall’s challenge, the Court ruled that the intentional segregation of African-American children in public schools was a violation of the Equal Protection Clause of the United States Constitution. In the

justices’ words: “To separate them [African-American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁹

Thurgood Marshall, by posing the challenge as he did, and the justices, by responding as they did, would seem to have taken for granted that no one in their right mind would ever imagine, and no court under the rule of law could possibly determine, that African Americans were inferior to other human beings. Yet Thurgood Marshall and the justices knew perfectly well that such a brilliant statesman as Thomas Jefferson¹⁰ and such a “respected” Supreme Court jurist as Roger Taney¹¹ had argued that blacks were indeed inferior to whites. Thurgood Marshall, for reasons of legal strategy, and the justices, for reasons known only to them, may have sealed between them this unspoken understanding of convenient myth.

But the truth was that our nation was founded explicitly, prospered implicitly, and still often lives uneasily on the precept of black inferiority and white superiority. Indeed, that precept helped to legitimize slavery in America and served to justify the segregation of African Americans in this nation long after slavery had been abolished. To this day, the premise of black inferiority and white superiority remains an essential element of the “American identity,” mesmerized as we still are by race and color.¹²

The dominance of the precept of inferiority has to do with the fact that “inferiority” is fundamentally different from all the other precepts. Most of the other precepts, in one way or another, defined or enforced certain tangible rights of the slave master or obligations of the slaves. For example, the precept of property described a right of the master. According to that precept, the master owned the slave much in the same way he owned his horse. Once the law abolished slavery, the original precept of property ceased to exist. This is because the precept of property owed its existence to the legal process. The law created it and, with the help of the Civil War and the Thirteenth Amendment, the law eliminated it.

By contrast, the precept of inferiority did not define any specific right or obligation. Instead, “inferiority” spoke to the state of the mind and the logic of the heart. It posed as an article of faith that African Americans were not quite altogether human. What’s more, “inferiority” did not owe its existence to the legal process. Although the law came to enforce the precept, it did not create it. From the time the Africans first disembarked here in America, the colonists were prepared to regard them as inferior.¹³ When the Thirteenth Amendment abolished slavery and, presumably, all its attendant conditions,¹⁴ it did not eliminate the precept of inferiority. Even much later, when the law abolished state-enforced racial segregation, it still did not eliminate the precept.

Today we have come to a time when whites may not own African Americans as property (Precept Two of American Slavery), when African Americans are not totally powerless to control their fate (Precept Three), when whites and African Americans may marry whomever they wish (Precept Four), when whites may no longer completely control where African Americans live and the status they have in the community (Precept Five), when white control is not a predominant worry of the African-American family (Precept Six), when African Americans are free to get an education if they wish (Precept Seven), when the African-American church can chart its own destiny (Precept Eight), when the Bill of Rights theoretically applies equally to African Americans and whites (Precept Nine), and when overt racism in the public sphere is far less tolerated (Precept Ten). But still we cannot say that we have reached a time when the belief that African Americans are inferior has disappeared without a trace from the American heart. That is why inferiority remains the most enduring—and perhaps most important—precept.

The Object of Hate

During colonial times in America, the ruling class of English colonists had "difficulties in fostering a sense of community in colonies populated by Portuguese, Spanish, French, Turks, Dutch, blacks, and Indians."¹⁵ For example, cases reported between 1640 and 1669 in Virginia reveal that white indentured servants, along with African-American slaves, had rebelled against the English colonists by running away and stealing from their masters.¹⁶ In addition to facing rebellion by whites and African Americans, the English colonies also had to withstand attacks from the Native American population that the colonists were doing their best to subjugate. "Indians and whites conducted guerrilla raids against each other's settlements with ever increasing ruthlessness."¹⁷

Faced with rebellion from within and attacks from without, the colonists needed to foster a common identity in order to quell the restless stirrings of their own less-happy members, who had no desire to serve their masters indefinitely, and in order to repel the not-unjustified attacks of the Native Americans, who had no intention of being subjugated quietly. The colonists discovered soon enough that nothing makes better friends of former enemies than a new common enemy. Give a people someone to hate and fear and they will have a reason to live with one another. To say this is not to indulge in any form of romantic despair. It is simply to admit that, even though love and its object may be what redeem our spirit in the next world, hate and its object seem to drive us in this world to conquer the land, build the bridges,

raise the armies, and fight the common enemy. For the white colonists, the common object of fear and hate became the Africans in their midst.

Scholars have over the years offered different theories about why the Africans became the object of hate and fear that united the white colonists. Some have suggested that the doctrine of black inferiority was developed subsequent to slavery in order to accommodate the economic necessity of slavery. Thus, in 1944, Eric Williams wrote: "Slavery in the Caribbean has been too narrowly identified with the Negro. A racial twist has thereby been given to what is basically an economic phenomenon. Slavery was not born of racism: rather, racism was the consequence of slavery."¹⁸ In contrast, other scholars have argued that in the Caribbean and in other parts of the Americas, blacks were enslaved precisely because, from the earliest of times, whites had perceived them to be inferior. Winthrop Jordan, in a careful canvass of fifteenth-, sixteenth-, and seventeenth-century literature noted:

Long before they found that some men were black, Englishmen found in the idea of blackness a way of expressing some of their most ingrained values. No other color except white conveyed so much emotional impact. As described by the *Oxford English Dictionary*, the meaning of *black* before the sixteenth century included, 'Deeply stained with dirt, soiled, dirty, foul. . . . Having dark or deadly purposes, malignant; pertaining to or involving death, deadly; baneful, disastrous, sinister. . . . Foul, iniquitous, atrocious, horrible, wicked. . . . Indicating disgrace, censure, liability to punishment, etc.' Black was an emotionally partisan color, the handmaid and symbol of baseness and evil, a sign of danger and repulsion.

. . . White and black connoted purity and filthiness, virginity and sin, virtue and baseness, beauty and ugliness, beneficence and evil, God and the devil.¹⁹

Both theories, although certainly helpful to the general debate on the root causes of slavery in America, fail to settle convincingly the question of whether the precept of black inferiority preceded or followed the institution of slavery. As to the first theory, even if slavery was purely an "economic phenomenon," it does not explain why in America after the seventeenth century, slavery came to be predicated exclusively on race, whereas at other times, in other places, slaves had come from all races. As to the second theory, even if from time immemorial Englishmen had used the color black as a symbol of everything base and evil, it does not explain why, upon coming in contact with Africans, Englishmen should immediately conclude that their concept of the color black was embodied in the Africans who, in all seriousness, were after all never *literally* the color black.

In any event, it may very well be pointless to argue whether the precept of black inferiority was a cause or a consequence of the institution of slavery.

To argue about such an intractable distinction is to insist upon finding reasoned nuances within the precept of black inferiority.²⁰ That precept, at bottom, was and is based on hate. Hate does not always choose its object with logic. Certainly, there is no logical explanation for the white colonists branding the Africans as inferior to all other human beings. But once they were so branded, the Africans gave the white colonists an indelible marker to fear, a common object of hate, which provided a bond more solid than love. The precept that African Americans were, in some immutable way, inferior became a powerful principle around which all white colonists, even those who did not own slaves, could begin to foster a common identity and forge a united community.

Contrary to some of our most cherished myths, not all of the white colonists who settled in America came here because they wanted to be "free." Some came because they were poor, some because they were convicts, some because they were greedy, some because they were religious zealots, and some because they had no place else to go. For the most part they had little in common, other than the fact that they were all suddenly here, and whatever America had to offer them was probably better than what they had left, and what still might await them back in Europe. So, trapped between the very real memory of the limitations of the Old World and the still unfulfilled hope of the possibilities of the New World, the white colonists may not have understood at the time who and what they were as a people. They were, however, at least able to say who and what they were not: they were not blacks; they were not inferior.

The idea that notions of black inferiority and white superiority serve as a rallying marker for American society is not a new one. Writers with greater imagination have expressed it far more elegantly than this chapter pretends to. For example:

Derrick Bell:

Black people are the magical faces at the bottom of society's well. Even the poorest whites, those who must live their lives only a few levels above, gain their self-esteem by gazing down on us. Surely, they must know that their deliverance depends on letting down their ropes. Only by working together is escape possible. Over time, many reach out, but most simply watch, mesmerized into maintaining their unspoken commitment to keeping us where we are, at whatever cost to them or to us.²¹

Richard Wright:

We black folk, our history and our present being, are a mirror of all the

manifold experiences of America. What we want, what we represent, what we endure is what America *is*. If we black folk perish, America will perish. If America has forgotten her past, then let her look into the mirror of our consciousness and she will see the *living* past living in the present, for our memories go back, through our black folk of today, through the recollections of our black parents, and through the tales of slavery told by our black grandparents, to the time when none of us, black or white, lived in this fertile land.

The differences between black folk and white folk are not blood or color, and the ties that bind us are deeper than those that separate us.²²

Ralph Ellison:

Since the beginning of this nation, white Americans have suffered from a deep inner uncertainty as to who they really are. One of the ways that has been used to simplify the answer has been to seize upon the presence of black Americans and use them as a marker, a symbol of limits, a metaphor for the "outsider." Many whites could look at the social position of blacks and feel that color formed an easy and reliable gauge for determining to what extent one was or was not American. Perhaps that is why one of the first epithets that many European immigrants learned when they got off the boat was the term "nigger"—it made them feel instantly American.²³

James Baldwin:

[In America], [i]n a way, the Negro tells us where the bottom is: *because he is there*, and *where* he is, beneath us, we know where the limits are and how far we must not fall. We must not fall beneath him. We must never allow ourselves to fall that low. . . .²⁴

Toni Morrison:

Africanism is the vehicle by which the American self knows itself as not enslaved, but free; not repulsive, but desirable; not helpless, but licensed and powerful; not history-less, but historical; not damned, but innocent; not a blind accident of evolution, but a progressive fulfillment of destiny.²⁵

By the latter part of the seventeenth century, the colonists would have in place a sort of "social and color ladder," occupied at the top rungs by propertied whites, in the middle by the poor and servant whites, and at the bottom rungs by Native Americans and African-American slaves.²⁶ Through the operation of this social and color ladder, the ruling class of whites was assured the loyalty of the poor and servant whites, upon whose loyalty the fate of the colony depended, without the ruling class having to share its wealth and power with the servant class. For the poor and servant whites, the rewards for their loyalty were the somewhat illusory promise that they too could ascend to the top rungs of the ladder occupied by the propertied whites, and, much

more important, the eternal guarantee that they could never fall to the lower rungs occupied by the Native Americans, or to the lowest rungs occupied by the African Americans.

Throughout the eighteenth and nineteenth centuries until 1865, the social and color ladder was reinforced by slaveholders, legislators, and judges who articulated and perfected the rationale of black inferiority and white superiority. As South Carolina Senator James Henry Hammond ruminated in 1861:

In all social systems there must be a class to do the menial duties, to perform the drudgery of life. That is, a class requiring but a low order of intellect and but little skill. Its requisites are vigor, docility, fidelity. Such a class you must have, or you would not have that other class which leads progress, civilization, and refinement. It constitutes the very mudsill of society and of political government. . . . Fortunately for the South, she has found a race adapted to that purpose at her hand. A race *inferior* to her own, but eminently qualified in temper, in vigor, in docility, in capacity to stand the climate, to answer all her purposes. We use them for our purpose, and we call them slaves.²⁷

The rationale for the precept of inferiority was this: blacks, for reasons of physiology, culture, behavior and even religion, were something less than fully human and were therefore inferior to whites. As such, blacks could be enslaved by whites, not only because of the economic benefits that the raw physical attributes of blacks would bring whites in their efforts to turn the primitive American land into a civilized nation, but also because of the moral benefits that dominance by whites would bring blacks in soothing their heat-then instincts. If, however, the civilizing restraints of slavery were to be removed and they were free,²⁸ then blacks had to be segregated from whites because, left entirely to their own devices, free blacks would tend to corrupt the moral virtue and physical purity of white society,²⁹ and because the two races, one a blessed fulfillment of divine destiny, the other a cursed accident of blind evolution, could not possibly live together peacefully in society without the beneficent controlling hand of the superior race upon the inferior one.

Eventually the precept of black inferiority and white superiority worked itself into the fabric of the American legal process. The social and color ladder became a legal one as well. Looking for evidence of the precept of inferiority in the American legal process, however, is very much like looking for evidence of slavery in the United States Constitution as originally ratified.

The Constitution accommodated the institution of slavery without ever *explicitly* using—prior to 1865—in any article or clause the word “slavery.” But the drafters’ coyness about using the word “slavery” did not necessarily reveal an aversion to the institution of slavery.³⁰ Rather, it suggests a reluc-

tance to sully the great document with a word that most of the founders realized, despite their protestations to the contrary, denoted a fundamentally evil institution.³¹

Similarly, the legal process institutionalized the premise of black inferiority without ever specifically delineating in any one case or statute the entire rationale for the precept of black inferiority. There are, of course, exceptions. Some judges and legislators bluntly stated their reasons for believing that blacks were inferior to whites. But the legal process as a whole was more subtle in assimilating and perpetuating an ideology in which whiteness was the nimbus of superiority, and blackness the stigma of inferiority.

The Stages of Development of the Precept of Inferiority

In America, the legal process developed the precept of black inferiority and white superiority in four distinct stages. This volume analyzes the four stages of the development of the precept of black inferiority by focusing first on cases and statutes of Virginia. As such, this work is not an exhaustive historical review of slavery in every American jurisdiction. Rather, it is an attempt at understanding how the American legal process developed the precept of black inferiority and white superiority.

In the first stage, lasting approximately from 1619 to 1662, the legal process presumed, without defining, the precept of black inferiority. During this stage, even though blacks were considered to be inferior to all other individuals in colonial society, the law did not succeed in articulating a clear rationale of, or in providing rigid enforcement for, the precept of black inferiority. This was the *laissez-faire* stage of the development of the precept of black inferiority, when the legal process struggled even to articulate a consistent jurisprudence for racial subordination. Whites during that time seemed to suspect that blacks were inferior, but they did not always articulate precisely how or why.

In the second stage, lasting from 1662 to the 1830s, the legal process carefully defined and, when necessary, ruthlessly enforced a precept which before then it had taken for granted. It was the stage when the rationale for American slavery was formed with cunning and without pity, when both blacks and whites became most conscious of and most dependent on the precept of black inferiority and white superiority. As a nation, we crossed the Rubicon of mere racial distinction, entered the oblivion of chattel slavery, and wandered lost in the labyrinth of racial oppression.

During the third stage, from the 1830s to the end of the Civil War, the legal process defended and protected from attacks the crumbling institution of

slavery and the precept of black inferiority. It was the stage during which the abolitionists launched a crusade against slavery and when the Supreme Court, with the disastrous decision in *Dred Scott v. Sandford*,³² contributed to the outbreak of the Civil War.³³

During the fourth stage, beginning at the Reconstruction period, the legal process attempted unsuccessfully to break free from the legacy of the precept of black inferiority. It was the stage when the nation generally seemed unable or unwilling to totally erase the vestiges of slavery, despite the significant constitutional amendments. The Supreme Court in several cases effectively nullified the Reconstruction legal changes, and in *Plessy v. Ferguson*³⁴ announced the "separate but equal" doctrine that formally legitimized segregation.

Just as racial subordination did not stop with the abolition of slavery and the end of the Civil War, the precept of black inferiority did not die during the post-Reconstruction stage. With the help of *Plessy v. Ferguson* and the "separate but equal" doctrine, the precept hid in what Justice Cardozo called the "interstitial" spaces of the law.³⁵ The Supreme Court decision in *Brown v. Board of Education*³⁶ was, as much as anything, the start of an effort to reach into these interstitial spaces and to cleanse the legal process of the precept of black inferiority and white superiority.

The four chronological stages described are analytical signposts that can be useful in tracking the development of the precept in the law. They are, however, not meant to be definitive historical categories. It is nearly impossible to determine precisely when this nation moved from one stage of the precept of inferiority to another. Certain judicial decisions such as *Dred Scott v. Sandford*, *Plessy v. Ferguson*, and *Brown v. Board of Education* were indeed critical to the development or the diminution of the precept. But judicial decisions and legislative enactments are unclear and imperfect signposts in the development of the precept of inferiority.

As stated earlier, the inferiority precept is the one precept that did not owe its existence to the legal process. More than any other precept, inferiority was a matter of belief and an article of faith. Thus, to take *Plessy v. Ferguson* as an example, the decision did not create state-enforced racial segregation; it merely gave it the imprimatur of the Supreme Court. But long before the decision was issued, whites, both in the South and in the North, practiced racial apartheid. To take *Brown v. Board of Education* as another example, the decision merely struck down state-enforced segregation in public schools. It did not, however, convince a great many white parents in either the North or the South to send their children to school with black children. Nor, in the final analysis, did *Brown* completely succeed in its ultimate goal of assuring to black children in public schools the same educational opportunities avail-

able to white children. There are many reasons why some black children continue to attend schools in conditions almost as wretched as during the era when Charles Hamilton Houston began to document the deplorable state of southern black schools. One of these reasons has to do with the precept of inferiority and how it has developed from 1619 to 1996.

This volume is mostly a record of the past. Perhaps it is also in some way a lesson for our own time. Between 1989 and 1991, the collapse of Communism in Eastern Europe and the break-up of the former Soviet Union brought about a rapid and public resurgence of anti-Semitism in Russia. All sorts of deceptive arguments, from the supposed inordinate wealth of the Jews, to their mythical religious depravity, were used to explain the shambles in which the country found itself. Once again Jews became the common object of hate around which other Russians tried to rebuild a common identity that had withered under Communism, and that had now all but died with the fall of the Soviet state. Thousands of Jews left Russia during that period because life there for them was unbearable.

The night before she was to leave Russia with her family, a Jewish woman wrote an anonymous letter to a Moscow weekly. She warned Russians not to suppose that the moral and economic devastation wrought upon their society by so many years of totalitarian government could ever be erased simply by expelling Jews from the country. Russia, she predicted, would not find peace and redemption by hating Jews because "[h]atred that rages in souls and suddenly loses its immediate object does not disappear without a trace."³⁷

The precept of black inferiority is the hate that raged in the American soul through over 240 years of slavery and nearly ninety years of segregation. Once slavery was abolished, and once the more oppressive forms of segregation were eliminated, many whites' hate still had not lost its immediate object. The ashes of that hate have, over the course of so many generations, accumulated at the bottom of our memory. There they lie uneasily, like a heavy secret which whites can never quite confess, which blacks can never quite forgive, and which, for both blacks and whites, forestalls until a distant day any hope of peace and redemption.³⁸