Notre Dame Law Review

Volume 54 | Issue 2 Article 1

12-1-1978

Relevance of Slavery: Race and the American Legal Process

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Introduction

To participate in the Notre Dame Civil Rights Lecture Series is the highest of honors. Your lecturers in the past have been among our most distinguished and thoughtful jurists, scholars and civil rights practitioners. Like all who have preceded me, not for reasons of protocol but because it is so true, I must first note my unlimited esteem for Father Theodore M. Hesburgh's long and enduring contributions to the advancement of human rights throughout this nation and the world. At all times during these dramatic and tension-filled struggles, he has been one of the nation's wisest and most effective leaders. If, during the last twenty-five years, most college presidents, public officials, and leaders of business and labor had demonstrated his understanding of and commitment to solving these problems, we would not be confronted today with the magnitude of pressing civil rights problems which still exist and we would be far closer to the fruition of Martin Luther King's dream that someday we would "transform the jangling discords of our nation into a beautiful symphony of brotherhood."[1]

As I surveyed the moving lectures previously presented in this series, the common denominator was always a commitment to full equality of opportunity and a recognition that opportunity must be measured by actual results rather than theoretical options. I agree with those pronouncements, yet I am increasingly convinced that the cause of human rights will not be advanced by merely repeating admonitions which others have made so eloquently that as individuals, as institutions, and as a nation we should and must do better.

I. The Relevance of Slavery

Instead of initially focusing on the civil rights crisis of the hour or even of this decade, I will comment primarily on an evil institution of centuries ago and ask you: Can we obtain insights for today's problems if we know more about

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* Some of the themes in this article have been developed more extensively in L. HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD (1978).

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1 THE VOICE OF BLACK AMERICA 974 (P. Foner ed. 1972).

the institution of legalized slavery two centuries ago? Most of us are victims of an educational process which distorted in our textbooks the nation's history. Because of this distortion, so many persons, even those of good will, have not had the commitment necessary to eradicate the pervasive barriers of racial and sexual bias with all of their institutional consequences. Most of our leaders have been oblivious to the magnitude of racial and sexual oppression caused by, sanctioned by, and perpetuated by the early American legal process. Perhaps if we understand better what an activist force American laws have been in the repression of blacks and other minorities, many would be more sympathetic to the efforts made through the legal processes to eradicate the institutional consequences of past repression. For if we understand the magnitude of past legal oppression maybe we can be more rational and creative in solving the problems of today.

Many Americans seem quite tired of hearing repeated the sad fact that racial slavery once existed in this country. They view slavery as some archaeological incident which has no more relevance to today's problems than the dinosaur has to supersonic jet travel. Perhaps the penultimate statement is one purportedly made by a Philadelphia public official who, when being questioned about affirmative action programs, replied that he and his family had never owned slaves. Yet, some of our most illustrious citizens, those few who for all time to come will deserve a special reverence by all Americans, have had a different perspective on this issue.

Shortly before Chief Justice Earl Warren died, I spoke with him in great detail about my fifteen-year research effort on the issue of colonial slavery. He responded, "I would be especially interested in seeing you at this particular time because of a reappraisal of my own thinking concerning slavery—not only what it meant in the past but the danger of what it will still mean to the future."[2]

What is its legal relevance to the events of today? Many will disregard George Santayana's warning that "Those who cannot remember the past are condemned to repeat it." If legal precedent is needed, perhaps the opinions of four Justices in the *Bakke* case[3] will demonstrate the continuing relevance of slavery.

At the outset of the opinion of Justices Brennan, White, Marshall, and Blackmun, they emphasized:

> Our Nation was founded on the principle that "all men are created equal." Yet candor requires acknowledgment that the Framers of our Constitution, to forge the Thirteen Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known and have aptly been called our "American Dilemma."[4]

Mr. Justice Marshall stressed the issue of slavery even more pointedly in the first two paragraphs of his separate opinion:

2 Letter from Earl Warren to A. Leon Higginbotham, Jr. (April 25, 1974).
3 Regents of Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978).
4 98 S. Ct. at 2767.

> I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.
>
> Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.[5]

In his opinion, Mr. Justice Blackmun asserts: "In order to get beyond racism we must first take account of race."[6]

II. The Historical Record

A. *The Separate Treatment of Negroes*

During the argument before the United States Supreme Court in *Brown v. Board of Education*,[7] Thurgood Marshall, then chief counsel for the plaintiffs, was being peppered with questions as to the original understanding and meaning of the Fourteenth Amendment. At one dramatic moment, he paused and replied, "Why, of all the multitudinous groups of people in this country [do] you have to single out Negroes and give them this separate treatment?"[8]

Few have attempted to answer the question as to why black people, and only black people, were subject to such *legalized* separate treatment in this country. Certainly there is no evidence to establish that whites could not have picked cotton, hoed tobacco or planted rice. For, as Eric Williams has so persuasively stated, "the Mississippi dictum is quite untenable that 'only black men and mules can face the sun in July.' "[9] For more than a hundred years whites faced the sun in Barbados and the white Salzburgers of Georgia insisted that rice cultivation was not harmful to them.[10] Thus blacks did not become slaves because whites were physically unable to handle the agricultural demands of the new colonies. Blacks became slaves because they were cheaper than white labor and because those in power were willing to treat blacks differently.

In the process of implementing these economically motivated decisions,

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5 98 S. Ct. at 2798.
6 98 S. Ct. at 2808.
7 347 U.S. 483 (1954).
8 ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952-55 at 239 (L. Friedman ed. 1968).
9 E. WILLIAMS, CAPITALISM AND SLAVERY 20 (4th ed. 1966).
10 *See* 3 COLONIAL RECORDS OF GEORGIA (A. Candler ed. 1904); WILLIAMS, *supra* note 9, at 20.

blacks were kidnapped, brutalized and forced into slavery. Now upon reflection, it seems incredible that any group claiming to be civilized would have tolerated and perpetuated a legal process sanctioning such cruelty. On a mass level, it started with blacks being subjected to the horrors of the middle passage whereby millions died from disease and suffocation when being transported from Africa to the Americas.[11] Slaves were packed in between decks only eighteen inches high, where on some occasions desperate for air to breathe, "men strangled those next to them and women drove nails into each other's brains. Many unfortunate creatures on other occasions took the first opportunity of leaping overboard and getting rid, in this way, of an intolerable life."[12]

What was the justification for these atrocities? Merchants and traders either did not perceive of blacks as human beings or they did not care about what happened to black human beings so long as a profit could be made. Perhaps the most candid statement was given by General Charles Cotesworth Pinckney, one of South Carolina's most prominent leaders and a delegate to the Constitutional Convention. When applauding the Constitution's assurance of slavery and urging the South Carolina delegation to ratify the constitution, he said:

> I am of the same opinion now as I was two years ago . . . that, while there remained one acre of swampland uncleared of South Carolina, I would raise my voice against restricting the importation of negroes [slaves]. I am as thoroughly convinced as that gentleman is, that the nature of our climate, and the flat, swampy situation of our country, obliges us to cultivate our lands with negroes, and that without them South Carolina would soon be a desert waste.[13]

In short, he was asserting that slavery must be perpetuated because of the economic advantages it gave to the white masters without regard to its destruction of blacks.

B. *A Bicentennial Era Perspective*

Particularly during this bicentennial era, it is appropriate to assess the interrelationship of race and the American legal process. This nation has just celebrated its 200th birthday in a most grandiose fashion. Conventions have been held in almost every town to reaffirm those "self-evident truths," and the oratory will continue to 1987, the 200th anniversary of the United States Constitution. As praise is heaped on the great leaders of yesterday, and as some laud 1776 as the Golden Era of liberty, it is often suggested that if only today's leaders had the integrity and character of Jefferson, Franklin, John Adams, Washington, and Madison, today's racial difficulties might be quickly resolved. Few have had the temerity to contradict this general but misdirected consensus, for it is

11 *See* J. FRANKLIN, FROM SLAVERY TO FREEDOM 40-45 (4th ed. 1974); B. QUARLES, THE NEGRO IN THE MAKING OF AMERICA 15-33 (rev. ed. 1969); F. TANNENBAUM, SLAVE AND CITIZEN 16-35 (1946); W. WARD, THE ROYAL NAVY AND THE SLAVERS 403 (1969).

12 TANNENBAUM, *supra* note 11, at 25 (quoting REV. R. WALSH, 2 NOTICES OF BRAZIL 265 (Boston 1831)).

13 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 254 (M. Farrand ed. 1966) [hereinafter cited as RECORDS OF CONVENTION].

bad bicentennial form to refer to the fact that many of America's founding fathers owned slaves and that most, either directly or indirectly, profited from the evil institution that enslaved only black human beings. For the runaway mulatto slave, Sandy, this advertisement placed in the Virginia Gazette by Thomas Jefferson was far more significant than his flourish of words in the Declaration of Independence.

> Run away from the subscriber in *Albemarle,* a Mulatto slave called Sandy, about 35 years of age, his stature is rather low, inclining to corpulence, and his complexion light; he is a shoemaker by trade, in which he uses his left hand principally, can do coarse carpenter's work, and is something of a horse jockey; he is greatly addicted to drink, and when drunk is insolent and disorderly, in his conversation he swers much, and his behaviour is artful and knavish. He took with him a white horse, much scarred with traces of which it is expected he will endeavour to dispose; he also carried his shoemaker's tools, and will probably endeavour to get employment that way. Whoever conveys the said slave to me in *Albemarle,* shall have 40 s. reward, if taken up within the county, 4 1. if elsewhere within the colony and 10 1. if in any other colony, from THOMAS JEFFERSON.[14]

The bicentennial drum roll of revolutionary heroes and events, then, symbolizes one thing to white Americans but quite another to blacks. From a predominantly white perspective, the Declaration of Independence is viewed as former President Nixon described it, "the greatest achievement in the history of man. We are the beneficiaries of that achievement."[15] But who, until recently, did the "we" describe? Not black America. Frederick Douglass, a leading abolitionist who was born a slave, described Independence Day in 1852 from the perspective of blacks and slaves rather than whites and slaveholders:

> This Fourth of July is *yours,* not mine. You may rejoice, I must mourn. To drag a man in fetters to the grand illuminated temple of liberty, and call upon him to join you in joyous anthems, were inhuman mockery and sacriligious irony. . . . I say it with a sad sense of the disparity between us. I am not included within the pale of this glorious anniversary. . . . The blessings in which you, this day, rejoice, are not enjoyed in common. The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought light and healing to you, has brought stripes and death to me.[16]

Likewise, from a predominantly white perspective, the pledges of the Preamble to the Constitution honestly set out the largest principles for which the new American legal process would strive.

> We the people . . . in order to form a more perfect union, establish justice, . . . promote the general welfare, and secure the blessings of liberty to ourselves and our posterity. . . .[17]

14 Virginia Gazette, Sept. 14, 1769.

15 Recorded message of President Richard M. Nixon on July 4, 1970, at the Honor America Day Celebration in Washington, D.C., 6 WEEKLY COMP. OF PRES. DOC. 892 (1970).

16 2 THE LIFE AND TIMES OF FREDERICK DOUGLASS 189 (P. Foner ed. 1970).

17 U.S. CONST. preamble.

From a black perspective, however, the Constitution's references to justice, welfare, and liberty were mocked by the treatment meted out daily to blacks from the seventeenth to nineteenth centuries through judicial decisions, in legislative enactments, and those provisions of the Constitution that sanctioned slavery for the majority of black Americans and allowed disparate treatment for those few blacks legally "free."

Whatever hope there might have been for one day peacefully redefining "We the people" to include black Americans was closed by the 1857 U. S. Supreme Court decision *Dred Scott v. Sandford*.[18] When asked if the phrase "We the people" included black people and whether blacks were embraced in the egalitarian language of the Declaration of Independence, Chief Justice Roger Taney, speaking for the majority, wrote: "[A]t the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted . . . [blacks] had no rights which the white man was bound to respect."[19]

Yet, Taney had not really answered the question. Rather, he had gone back in time in an attempt to determine what the founding fathers had intended, and in so doing, had argued from the untenable position that the Constitution might never have any meaning broader than that allowed by the restrictive vision of eighteenth-century America.

Thus, for black Americans today—the children of all the hundreds of Kunta Kintes unjustly chained in bondage—the early failure of the nation's founders to share the legacy of freedom with black Americans is one factor in America's persistent racial tensions. As late as 1884, twenty years after the Civil War, over one hundred years after the Declaration of Independence, two hundred fifty years after the first black man set foot in America, Mark Twain wrote the following passage from *Huckleberry Finn,* in which he parodied white attitudes, and suggested that many white Americans still failed to perceive blacks as human beings.

"Good gracious. Anybody hurt?"

"No'm. Killed a nigger."

"Well, it's lucky because sometimes people do get hurt. . . ."[20]

But however tightly woven into the history of their country is the legalization of black suppression, many Americans still find it too traumatic to study the true story of racism as it has existed under their "rule of law." For many, the primary conclusion of the National Commission on Civil Disorders is still too painful to hear:

> What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.[21]

Since the language of the law shields one's consciousness from direct involve-

18 60 U.S. 393 (1857).
19 60 U.S. at 407.
20 M. Twain, The Adventures of Huckleberry Finn 306-07 (1884).
21 Report of the National Advisory Commission on Civil Disorders 1 (1968).

ment with the stark plight of its victims, the human tragedy of the slavery system does not surface from the mere reading of cases, statutes, and constitutional provisions. Rather it takes a skeptical reading of most of the early cases and statutes to avoid having one's surprise and anger dulled by the casualness with which the legal process dealt with human beings who happened to be slaves. Generally neither the courts nor the legislatures seemed to have been any more sensitive about commercial transactions involving slaves than they were about sales of corn, lumber, horses, or dogs. This casualness is reflected in a perfectly legal and acceptable advertisement of that era:

> One hundred and twenty Negroes for sale—The subscriber has just arrived from Petersburg, Virginia, with one hundred and twenty likely young Negroes of both sexes and every description, which he offers for sale on the most reasonable terms. The lot now on hand consists of ploughboys, several likely and well-qualified house servants of both sexes, several women and children, small girls suitable for nurses, and *several small boys without their mothers.* Planters and traders are earnestly requested to give the subscriber a call previously to making purchases elsewhere, as he is enabled to sell as cheap or cheaper than can be sold by any other person in the trade.
>
> —Hamburg, South Carolina, Benjamin Davis[22]

The advertisement of Benjamin Davis was not unique; it was typical of thousands of advertisements posted in newspapers and bulletin boards throughout our land. In the *New Orleans Bee* an advertisement noted:

> Negroes for sale—a Negro woman, 24 years of age, and her two children, one eight and the other three years old. Said Negroes will be sold separately or together, as desired. The woman is a good seamstress. She will be sold low for cash, or exchange for groceries. For terms apply to Matthew Bliss and Company, 1 Front Levee.[23]

How could a legal system encourage and sanction such cruelty—cruelty that permitted the sale, as Benjamin Davis bragged, of "several small boys without their mothers"? Was there any justice in a legal process that permitted a mother, twenty-four years of age, to be sold in exchange for groceries and separated from her children, only eight and three years old? Looking past the commercial façade, one sees the advertisement as stating that American laws encouraged the destruction of black families and the selling of human beings. The only criterion was the demand of the marketplace.

C. *The Voices for Abolition*

During these centuries, many did question the morality and legality of slavery. As early as February, 1688, the Germantown Mennonites and Quakers of Philadelphia had issued a proclamation against slavery, having found it in-

22 W. GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE 54-55 (2d ed. New York, 1969) (1st ed. 1853).
23 *Id.*

consistent with Christian principles.[24] In 1780, the Pennsylvania legislature passed "An Act for the Gradual Abolition of Slavery."[25] It was the first legislative act mandating the ultimate abolition of slavery. In the preamble it was stated:

> We find, in the distribution of the human species, that the most fertile as well as the most barren parts of the earth are inhabited by men of complexions different from ours, and from each other; from whence we may reasonably, as well as religiously, infer, that He, who placed them in their various situations, hath extended equally his care and protection to all, and that it becometh not us to counteract his mercies. We esteem it a peculiar blessing granted to us, that we are enabled this day to add one more step to universal civilization, by removing, as much as possible, the sorrows off those, who have lived in undeserved bondage, and from which, by the assumed authority of the Kings of Great Britain, no effectual, legal relief could be obtained.[26]

In 1783, the Massachusetts Supreme Court, through an eloquent opinion of Chief Justice Cushing in the *Quock Walker* cases,[27] declared that

> whatever usages formerly prevailed or slid in upon us by the example of others on the subject, they can no longer exist. Sentiments more favorable to the natural rights of mankind, and to that innate desire for liberty which heaven, without regard to complexion or shape, has planted in the human breast—have prevailed since the glorious struggle for our rights began . . . slavery is in my judgment as effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence. The court are therefore fully of the opinion that perpetual servitude can no longer be tolerated in our government, and that liberty can only be forfeited by some criminal conduct or relinquished by personal consent or contract.[28]

Despite these significant judicial and legislative blows for freedom, the legal process was generally ineffective in limiting or eliminating slavery where the economic consequences of emancipation were great. Perhaps Thomas Jefferson recognized his personal hypocrisy and that of the whole nation when he wrote on the issue of slavery, "Indeed, I tremble for my country when I reflect that God is just; that his justice cannot sleep forever."[29]

III. Conclusion

I believe that Mr. Justice Blackmun was right when he said: "In order to

24 *See* DOCUMENTS OF AMERICAN HISTORY 37-38 (H. Commager ed. 1968).
25 Pennsylvania Laws, vol. 1, p. 840, section S.
26 10 Pa. Stat. at L. 67 (March 1, 1780).
27 Quock Walker v. Jennison, Proc. Mass. Hist. Soc. 1873-1875, 296 (September, 1781); Jennison v. Caldwell, Proc. Mass. Hist. Soc., 1873-1875, 296 (September, 1781); Commonwealth v. Jennison (Mass. Sup. Ct. 1783). One version of the opinion in this last case appears in a manuscript notebook in the Harvard University Law Library entitled "Notes of Cases decided in the Superior and Supreme Judicial Courts of Massachusetts from 1771-1789 taken by the Honorable Wm. Cushing, one of the Judges during that period and most of the time Chief Justice"; this version first appeared in Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the Quock Walker Case,* 5 AM. J. LEGAL HIST. (1961).
28 *Id.* at 132-33.
29 T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 156 (1964).

get beyond racism we must first take account of race."[30] And in taking account of race, we must take account of the lessons of slavery. For American slavery demonstrates how even distinguished and revered individuals can sanction the imposition of the most extreme forms of mental and physical cruelty on their fellow human beings. Today we suffer the consequences of their cruelty decades and centuries ago.

Of course a comparison of the slavery era with today reveals change and a recent quarter century of significant progress. Obviously, the racial polarity and oppression in America is not at the level it was two centuries ago. But we should not view the last two decades of progress as an era which has been beneficial only to blacks or other racial minorities. In fact, a compelling argument can be made that, during this century, other groups such as minors, union members, business interests and the aged have made relatively greater progress.

From my view there is a real danger today that too many individuals believe that the battle for equal opportunity for blacks and other minorities has been won. They seem to be begging civil rights advocates to applaud the nation for what good has been accomplished and to tone down their rhetoric and demands for full equality. Thus we may be confronting an era where progress will be miniscule and retrogression could take place. This same argument, that the battle has been almost won, was made by some of the delegates at the Constitutional Convention in 1787. For there, Ellsworth of Connecticut emphasized that slavery had already been abolished in Masachusetts and urged: "Let us not intermeddle . . . slavery in time will not be a speck in our country."[31] He emphasized that slavery had already been abolished in Massachusetts and yet that speck of slavery continued for three quarters of a century and millions of blacks had a special hell, not imposed on anyone else in American society. If today we accept the advice of those who claim that the pace should be slackened, that the present barriers of racial and sexual discrimination will soon not be a speck, we will doom future generations to cruel injustices. If we slacken the pace or turn back to the "good old days" there will be a special bitter irony for the sons and daughters of slaves whose heirs worked centuries in this country without a paycheck to prevent this nation from, in the words of Charles Cotesworth Pinckney, "becoming a desert wasteland."[32]

For the purposes of this lecture I have focused on the plight of blacks and slaves. Yet my plea is not only in behalf of those who suffer from the legacy of slavery. There are millions of Americans both black and white who lack meaningful access to the most important opportunities afforded by this society; whatever their sex, race or national origin they are entitled to a more equitable share of the privileges of this affluent society.

If we recognize how effective and destructive the legal process was in repressing the options of blacks during the slavery and post-Reconstruction era, surely we must garner the will and the determination to utilize the legal process as effec-

30 98 S. Ct. at 2808.
31 RECORDS OF CONVENTION, *supra* note 13, at 370-71.
32 *See* note 10 *supra.*

tively to reverse this destruction and to narrow the gap between black and white and between rich and poor. There is no more relevant message to convey in closing than that expressed by Chief Justice Warren in concluding the first Notre Dame Civil Rights Lecture:

> But the vast majority of our people must realize that racial equality under law is basic to our institutions, and we cannot and will not have tranquility in our Nation until the race issue is properly settled. We have, it bears repeating, 34 million members of minority groups whose racial rights have not been but must be fully accorded. That calls for a combination of effective law and good will. In the absence of either of these elements, we can only expect chaos. If there is one lesson to be learned from our tragic experience in the Civil War and its wake, it is that the question of racial discrimination is never settled until it is settled right. It is not yet rightly settled.[33]

33 E. WARREN, *Notre Dame Law School Civil Rights Lectures*, 48 NOTRE DAME LAW. 14, 48 (1972).