SHADES OF FREEDOM

RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS

A. LEON HIGGINBOTHAM, JR.

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
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The collage on the cover was designed by Karen Watson. The individuals featured, starting clockwise from the bottom left, are an anonymous member of the Ku Klux Klan, Judge William Henry Hastie, Chief Justice Earl Warren, Charles Hamilton Houston, Justice Thurgood Marshall, and Chief Justice Roger Brook Taney. The figure in the center is Linda Brown, the plaintiff in the seminal civil rights case, *Brown v. Board of Education*. The collage also features portions of the Preamble of the United States Constitution and the numerals of the XIII, XIV, and XV Amendments that were intended to ensure that the phrase, "We the People," would thereafter include all Americans, regardless of race.

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Shades of Freedom

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1

MY FORTY-YEAR JOURNEY IN FORMULATING THE PRECEPTS

FOR MORE than forty years, I have had a keen interest in the evolution of American colonial and antebellum slavery and the related race relations law.[1] I believe that I have read every published appellate case and statute on this subject from 1630 to 1865. After reflecting on those thousands of statutes and cases and on innumerable related articles and books, I have concluded that, for those Americans in power, there were several premises, goals, and implicit agreements concerning the institution of slavery that at once defined the nature of American slavery and directed how it was to be administered with the imprimatur of the legal process. Sometimes these premises and goals were articulated precisely in statutes, judicial opinions, and executive orders. At other times, they were implicit; since most in power understood and agreed with these pernicious propositions, it would have been superfluous to announce or codify the common understanding. But whether or not articulated as formal rules of law, there was a general consensus on principles or premises that led to the legitimization of slavery and of racism.

In this book and in the remaining volumes of this series, I attempt to distill the essence of these assumptions or premises into what I now call the "Ten Precepts of American Slavery Jurisprudence." These are the precepts that were the foundation for American slavery jurisprudence and early race relations law. These precepts also provide a framework in which to analyze the underlying premises of the institution of slavery and its legitimization by the American legal system.

The term "precept" has at least two possible meanings: one as a broad analytical concept, and a second in a more restrictive legal sense. The first, "a command or principle intended as a *general rule of action*,"[2] denotes the *implicit* understanding of racial differences. In this context, the inferiority of African Americans was given the standing of a natural principle embodied through the existing moral and social climate of the time that was not to be

questioned. In a legal sense, there is the alternative definition of "precept," as suggested by my wise former judical colleague, Ruggero J. Aldisert, which covers three concepts: a rule of law, a legal principle, and a legal doctrine.[3] Used in this manner, the term "precept" encompasses the legal mandates explicitly written in the law and legal orders, which established, legitimized, and enforced the inferior position of African Americans before the law.[4]

These precepts concerning slavery and race relations exemplify the premises and perceptions that Justice Oliver Wendell Holmes described, in a somewhat different context, as the "prevalent moral and political theories, intuitions of public policy, avowed or unconscious, *even the prejudices which judges* [and other public officials] *share with their fellow-men*."[5]

Orlando Patterson has observed:

> There is nothing notably peculiar about the institution of slavery. It has existed from before the dawn of human history right down to the twentieth century, in the most primitive of human societies and in the most civilized. There is no region on earth that has not at some time harbored the institution. Probably there is no group of people whose ancestors were not at one time slaves or slaveholders.[6]

Nevertheless, there *were* different precepts in different slaveholding societies. This book attempts to delineate the precepts in American slavery jurisprudence. Although I note legal precedents from several states in this and succeeding volumes, I believe it is better to provide a more comprehensive view of the evolution of slavery jurisprudence and race relations law in a single state. I focus primarily on Virginia instead of any other state, to ascertain whether each of the precepts can be supported by actual cases, statutes, and events. Virginia, because it provided significant leadership for all the colonies, is an excellent choice as a starting point.

Virginians played a major role in leading the American Revolution and in shaping the destiny of the new nation after 1776. Yet, tragically, Virginia was also a leader in the debasement of African Americans by pioneering a legal process that perpetuated racial injustice. Virginia was the birthplace of American slavery.[7] Just as the other colonies emulated other aspects of Virginia's policies, many followed Virginia's leadership in slavery law.[8]

From my own experience as a federal judge for more than twenty-nine years, I am convinced that Charles Warren was on target when he said:

> The [Supreme] Court is not an organism dissociated from the conditions and history of the times in which it exists. It does not formulate and deliver its opinions in a legal vacuum. Its Judges are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by inheritance, education and environment and by the impact of history past and present . . . .[9]

By reason of shared economic interest and political views, the legislators and judges often had a *common understanding* of the issues of race and slavery. This common understanding created what Holmes might have called a "simple universality of the rules."[10] Once established, these rules permeated American slavery culture for more than 200 years. It is this "universality of the rules" that the Ten Precepts of American Slavery Jurisprudence embody. The precepts pertaining to inferiority and powerlessness[11] continue to haunt America even today, although it is now more than one hundred and thirty years after the Thirteenth Amendment abolished slavery.

These precepts summarize the operational perceptions that underlay the maintenance of the slave system to 1865.[12] The voice of these precepts is that of those white men who implemented and perpetuated slavery in American society. The history of American slavery shows that, although the consensus developed incrementally, by the time slavery had "matured," what began as mere notions had become guiding principles.[13]

These precepts were most solidly embedded in the antebellum period from 1820 to 1865. It was during that time that slaveholders made their most zealous doctrinal arguments in defense of slavery and most firmly solidified the ten precepts as the underlying basis of the system of law and governance. Historians who have highlighted the geographic and chronological spread of pro-slavery advocacy recognize the unique character of the era following the Missouri Compromise in 1820. As Professor Drew G. Faust has observed: "Although proslavery thought demonstrated remarkable consistency from the seventeenth century on, it became in the South of the 1830s, forties, and fifties more systematic and self-conscious; *it took on the characteristics of a formal ideology with its resulting social movement.*"[14]

These Ten Precepts of American Slavery Jurisprudence represent the institutionalized values, standards, or assumptions for which there was a broad acceptance, at least on the part of those who wrote and interpreted the laws. Nevertheless, as with most generalizations of social phenomena, there were individuals who deviated from the precepts and even some who repudiated them. There were a few humanitarian groups, such as the Quakers and the German Mennonites, who rejected slavery and who thereby caused "[t]he chains of slavery" to be "loosened by degrees."[15] But they were unable to develop anything close to a national consensus for its abolition. So, while the precepts were cast almost as absolutes, their application was not uniform. Individual adherence to them varied to some extent within the slave system from state to state, community to community, and master to master.

The tone of the precepts is in the imperative, to convey the sense of law and near-holy writ attached to them. Although the totality of the precepts was never codified in one comprehensive legal document, together these precepts, nevertheless, operated as the basic legal premises of this slaveholding land.[16]

2

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 Jefferson[10] and such a "respected" Supreme Court jurist as Roger Taney[11] 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 heathen 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]

3

THE ANCESTRY OF INFERIORITY
(1619–1662)

Last Among Equals

WHEN the first Africans arrived at Virginia in August 1619,[1] they were initially accorded an indentured servant status similar to that of most Virginia colonists. In two letters, John Rolfe, Secretary and Recorder of the Virginia colony, reported on the arrival of the Africans. One letter stated that a Dutch man-of-war "brought not any thing but 20. and odd Negroes, which the Governor and Cape Marchant bought for victualles."[2] The other letter, describing the same event, stated: "[A]bout the last of August, came in a dutch man of warre that sold us twenty Negars."[3] The references in the letters to "buying" and "selling" do not necessarily mean that these Africans were being sold into chattel slavery. During that period, the majority of the population in Virginia consisted of servants.[4] It was common practice to refer to the transaction of acquiring a servant as "buying" a person. Buying in that sense simply meant buying the person's services and not actually buying the person's body.[5] Thus, it would appear that, in 1619, the first Africans became one more group in a majority servant class made up of whites and Native Americans.[6]

There are two reasons, however, why the Africans probably did not join this servant class as full equals. First, most but not all white servants came to the colony voluntarily and engaged in service with a written contract of indenture for a specific period.[7] At the expiration of the period of their indenture, whites were released into freedom. The master of a white indentured servant could not, at his sole desire and discretion, prolong the period of servitude. In fact, court approval was necessary for masters and servants to extend the original indenture.[8] Only if the white servant had broken the contract of indenture, or if the servant had in some way violated the laws of the colony,

could the period of servitude be extended, either as compensation to the master for the servant breaking the contract or as punishment by society for the servant violating the law.[9] By contrast, as far as we know, the Africans came involuntarily or under duress,[10] and presumably were sold into service *without* a written contract of indenture for a specific period. So, in theory, their period of servitude may have been for as long as the purchaser desired, or even for life.

The second reason why the new Africans probably did not occupy the exact same socioeconomic position as other white servants is that—as Winthrop Jordan has demonstrated—since the fifteenth century, Englishmen had regarded blackness as "the handmaid and symbol of baseness and evil, a sign of danger and repulsion."[11] There is no reason to suppose that, in August 1619, the English colonists of Virginia would have immediately abandoned their historical tendency of associating blackness with inferiority in favor of a more enlightened view of seeing these particular black Africans as fully human. It is more likely that, in the eyes of the English colonists, the Africans represented a dark and inferior quantity. As members of the servant class they probably were last among equals.

Blackness As Sin

Notwithstanding the colonists' predilection for seeing Africans as less than human, from 1619 and for approximately two decades thereafter, the legal system did not appear to actively promote rigid, invidious distinctions between the new African settlers and their European counterparts.[12] The first reference to a black person in a judicial proceeding occurred in 1624, when the Council and General Court of Virginia mentioned, in the case of *Re Tuchinge,* in sum: "John Phillip A negro Christened in England 12 yeers since, sworne and exam sayeth, that beinge in a ship with Sir Henry Maneringe, they tooke A spanish shipp aboute Cape Sct Mary, and Caryed her to mamora."[13]

The case apparently involved the trial of a white man, Symon Tuchinge, for the illegal seizure of a Spanish ship and the kidnapping of various persons. Given that Phillip was referred to specifically by the court as black, it is logical to assume that the defendant, whose race was not similarly specified, was white. This conclusion is supported by the fact that other witnesses were not identified by race.[14]

Phillip's testimony against the white man was accepted presumably because, as the court explained, Phillip had been "Christened in England." Prior to 1680, the colonies would often follow the Spanish and English practice

that blacks who had been baptized into the Christian religion were to be accorded the privileges of a free person.

Had the legal process in 1624 in Virginia not yet begun to institutionalize the precept of black inferiority, however, one would have expected the case to have been reported quite differently from the way it was actually reported. Specifically, had Virginia law been free of any theory of racial subordination, the case would have been reported as follows: "John Phillip sworne and exam sayeth, that beinge in a ship with Sir Henry Maneringe, they tooke A spanish shipp aboute Cape Sct Mary, and Caryed her to mamora." There would have been no description of Phillip as a "Negro" and having been "Christened," just as there had been no mention of the white defendant's race or his religion. In a jurisdiction where black did *not* carry the stigma of inferiority, Phillip's race and religion would *not* be material to the determination of whether his testimony was admissible in court because the blemish of his race would *not* need to be washed clean by the grace of his Christian religion. In a jurisdiction such as Virginia, however, where black was already the stigma of inferiority, Phillip's race and religion *were* material to the determination of whether his testimony was to be admitted, because in a real sense, his race was a sin for which he could obtain forgiveness only by becoming a Christian.

By explicitly describing Phillip's race and religion, the court implicitly revealed that, in 1624 Virginia, the legal process was ready to perceive and to treat blacks, by reason of the color of their skin, as different from white colonists. Granted, at first, the consequences of that difference were not immutable. If blackness was a sin, at least it could be absolved by Christianity. But the sinner who obtains Christian forgiveness for his sin always pays a price for that forgiveness. The price is that he has to admit that his sin caused him to be, in some way, a less perfect or inferior image of God. For the African, the sin that caused him to be a less perfect or inferior image of God was his race. So, to the African, Christian forgiveness *and all its attendant legal rights and privileges here on earth* came only at the price of admitting to himself and to society that he was inferior. What's more, the legal process, supported by public opinion and cloaked with the mysticism of Christian religion, reinforced this sense of black inferiority by the identification of the black race in judicial decisions and in legislative enactments. In short, by 1624, the legal process had begun to lay the foundation for the precept of black inferiority and white superiority; the process had "crossed," in the words of historian Lerone Bennett, Jr., "a great divide," and had placed white colonists on one side and Africans on the other side.[15]

The case of *Re Davis,* decided in 1630, illustrates that great divide in very stark terms. The full official court report reads as follows: "Sept. 17. 1630 *Hugh Davis* to be soundly whipt before an assembly of negroes & others

for abusing himself to the dishon[o]r of God and shame of Christianity by defiling his body in lying with a negro. w[hi]ch fault he is to actk next *Sabbath* day."[16]

This case demonstrates the evolution of the precept of inferiority in at least three ways. First, though the court did not state that Hugh Davis was white, his race may be inferred from the fact that he is not identified as a "Negro," whereas the person with whom he presumably "defiled" his body was specifically identified as a "negro." The very statement that Davis "abused himself," and that "he defiled his body by lying with a negro," means that he engaged in sexual relations with someone inferior, someone less than human. In short, Davis's crime was not fornication, but bestiality. Second, the statement of the court that Davis had abused himself "to the dishon[o]r of God and shame of Christianity" means that the blacks' inferiority was not simply a custom of society, but also a tenet of Christianity. Finally, the court ordered Davis to be "whipt before an assembly of *negroes & others*." One must assume that the "others" referred to most probably were white colonists. Therefore, the only reason why the court specified that the assembly was also to include "negroes" was because generally white colonists were not whipped in front of blacks. For Davis, a white colonist, to be whipped in front of blacks would have been especially humiliating, because he would have been debased in front of individuals who were his legal inferiors.

The *Davis* case, decided a mere six years after the *Tuchinge* case, marked an important step in the development of the precept of black inferiority in the common law of Virginia. In *Tuchinge*, the court had remarked upon Phillip's "otherness" by simply identifying him as a "Negro Christened." The precept that Phillip's race marked him as inferior was not stated, but instead remained implicit in the fact that his race alone was identified. By contrast, in *Davis*, the precept of black inferiority was no longer implied, but stated explicitly in the fact that a white colonist "defiled" his body by engaging in sexual relations with an African. In *Tuchinge*, the court recognized that Phillip's inferiority was not so immutable that it could not be mitigated by his Christianity. Phillip, having become a Christian, was permitted to give testimony in court against a white man. God was the African's savior from inferiority. In *Davis*, however, Christianity, instead of supplying a balm for the injury of black inferiority, provided the very instrument which confirmed its existence. Davis's crime of engaging in sexual relations with a black was a crime against Christianity. God now became witness to the African's inferiority. But in *Tuchinge*, the black man's relative equality was measured by his presence in court as a witness against the white man's transgression. By contrast, in *Davis*, the black person's irredeemable inferiority was measured by his presence as the reason for the white man's punishment.

Ten years later, in 1640, the courts in Virginia took the next step in the development of the precept of black inferiority. In *Re Sweat,* the court considered the case of Robert Sweat, a white colonist who had impregnated a black woman servant belonging to a Lieutenant Sheppard.[17] As punishment for Sweat and the unnamed black woman, the court ruled: "[T]he said negro woman shall be whipt at the whipping post and the said *Sweat* shall tomorrow in the forenoon do public penance for his offence at *James city* church in the time of devine service according to the laws of *England* in that case p[ro]-vided."[18]

Sweat, at one level, can be interpreted simply as a case about the invasion of property rights. The black woman servant belonged not to Sweat, but to Lieutenant Sheppard. Sweat impregnated her. During her pregnancy and post-childbirth period, she probably became less valuable to Sheppard.[19] Therefore, Sweat had to pay a price for diminishing the value of Sheppard's property, and the woman servant had to pay a price for allowing her value to Sheppard to be diminished. If the case was, however, only about the invasion of Sheppard's property rights, then Sweat and the woman servant would have been made to pay compensation to Sheppard: Sweat would have had to pay monetary damages to Sheppard, and the woman servant would have had to increase the period of servitude she owed to Sheppard. Instead, Sweat and the woman servant were administered respective forms of punishment, as if this were a criminal prosecution and not a property rights dispute.

That the woman was punished and not made to increase her period of servitude can be explained simply by the fact that she "belonged" to Sheppard and was probably already a servant for life. That Sweat was also not made to pay some form of compensation to Sheppard cannot be easily explained by interpreting the case solely in the context of property rights. Instead, a more complete explanation suggests itself if the case is viewed also as an expression of the precept of black inferiority. By engaging in sexual relations, Sweat and the black woman did much more than diminish Sheppard's property rights. Sweat "defiled his body" and shamed God by sleeping with someone less than human. For that, he needed to be punished by doing public penance in church in order to mortify him and to require him to ask God's forgiveness. The black woman, in turn, defied society and rejected her inferiority by sleeping with her superior.[20] For that, she needed to be punished at the whipping post, so that the mark of her inferiority that she had failed to imprint in her mind would now be whipped into her skin.

For blacks, the lesson of their inferiority was one that was written not only on their own bodies, but also on the bodies of their children. *In Re Graweere* in 1641 described how John Graweere, a black servant belonging to a white colonist named William Evans purchased the freedom of his young

child from a Lieutenant Sheppard, the owner of the child's mother.[21] After Graweere purchased his child from Sheppard, it seems that a question arose as to whether the child belonged to him or to Evans, his master.[22] Graweere argued that the child should be freed, so that he would "be made a christian and be taught and exercised in the church of *England*."[23] The court ruled in Graweere's favor and ordered: "that the child shall be free from the said *Evans* or his assigns and to be and remain at the disposing and education of the said *Graweere* and the child's godfather who undertaketh to see it brought up in the christian religion as aforesaid."[24]

This case is correctly interpreted as significant evidence that, by 1641, the legal process had not contemplated the institution of hereditary slavery. Graweere, himself, may have been a servant for life, but he was able to break the grip of servitude on his posterity by purchasing his child's freedom. Moreover, the facts of the case reveal that Graweere enjoyed certain benefits not usually afforded to slaves. Evans, Graweere's master, permitted him to own and raise hogs under an arrangement whereby Graweere paid half of the profits from his hog business to Evans and kept the other half for himself.[25] However, this case presents more than mere evidence of the ambiguous socio-economic position of black servants in 1641 Virginia.

In Re Graweere also offers an illustration of how the precept of black inferiority operates. The court sided with Graweere's position, by freeing his child, so that he could be raised as a Christian. But nowhere in the opinion was it stated that Graweere himself was a Christian. A close reading of the opinion reveals that Graweere was probably *not* a Christian. There are two reasons for this conclusion. First, Graweere is described only as "a negro servant unto *William Evans*."[26] During that period, it was common practice to distinguish between "negroes" and "Christian negroes," since certain rights and privileges flowed from a black person being a Christian.[27] Recall the *Tuchinge* case in which the court accepted a black witness's testimony, because he had been baptized a Christian himself. Yet in this case, which turned almost entirely on the very issue of religion, Graweere's own faith was not explicitly mentioned. Surely, Graweere's position to raise his child as a free Christian would have been strengthened in the mind of the court had he been a Christian. Additionally, the court's decision to free the child would have been even more rational had the court stated that Graweere was a "Christian negro." Graweere presumably did not claim that he was a Christian, and the court did not so state in its opinion.

The second reason for that conclusion is: If Graweere was a Christian, or if he desired to convert to the Christian religion, one would assume that he could have petitioned the court to purchase *his own* freedom from Evans, because the court permitted him to purchase the freedom of his child on the

promise the child was to be raised as a Christian. In other words, if, as the opinion clearly suggests, religion was the decisive argument that convinced the court to free the child, the same argument would also presumably be convincing in gaining Graweere his own freedom. The most probable reason why that argument did not apply to Graweere's situation was because, even though he wanted his child raised as a Christian, he himself was *not* a Christian.

If this argument is correct, then it inevitably raises a critical question: Why did the court permit a non-Christian black servant to gain the freedom of his child on the promise that the child would be raised and educated as a Christian? Put more simply, how could the court expect a non-Christian parent to educate a Christian child? The answer is suggested by the cryptic last statement in the court's opinion. The court wrote that the child was to "remain at the disposing and education of the said *Graweere and the child's godfather* who undertaketh to see it brought up in the christian religion as aforesaid."[28] The godfather to whom the court refers was a Christian to be sure, either a black Christian or a white Christian. It is unlikely that the godfather was black, because that would have presented a much too obvious way for black servants to achieve their freedom in 1641. Blacks could have petitioned the court, *en masse,* for freedom by getting themselves baptized with black Christian godfathers and promising to follow in the ways of Christianity. The system of non-indentured black servants could not have possibly survived and flourished for as long as it did had the legal process permitted blacks and their children to gain freedom merely with the help of fellow blacks who were Christians.

The only remaining possibility was that the godfather of Graweere's child was white. As implausible as it may at first sound, this does more completely explain the court's willingness to free the child. After all, if the precept of black inferiority meant anything, it certainly meant that, in the court's estimation, the child's Christian education would have been better safeguarded if entrusted to the care of a white colonist than if placed in the hands of a black servant, Christian or otherwise.

In short, this case exemplifies how the legal process, in a subtle but pernicious manner, reinforced the precept of black inferiority and white superiority in the minds and hearts of the colonists. The black parent was not completely denied dominion over his child, but he was made to understand that, alone, he was too inferior to protect the freedom and save the soul of his child. The white godfather, in turn, was given control over the child, not because of any parental rights, but because of the superiority of his race.

The cases of *Tuchinge, Davis, Sweat,* and *Graweere* were not the only judicial decisions in Virginia involving blacks during the first stage in the

development of the precept of black inferiority.[29] Moreover, as was characteristic of the first stage, these four decisions were relatively benign in their treatment of blacks in comparison with later developments in Virginia law.[30] While these cases exemplify how the legal process began to recognize the precept of black inferiority, it should also be noted that the common law at that time had not yet evolved a seamless rationale for the principles of racial subordination that would permit judges in successive decisions to apply the precept of black inferiority to different factual scenarios in a consistent fashion. In other words, the legal process had not yet merged the precept of black inferiority with the doctrine of *stare decisis*.

These qualifications notwithstanding, reviewing the decisions in *Tuchinge, Davis, Sweat,* and *Graweere* is crucial to a proper understanding of the precept of black inferiority and white superiority. Taken together, these cases reveal four essential steps that were taken in the first stage of development of the precept of black inferiority and white superiority: establish white superiority; establish black inferiority; enforce the notions publicly; and enforce the notions by way of theology.

First: convince the white colonists, regardless of their social or economic status, that they are superior to the black colonists. In that way, white servants, who may in reality have more in common with black servants, will identify with propertied whites, with whom they may have little in common other than race. For example, in *Davis* and in *Sweat,* the white colonists who engaged in sexual relations with black women were made to understand that they had defiled their own bodies. Had the defendants been propertied whites, it is difficult to imagine that they would have been punished for sleeping with their black servants or their slaves. During the antebellum period, when slavery was certainly firmly rooted in Virginia, a white master had the right to demand sexual compliance from his female slaves, just as surely as he had the right to ride his mares. This practice, encouraged *openly* as a matter of right in 1831 Virginia was, to be sure, already tolerated secretly as a matter of privilege in 1630. This was precisely the position advanced on the floor of the Virginia legislature in 1831 by a Mr. Gholson, in response to statements proposing abolition: "Why, I really have been under the impression that I *owned* my slaves. I lately purchased *four women* and ten children, in whom I thought I obtained a great bargain, for I really supposed they were *my property,* as were my *brood mares.*"[31] The only logical conclusion to be drawn from *Davis* and *Sweat,* then, is that the defendants were probably poor whites or servants who had managed to sleep with black women belonging to others. In spite of their relatively modest socioeconomic positions, the legal process sought to convince these whites that they were superior to blacks.

Second: convince blacks that they are inferior to all others. In that way,