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White Superiority in America: Its Legal Legacy, Its Economic Costs

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A major function of racial discrimination is to facilitate the exploitation of black labor, to deny blacks access to benefits and opportunities, and to blame all the manifestations of exclusion-bred despair on the asserted inferiority of the victims. Two other inter-connected political phenomena emanate from the widely shared belief that whites are superior to blacks. First, whites of widely varying socio-economic status employ white supremacy as a catalyst to negotiate policy differences, often through compromises that sacrifice the rights of blacks. Second, even those whites who lack wealth and power are sustained in their sense of racial superiority and more willing to accept a lesser share, by an unspoken but no less certain property right in their "whiteness." This right is recognized and upheld by courts and the society like all other property rights.

Let us look first at the compromise-catalyst role of racism in American policy-making. When the Constitution's Framers gathered in Philadelphia, it is clear that their compromises on slavery were the key that enabled Southerners and Northerners to work out their economic and political differences. The slavery compromises set a precedent under which black rights have been sacrificed throughout the nation's history to further white interests. Those compromises are the original and still definitive examples of the ongoing struggle between individual rights reform and the maintenance of the socio-economic *status quo*.

Why did the Framers do it? Surely, there is little substance in the traditional rationalizations that the slavery provisions in the Constitution were merely unfortunate concessions influenced by then prevailing beliefs that slavery was on the decline and would soon die of its own weight, or that Africans were thought a different and inferior breed of beings whose enslavement carried no moral onus. The insistence of Southern delegates on protection of their slave property was far too vigorous to suggest that the institution would soon be abandoned. And the anti-slavery statements by slaves and white abolitionists alike were too forceful to suggest that the slavery compromises were the product of men who did not know the moral ramifications of what they did.

The question of what motivated the Framers remains. In my recent book, *And We Are Not Saved*,[1] the heroine, Geneva Crenshaw, a black civil rights lawyer, gifted with extraordinary powers, is transported back to the Constitutional Convention of 1787.

There is, I know, no mention of this visit in Max Farrand's records of the Convention proceedings. James Madison's compulsive notes are silent on the event. But the omission

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of the debate that followed her sudden appearance in the locked meeting room and the protection she is provided when the delegates try to eject her is easier to explain than the still embarrassing fact that these men—some of the outstanding figures of their time—could incorporate slavery into a document committed to life, liberty, and the pursuit of happiness to all. Would the Framers have acted differently had they known the great grief their compromises on slavery would cause? Geneva's mission is to use her knowledge of the next two centuries to convince the Framers that they should not incorporate recognition and protection of slavery. Her sudden arrival at the podium was sufficiently startling to intimidate even these men. But outrage quickly overcame their shock. Ignoring Geneva's warm greeting and her announcement that she had come from 200 years in the future, some of the more vigorous delegates, outraged at the sudden appearance in their midst of a woman, and a black woman at that, charged towards her. As Geneva described the scene:

> As the delegates were almost upon me—a cylinder composed of thin vertical bars of red, white, and blue light descended swiftly and silently from the high ceiling, nicely encapsulating the podium and me.
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> To their credit, the self-appointed eviction party neither slowed nor swerved. As each man reached and tried to pass through the transparent light shield, a loud hiss, quite like the sound electrified bug zappers make on a warm, summer evening filled the air. While not lethal, the shock the shield dealt each attacker was sufficiently strong to literally knock him to the floor, stunned and shaking.

This phenomenon evokes chaos rather than attention in the room, but finally during a lull in the bedlam, Geneva tries for the third time to be heard. "Gentlemen," she begins again, "Delegates,"—then paused and, with a slight smile, added, "fellow citizens. I have come to urge that, in your great work here, you not restrict to white men of property the sweep of Thomas Jefferson's self-evident truths. For all men (and women too) are equal and endowed by the Creator with inalienable rights, including 'Life, Liberty and the pursuit of Happiness.'"

The debate that ensues between Geneva and the Framers is vigorous, but despite her extraordinary powers, Geneva is unable to alter the already reached compromises on slavery. She tries to embarrass the Framers by pointing out the contradiction in their commitment to freedom and liberty and their embrace of slavery. They will not buy it:

> "There is no contradiction," replied a delegate. . . . "Life and liberty were generally said to be of more value, than property, . . . [but] an accurate view of the matter would nevertheless prove that property is the main object of Society."
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> "A contradiction," another added, "would occur were we to follow the course you urge. We are not unaware of the moral issues raised by slavery, but we have no response to the [Southern delegate] who has admonished us that 'property in slaves should not be exposed to danger under a Government instituted for the protection of property.'"
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> Government, was instituted principally for the protection of property. . . . Property is the great object of government; the great cause of war; the great means of carrying it on.[2] The security the Southerners seek is that their Negroes may not be taken from them. After all, Negroes are their wealth, their only resource.

Where, Geneva wondered, were those delegates from Northern states, many of whom abhorred slavery and had already spoken out against it in the Convention? She found her answer in the castigation she received from one of the Framers, who told her:

> Woman, we would have you gone from this place. But if a record be made, it should show that the economic benefits of slavery do not accrue only to the South. Plantation states provide a market for Northern factories, and the New England shipping industry and merchants participate in the slave trade. Northern states, moreover, utilize slaves in the fields, as domestics, and even as soldiers to defend against Indian raids.
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> Slavery has provided the wealth that made independence possible, another delegate told her. The profits from slavery funded the Revolution. . . . The nation's economic well-being depended on the institution, and its preservation is essential if the Constitution we are drafting is to be more than a useless document.

At the most dramatic moment of the debate, a somber delegate got to his feet, and walked fearlessly right up to the shimmering light shield. Then he spoke seriously and with obvious anxiety:

> This contradiction is not lost on us. Surely we know, even though we are at pains not to mention it, that we have sacrificed the freedom of your people in the belief that this involuntary forfeiture is necessary to secure the property interests of whites in a society espousing, as its basic principle, the liberty of all. Perhaps we, with the responsibility of forming a radically new government in perilous times, see more clearly than is possible for you in hindsight that the unavoidable cost of our labors will be the need to accept and live with what you call a contradiction.

Realizing that she was losing the debate, Geneva intensified her efforts. But the imprisoned delegates' signals for help had been seen and the local militia summoned. Hearing some commotion beyond the window, she turned to see a small cannon being rolled up and aimed at her. Then, in quick succession, a militiaman lighted the fuse; the delegates dived under their desks; the cannon fired; and, with an ear-splitting roar, the cannonball broke against the light shield and splintered, leaving the shield intact, but terminating both the visit and all memory of it.

The Framers felt—and likely they were right—that a government committed to the protection of property could not have come into being without the race-based slavery compromises placed in the Constitution. Without slavery, there would be no Constitution to celebrate. This is true not only because slavery provided the wealth that made independence possible, but also because it afforded an ideological basis to resolve conflict between propertied and unpropertied whites. Working-class whites did not oppose slavery when it took root in the mid-1600s. They identified on the basis of race with wealthy planters . . . even though they were and would remain economically subordinate to those able to afford slaves. But the creation of a black subclass enabled poor whites to identify with and support the policies of the upper class. And large landowners, with the safe economic advantage provided by their slaves, were willing to grant poor whites a larger role in the political process. Thus, paradoxically, slavery for blacks led to greater freedom for poor whites, at least when compared with the denial of freedom to African slaves. Slavery also provided mainly propertyless whites with a property in their whiteness.

Slavery compromises continued. The long fight for universal male suffrage was successful in several states when opponents and advocates alike reached compromises based on their generally held view that blacks should not vote. Historian Leon Litwack reports that "utilizing various political, social, economic, and pseudo-anthropological arguments, white suffragists moved to deny the vote to the Negro. From the admission of Maine in 1819 until the end of the Civil War, every new state restricted the suffrage to whites in its constitution."[3]

Chief Justice Taney's conclusion in *Dred Scott* that blacks had no rights whites were bound to respect represented a renewed effort to compromise political differences between whites by sacrificing the rights of blacks. The effort failed, less because Taney was willing to place all blacks—free as well as slave—outside the ambit of constitutional protection, than because he rashly committed the Supreme Court to one side of the fiercely contested issues of economic and political power that were propelling the nation toward the Civil War.

When the war ended, the North pushed through constitutional amendments, nominally to grant citizenship rights to former slaves, but actually to protect its victory. But within a decade, when another political crisis threatened a new civil war, black rights were again sacrificed in the Hayes-Tilden Compromise of 1877. Constitutional jurisprudence fell in line with Taney's conclusion regarding the rights of blacks *vis-à-vis* whites even as his opinion was condemned. The country moved ahead, but blacks were cast into a status that only looked positive when compared with slavery itself.

Even those whites who lack wealth and power are sustained in their sense of racial superiority, and thus rendered more willing to accept their lesser share, by an unspoken but no less certain property right in their "whiteness." In the post-Reconstruction era, the constitutional amendments initially promoted to provide rights for the newly emancipated blacks were transformed into the major legal bulwarks for corporate growth. The legal philosophy of that era espoused liberty of action untrammeled by state authority, but the only logic of the ideology—and its goal—was the exploitation of the working class, whites as well as blacks.

As to whites, consider *Lochner v. New York*,[4] where the Court refused to find that the state's police powers extended to protecting bakery employees against employers who required them to work in physically unhealthy conditions for more than 10 hours per day and 60 hours per week. Such maximum hour legislation, the Court held, would interfere with the bakers' inherent freedom of contract. In effect, the Court simply assumed in that pre-union era that employees and employers bargained from positions of equal strength. Liberty of that sort simply legitimated the sweat shops in which men, women, and children were quite literally worked to death.

For blacks, of course, we can compare *Lochner* with the decision in *Plessy v. Ferguson*,[5] decided only nine years earlier. In *Plessy*, the Court upheld the state's police power to segregate blacks in public facilities even though such segregation must, of necessity, interfere with the liberties of facilities' owners to use their property as they saw fit. Both opinions are quite similar in the Court's use of fourteenth amendment fictions: the assumed economic "liberty" of bakers in *Lochner*, and the assumed political "equality" of blacks in *Plessy*. Those assumptions required the most blatant form of hypocrisy. Both decisions protected existing property and political arrangements, while ignoring the disadvantages to the powerless caught in those relationships.

The effort to form workers' unions to combat the powerful corporate structure was undermined because of the active antipathy against blacks practiced by all but a few unions.[6] Excluded from jobs and the unions because of their color, blacks were hired as scab labor during strikes, a fact that simply increased the hostility of white workers that should have been directed toward their corporate oppressors.

The Populist movement in the latter part of the nineteenth century attempted to build a working-class party in the South strong enough to overcome the economic exploitation by the ruling classes. But when neither Populists nor the conservative Democrats were able to control the black vote, they agreed to exclude blacks entirely through state constitutional

amendments, thereby leaving whites to fight out elections themselves. With blacks no longer a force at the ballot box, conservatives dropped even the semblance of opposition to "Jim Crow" provisions pushed by lower-class whites as their guarantee that the nation recognized their priority citizenship claim, based on their whiteness.

Later, Southern whites rebelled against the Supreme Court's 1954 decision declaring school segregation unconstitutional precisely because they felt the long-standing priority of their superior status to blacks had been unjustly repealed. Today, over forty years since the Court's rejection of the "separate but equal" doctrine of *Plessy v. Ferguson*,[7] the passwords that still exist for the property right in being white include "higher entrance scores," "seniority," and "neighborhood schools." Consider, too, the use of impossible to hurdle intent barriers to deny blacks remedies for racial injustices where the relief sought would either undermine white expectations and advantages gained during years of overt discrimination[8] or expose the deeply imbedded racism in a major institution, such as the criminal justice system.[9]

The continuing resistance to affirmative action plans, set-asides, and other meaningful relief for discrimination-caused harm is based in substantial part on the perception that black gains threaten priorities and preferences many whites believe they are entitled to over blacks. The law has mostly encouraged and upheld what Mr. Plessy argued in *Plessy v. Ferguson* was a property right in whiteness, while the wealthy have benefited because the masses of whites are too occupied in keeping blacks down to note the large gap between their shaky status and that of whites on top.

Blacks continue to serve as buffers between those most advantaged in the society and those whites seemingly content to live the lives of the rich and famous through the pages of the tabloids and television dramas like *Dallas*, *Falcon Crest*, and *Dynasty*. Caught in the vortex of this national conspiracy that is perhaps more effective because it apparently functions without master plan or even conscious thought, the wonder is not that so many blacks manifest self-destructive or non-functional behavior patterns, but that so many continue to strive and sometimes succeed, despite all.

Notes

1. Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987).

2. See generally I The Record of the Federal Convention of 1787, at 535, 542, 593–94 (M. Farrand ed. 1911).

3. Leon Litwack, North of Slavery: The Negro in the Free States 1790–1860, at 79 (1967).

4. 198 U.S. 45 (1905) (overruled by *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("[D]octrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely [is] . . . discarded.")).

5. 163 U.S. 537 (1896) (overruled by *Brown v. Board of Educ.*, 347 U.S. 483 (1954)("separate but equal" doctrine inapplicable to public education)).

6. See, e.g., William Gould, Black Workers in White Unions: Job Discrimination in the United States (1977); H. Hill, Black Labor and the American Legal System (1977).

7. *Brown v. Board of Education*, 347 U.S. 483 (1954).

8. *Washington v. Davis*, 426 U.S. 229 (1976).

9. McCleskey v. Kemp, 107 S. Ct. 1756 (1987).