HOW LAWS HAVE APPLIED TO NEGROES PAST, PRESENT AND FUTURE

I have been asked to speak on how laws have applied to Negroes past, present and future. I always encounter a special difficulty when I have occasion to speak on Negroes and the law--and frequently I do have such occasion. Every Negro of a little learning presumably is an expert on some phase of race relations or Negro society. I suppose if I were a mathematician, I would be asked to speak on "Mathematics and How It Has Applied to Negroes Past, Present and Future." If I were an atomic physicist, no doubt I would be asked to speak on some subject such as "Electro-magnetic Waves and How They Have Applied to Negroes Past, Present and Future" et cetera. Obviously, just because I am a Negro, there is no reason why I should have any special scientific knowledge about Negroes. Every doctor who suffers from heart disease is not necessarily a heart specialist. This may not be a fair analogy; however, sometimes I do feel being a Negro is like being infected with a disease. Society does not let you forget you are infected and thus you or I am inclined to reflect upon this ailment more than you or I would otherwise. Nevertheless, although I teach constitutional law and necessarily have to deal with many cases and laws that specially concern the Negro, my first love and most enduring interest are legal and political philosophy.

Now I do not flinch from my subject; just that being so frequently called upon to speak on some phase of it is tiresome

and an unhappy honor. Being a student and teacher of law, I cannot help but realize that law violates its dignity, yes, even its nature when it necessitates such special attention to law and the Negro. On another occasion similar to this, I said, "Law is the refinement of man's aspiration to be decent and humane. Decency is that quality in man that recognizes the desirability of fair play--not hitting a man while he is down, not debauching the innocent, not spitting on a six-year old for having the temerity to want an equal education." A conventional definition of law is that it is the process by which predetermined rules are even-handedly applied by the government or courts to whoever falls within the ambit of the rules. You all are familiar with the spurious slogan that law is no respecter of persons. I should quickly add that the slogan is becoming less and less spurious than it use to be. Some how I cannot help but feel there must be something pathological in the social and legal order that requires special attention to the Negro and the law.

Before considering the pathology of law's application to the Negro, it might be interesting to note at the outset that prior to the Civil War law hardly recognized Negro at all. Therefore, it may be convenient to divide my remarks into three periods: Pre-Civil War, Post-Civil War to the Great Depression of the thirties, and Post-Depression and the future.

Notwithstanding the Declaration of Independence proclaimed, "We hold these truths to be self-evident, that all men

are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," paragraph 3 of Section 2, Article I of the Constitution regarded Negroes as three-fifths of a person. Section 9 of Article I sanctioned the institution of slavery by providing, "The Migration or Importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."

The infamous Dred Scott case of 1857, which I believe made the Civil War practically inevitable, in effect said Negroes were not people and were not entitled to any of the rights and privileges and immunities guarantied by the Constitution to the citizens of the United States. People of the United States was regarded as synonymous to citizens and Negroes or descendants of the imported slaves could not become citizens. The court said Negroes "were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominat race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might chose to grant them." The court said that surely the Declaration of Independence when it said, "all men are created equal," did not include or embrace Negroes.

Let me quote Mr. Chief Justice Taney further, "But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this Declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation."

This is how the law regarded the Negro before the Civil War; he was less than a person, not even embraced by the human family, "a subordinate and inferior class of beings." I really should not restrict this attitude to the Pre-Civil War era, for to the extent the Negro is still segregated, discriminated, and exploited, he is still so regarded by, perhaps, millions in this country today. Indeed, from my study of the law's application to Negroes, the thousands of lynchings, and the present struggle of the Negro for equal opportunity and justice, it is obvious that many do not regard the Negro as a human being. A very learned white lawyer of the Georgia Bar has even suggested that the language quoted from the Declaration of Independence was a "gross fraud" and a "glaring imposition." He said that Jefferson, as Lincoln later in the Gettysburg Address, "needed a phrase that would arrest the imagination and stir emotion." He further has

pointed out all men are no more created equal than are "all dogs or all race horses." I suppose the distinguished lawyer has a point, but note he has to reduce mankind to dogs and horses to make it. So much for the Pre-Civil War period.

To prove that the Union would endure cost this nation much bloodshed and suffering. The role of slavery in causing the Civil War has been much debated. It may not have been the only cause, but surely it was the major cause of the Civil War. The Emancipation Proclamation, the Thirteenth, Fourteenth, and Fifteenth Amendments were designed to free the slave, give him all the rights, privileges, immunities of other citizens, and enfranchise him. The design of these great instruments has yet to be fully realized. The initial success and impact of the Civil War Amendments and the Civil Rights Acts enacted to implement them were very short lived to say the least.

The Thirteenth Amendment of 1865 reaffirmed the Emancipation Proclamation and legally removed all doubt regarding the free status of the ex-slaves. However, the South had lost the War but not its prejudices, feeling of racial superiority, and pathological preoccupation for the porticos, crinolines, magnolia blossoms, and fox hunts of its own lost image of itself. No sooner than a modicum of self rule was returned to the South than it began, in a number of states, to enact Black Codes "which were designed to restore the substance of slavery in different forms by placing serious disabilities upon Negroes with respect to contract, ownership of property, access to courts, and the like."

Harris, The Quest for Equality (1960). Also the states failed to suppress private violence directed largely at Negroes. The results of this were the Civil Rights Acts of 1866, the Freedmen's Bureau Act, and in 1868 the adoption of the Fourteenth Amendment. Many of the so called excesses of the Reconstruction were in a large part a reaction to the brutal excesses perpetrated on the freedmen by the South. The right to access to the courts, contract, own property and the like provided for by the Civil Rights Act of 1866 raised constitutional doubts that were to be resolved by the Fourteenth Amendment, which also sought to secure other important rights to the freedmen and people of the United States.

The insistent refusal of the South to permit the Negro to vote resulted in the Fifteenth Amendment of 1870. As you know ninety-two years later the right to vote still has not been secured to the Negro in many parts of the South. The Thirteenth, Fourteenth, and Fifteenth Amendments still went unheeded due to a callous collusion between rabid racists and the officials of state governments. Legislation of 1866, 1870, and 1870-78 sought to remedy this by imposing penalties upon persons or officials acting under color of law and depriving persons of their constitutional and federally protected civil rights.

The United States Supreme Court was a witting or unwitting ally of those in the South who were determined that the high purposes of this legislation and the Constitutional Amendments would not be realized. Sections 2, 3 and 4 of the Fourteenth Amendment soon became dated and the Committee system and filibuster

made section 5 an impractical instrument for forging the precepts and ideals of section 1 into a living reality by appropriate legislation. Section 1 provided:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Judges, law professors, lawyers, political scientists, and historians still dispute the import of this section.

All concede the first sentence clearly reversed or repealed the Dred Scott case. Most concede the Slaughter House Cases of 1873 eviscerated the guts and took all meaning from the Privileges and Immunities Clause. One leading constitutional authority maintains, and I agree with him, that the Privileges and Immunities Clause was intended to reverse or repeal Barron v. Baltimore (1833), which had held the Bill of Rights was directed at the National Government, not the States. It may come as a shock to you, certainly it shocked me when I learned it first in Constitutional Law, that much of the Fourth of July oratory regarding the first Ten Amendments (Bill of Rights) only obliquely and very uncertainly apply to the States. The Privilege against Self-Incrimination, Right to Trial by Jury, etc., are not secured to you by the United States Constitution, so the United Supreme Court has repeatedly held. The Due Process

Clause of the Fourteenth Amendment has been given much application in economic matters and was the basis for striking down much state and federal social legislation until the late thirties and early forties. The School Desegregation decision of 1954 finally re-establish the Equal Protection Clause as a meaningful provision of the Fourteenth Amendment.

This is not the place to canvass the many cases and commentary on them in order to substantiate the assertions just made. The Constitution and the legislation enacted in pursuance thereof after the Civil War were fine, even with the very restricted and illiberal constructions the Supreme Court made on them, but the delay and insolence of office, the dedication to an outmoded slaveholding tradition, the callous disrespect for human decency, and the State Right fetish for local autonomy of the South have frustrated even to this day the realization of the ideals of the Constitution and American Government.

Until the withdrawal of the invidiously labelled Carpet-baggers, the freedmen enjoyed comparatively many rights. The 1890's through the middle thirties saw a brutal subjugation and mistreatment of the Negro. No doubt much of the South's demagoguery regarding recent Supreme Court decisions stems from its feeling that, perhaps, it has lost a former ally in its assault upon the dignity of the Negro. Permit me to quote from a lecture given at Louisiana State University by a white southern

scholar who summarized the constitutional cases and the period of which I have been speaking:

> Although the South had lost the war, it had conquered constitutional law. Regardless of any subsequent developments in constitutional interpretation, the Court had emerged as an ally of the South in a most critical period of its existence as a conscious sectional minority. In turn, it was inevitable that what the South did with this constitutional victory, and how the southern states used the powers taken from them by constitutional amendment and restored to them by judicial decision, would inexorably influence the future course of judicial interpretation. It is melancholy to record that the southern states, instead of using their newly restored powers over race relations to bring about a gradual improvement of the legal, political, and economic status of Negroes, used them in a discriminatory and oppressive manner, with a view of keeping the colored race in a low service and cringing status, under the leadership or irresponsible office seekers who fanned the flames of racial hatred and rode into office on the back of the Negro. Harris, Quest for Equality (1960).

So much for the Post-Civil War era. I now turn to the present and the future.

I suppose it is not necessary for me to recount the great strides made in law in the last twenty odd years so far as its application to the Negro is concerned. Indeed, it is melancholy to reflect that except for the manpower needs of war and its color blind blooshed and the realistic enterprising spirit of vendors of perfessional athletics, most of the gains Negroes have realized have been won through hard fought battles in the courts, especially the federal courts. Goodwill and human decency have been short; recalcitrance and obstruction to the Negro's aspirations have been long.

Access to equal transportation, education, voting rights, labor and employment opportunities, ownership or use of property, and the like have seldom been voluntarily conferred upon the Negro. He has had to constantly resort to the United States Supreme Court.

The Civil Rights Act of 1957, the first such act since 1875, and the United States Commission on Civil Rights set up in pursuance thereof are still seeking to secure the right to vote and other rights supposedly secured by the United States Constitution and other federal enactments. Many in our country are still dead set against freely permitting the Negro to be free. The death blow to the "seprate but equal doctrine" handed down by the United States Supreme Court in the School Desegregation decision of 1954 is encouraging for the future. The implications of it have already been felt in many other areas. Yet the resistance to its mandate is still very much present.

The President's Commission on Equal Employment Opportunity, set up by virtue of President Kennedy's executive order relating to same of 1961, is making some progress in employment and job opportunities. Too much still has to be done, but so far some of what we have seen is encouraging.

State's Rights and the doctrine of "interposition" are still being used as a weapon of resistance and delay to the obviously denied Constitutional rights of the Negro. They have been repeatedly rejected by the United States Supreme Court.

United States v. Louisiana.(1960); Cooper v. Aaron (1958). State's Rights doctrine has been a calculated fraud and ruse ever since it was propounded to resist congressional intervention feared by southerners into the regulation of slavery. Southern States have wanted to retain the right to suppress the Negro's rights. Interposition was a doctrine propounded to justify the seccession which brought on the Civil War and its human suffering. Demagogues are eloquent on the rights of the states but mute and inarticulate on the rights of all citizens and residents of the states. Do not be deceived by this hypocritical eloquence.

I do not believe it is necessary for me to bore you with a discussion of the many recent cases affecting the Negro's rights. You strike me as a very intelligent group of students who keep up on current events. The Negro has been denied everything in the past, he is beginning to get more in the present, much is promised him in the future. There is hope. However, none of us dedicated to the high ideals and principles of our Constitution can well afford to rest. The time is now.