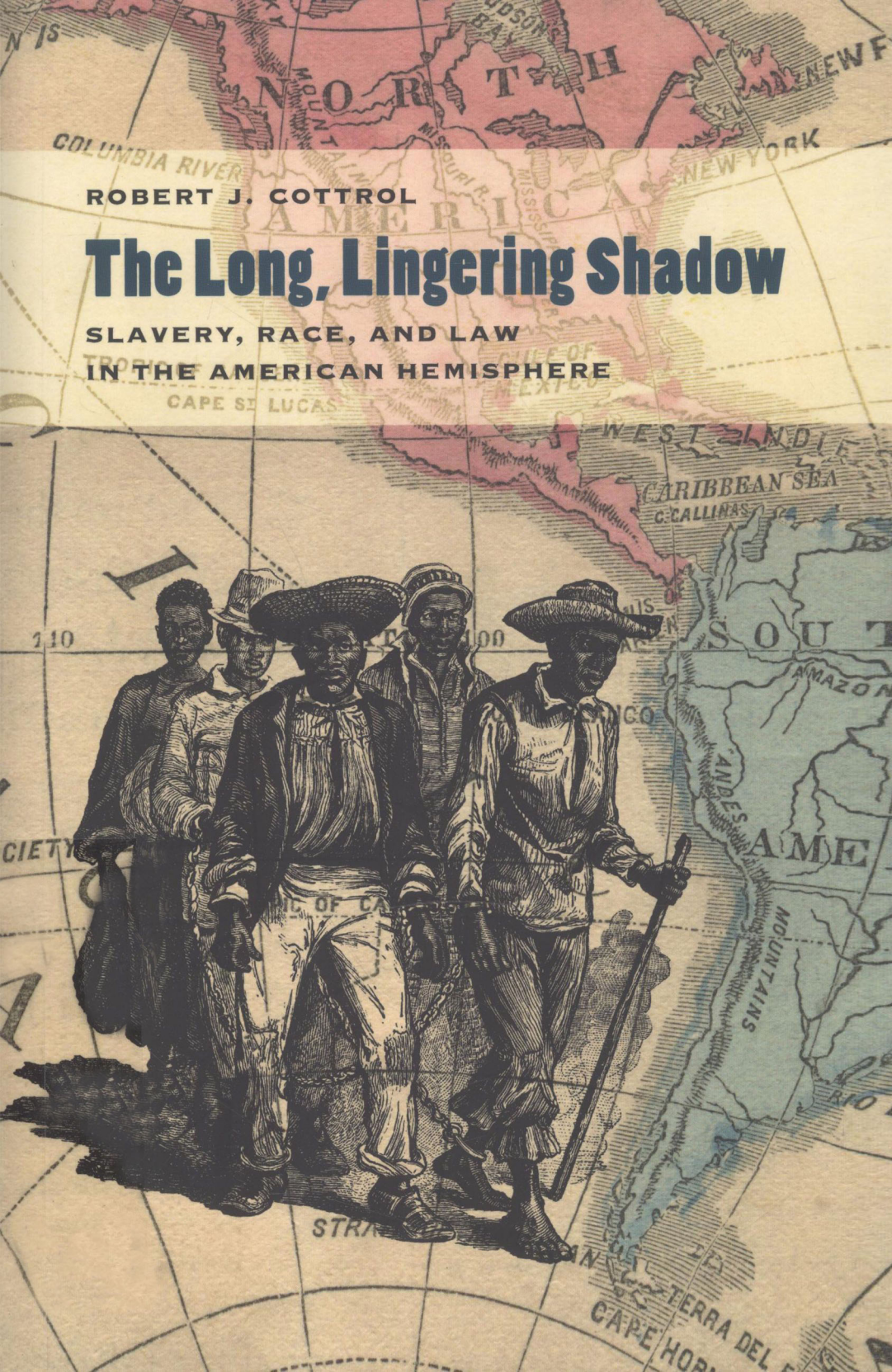
ROBERT J. COTTROL

The Long, Lingering Shadow

SLAVERY, RACE, AND LAW IN THE AMERICAN HEMISPHERE



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"Robert Cottrol's well-written book is a brilliant explication of the comparative treatment of persons of African ancestry in the western world. This is a must-read for those interested in the larger context of the black experience in the Western Hemisphere." —DAVISON M. DOUGLAS, author of *Jim Crow Moves North: The Battle Over Northern School Segregation, 1865–1954*

"A magisterial survey of the legal structures of race in the Americas from the 1500s through the present. Deftly comparing and contrasting Brazil, Spanish America, and the United States, Cottrol examines the legal underpinnings of racial inequality in those countries, the efforts over time to combat inequality, and the continuing challenges that all the societies of the Americas face in the twenty-first century. The result is a thoroughly impressive work of synthesis and comparison." —GEORGE REID ANDREWS, author of *Afro-Latin America, 1800–2000*

"Though always sensitive to the distinct institutional trajectories that slavery imprinted on different European colonies and their successor states and to the cultural multiplicity of race and law, Cottrol determinedly pursues answers to the 'big' questions—how to account for different patterns of race relations; how to relate contemporary race to bygone slavery. His book confirms the wisdom of Frank Tannenbaum's observations more than sixty years ago that, no matter where one encounters it, the history of slavery and race turns out to be largely a history of the laws that have structured both and that to study the histories of others is an excellent way to learn more about one's own." —CHRISTOPHER TOMLINS, author of *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865*

"Cottrol has written a remarkably concise history of slavery throughout the Americas, encompassing a period of several hundred years and territory extending from the northern British colonies southward to Chile. It opens many new paths for comparative analysis by historians, political scientists, lawyers, and students of the importance of culture and religion on the actualities of slavery. No reader can any longer identify 'slavery' with only the particular variant that occurred within what became the United States." —SANFORD LEVINSON, author of *Framed: America's 51 Constitutions and the Crisis of Governance*

Studies in the Legal History of the South

EDITED BY PAUL FINKELMAN AND TIMOTHY S. HUEBNER

This series explores the ways in which law has affected the development of the southern United States and in turn the ways the history of the South has affected the development of American law. Volumes in the series focus on a specific aspect of the law, such as slave law or civil rights legislation, or on a broader topic of historical significance to the development of the legal system in the region, such as issues of constitutional history and of law and society, comparative analyses with other legal systems, and biographical studies of influential southern jurists and lawyers.

The Long, Lingering Shadow

To the memory of my parents,
Robert W. Cottrol and Jewel G. Cottrol,

and

To my children,
John M. Cottrol II and Dora J. Cottrol,
who will inherit the future

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I have also benefited greatly from informal conversations with Latin Americans who have given me their views on race in their nations. These discussions have not risen to the level of formal ethnographic or oral

history interviews, but they nonetheless helped shape my thinking on questions of race and social status in Latin America. Among the people who privileged me with their insights were Jorge Ramirez (Peru), María Magdalena "Pocha" Lamadrid (Argentina), Miriam Gomes (Argentina), Lucia Molina Dominga (Argentina), Horacio Pita (Argentina), Marta Maffia (Argentina), Romero Rodriquez (Uruguay), Eunice Prudente (Brazil), and minister Joaquim B. Barbosa Gomes (Brazil).

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Introduction

THIS BOOK IS AN EFFORT to broaden our current conversation on law and race. In the United States, the discussion on law and race has, in my view, tended to focus too narrowly on the American experience. This is perhaps understandable. The law in the United States has played a clear, undeniable role both in the construction of the American system of racial inequality and in the struggle to achieve equal rights. Any student educated in the United States — perhaps one who has simply taken the undergraduate survey course in American history or even one who only vaguely remembers the subject from high school — knows this history, at least in broad outline.

The new nation that began with a ringing declaration "that all men are created equal" quickly adopted a constitution that protected slavery, most prominently in that document's fugitive slave clause. Slavery had the law's imprimatur, an imprimatur reinforced by the Supreme Court's 1857 decision in *Dred Scott v. Sandford* — the infamous *Dred Scott* case. A cataclysmic civil war that killed more Americans than any of the nation's foreign conflicts put an end to slavery. The Constitution was amended in the wake of that conflict. The new Thirteenth Amendment permanently prohibited slavery. The Fourteenth proclaimed the citizenship and equal status of the former slaves. The Fifteenth opened political rights — voting — to all men, regardless of race. The nation enjoyed, briefly, that "new birth of freedom" eloquently proclaimed in Lincoln's Gettysburg Address. But by the end of the nineteenth century, the light of freedom was growing dimmer. Inequality was again being made part of the law of the land. State Jim Crow statutes mandating separate and stigmatizing treatment for Americans of African descent were declared constitutional by the Supreme Court in *Plessy v. Ferguson* in 1896. The stage was set for an early twentieth-century history of rigid segregation, racial violence, and disenfranchisement. The stage was also set for one of the more inspiring chapters in the legal history of the United States and indeed any nation, the struggle to use the law to dismantle the system of state-mandated inequality that prevailed in the southern states and indeed throughout the nation. That struggle would

take many forms, bringing the champions of equal rights many times before the nation's courts and legislatures. The most important triumphs of the civil rights movement in the postwar era — the Supreme Court's 1954 decision in *Brown v. Board of Education*, outlawing segregation in public education; the Civil Rights Act of 1964, outlawing discrimination in public accommodations and employment; and the 1965 Voting Rights Act prohibiting discriminatory practices against minority voters — remain the foundations of modern American antidiscrimination law.

American scholars might be forgiven for thinking that the legal history of race relations in the United States is sufficiently long and difficult enough to unravel so as to demand the exclusive attention of legal historians and others concerned with issues of race and law. The sheer size of the United States, coupled with its governance under a federal system where much of the law is determined not only by the national Congress and the federal judiciary but also by different state courts and legislatures, ensures that simple statements about the law will never be easy. This is as true or perhaps more so for what the law has had to say about issues of slavery and race as it is for other topics. And legal historians have also come to realize that the legal history of race in the United States is made even more complex because it involves more than the histories of those we have come to call black and white. The law has regulated the statuses of other groups — peoples of indigenous descent, and those whose ancestors came from Latin America and Asia as well. This has also contributed to the complexity of any discussion of the role of law in the troubled history of race relations in the United States. It has also contributed to the largely inward gaze of American legal historians concerned with the topic.

This prevailing tendency to focus inward might be contrasted with the broad comparative work essayed by sociologist Frank Tannenbaum in the 1940s. Tannenbaum believed — correctly, in my view — that comparative study can tell us much not only about other societies but also about our own. Tannenbaum was concerned with law as a force that greatly influenced the treatment of slaves in different societies and had a profound impact on race relations after emancipation as well. The Tannenbaum thesis is well known to students of comparative slavery. Tannenbaum's central claim is that the law played a critical role in helping to fashion slave systems in Latin America that were more protective of the rights of slaves and ultimately more conducive to egalitarian race relations than was the

case in the United States. His work remains the starting point for modern discussions on comparative slavery and race relations in the Americas, an impressive accomplishment for a work now more than six decades old.[1]

If the Tannenbaum thesis has been sharply criticized in recent decades, with historians of slavery convincingly challenging its benign portrayal of the institution in Latin America and students of race relations exploding the myth of racial democracy in the region, Tannenbaum still presents a worthy point of consideration and departure for scholars concerned with the role of law in creating and sustaining systems of racial hierarchy. Tannenbaum asked what historical sociologist Theda Skocpol has termed the "big" questions — those questions that force us to confront the fundamental differences between the society or civilization with which we are familiar and others that have developed in different or seemingly different ways. Confronted with the harsh realities of the Jim Crow America of the 1940s, Tannenbaum tried to understand those realities by contrasting the America he knew — with its color lines, its segregated schools, its Jim Crow army, its lynchings, its ubiquitous "white" and "colored" signs in front of water fountains and restrooms, train station waiting rooms, and park benches — with the seeming absence of discrimination in Latin America. He sought to explain what appeared to be the radically different developments of societies that had begun with the common institution of African slavery. He believed he had found the answer in the different ways that the law governed the lives of masters, slaves, and free people of color in what would become the United States and the different nations of Latin America.[2]

The "big" questions posed by Tannenbaum — How can we account for different patterns of race relations in the Americas, and to what extent can these differences be traced to the different slave regimes that developed in the New World and to the laws that governed those regimes? — remain critical. The black experience in the United States is a small part of a much larger history of the forced transportation and settlement of Africans in the Americas and the histories of their Afro-American and non–Afro-American descendants. Our best information indicates that less than 4 percent of Africans brought to the Americas settled in what became the United States. The experiences of Portugal, Spain, and later Latin America with African and Afro-American slavery were of a far longer duration than that of British North America. African slavery would begin in metropoli-

tan Spain and Portugal before the fifteenth century. Latin American slavery would formally end nearly four hundred years after Columbus's voyage to the New World with Cuban emancipation in 1886 and the abolition of slavery in Brazil in 1888. This final emancipation occurred a generation after Lee's surrender at Appomattox and the enactment of the Thirteenth Amendment. Nearly 5,000,000 of the more than 10,000,000 Africans forcibly brought to the Americas (roughly 45 percent) went to Brazil alone. The giant Lusophonic colony and nation received the largest number of Africans from the trans-Atlantic slave trade, more than twelve times the 388,700 Africans who are estimated to have come to British North America. The Spanish-speaking regions of the Western Hemisphere received 1,292,900 African captives. The sugar plantation economies of the Americas were by far the biggest magnet for the African slave trade. British and French Caribbean colonies combined received more than 3,000,000 Africans. The pull of the sugar plantation economy was so strong that Cuba is estimated to have imported more than 780,000 African slaves between 1790 and 1867 alone, nearly double the total number of Africans brought to the United States between the seventeenth century and the end of the Civil War.[3]

Today, the descendants of those African captives who were forced to come to the Americas to labor, and often perish, in the plantations and mines of the New World inhabit every nation in the hemisphere. In some countries, the presence of people of African descent is highly visible. In the Caribbean, the states of Bahia and Pernambuco in northeastern Brazil, and other parts of the Americas, large numbers of people are visibly of African descent; in addition, African cultures have been preserved in these regions, often influencing the language, religion, music, architecture, and other aspects of the daily lives of most people. In other nations, the African presence is more elusive. Descendants of Africans, some visibly Afro-American, others regarded as white or mestizo may be found in nations such as Argentina and Chile, although most people in both countries are largely unaware of this phenomenon and in many cases would vigorously deny it. In some nations, the business of locating Afro-Americans is complicated by national ideologies, legacies of stigmatization, and traditional antagonisms. A substantial Afro-Mexican population lives on that nation's Atlantic and Pacific coasts. There is an even larger population of Mexican mestizos who do not acknowledge and in many cases are probably unaware of their African ancestry. And yet the African contribution

to what Mexicans have long celebrated as "La Raza Cósmica" remains largely unrecognized, in large part because of a national racial ideology that stresses that the nation is a biological and cultural synthesis of the indigenous Aztec Empire and the conquering Spaniards. Both groups are given a noble history in the national narrative, while the large presence of African slaves in colonial Mexico and the subsequent history of their Afro-Mexican descendants is often ignored.[4]

In many American nations, the stigma associated with black or African ancestry causes many who clearly have that ancestry to deny it. The population of the Dominican Republic is predominantly of African descent. Only a minority of the population is phenotypically white, and even a majority of that group probably has some African ancestry. Nevertheless, many Dominicans customarily define themselves as "Indios" — Indians or descendants of indigenous peoples — and not as Afro-Dominicans. Blacks have frequently used the term *Indio Oscuro* (dark Indian), while mulattoes have tended to use the term *Indio Claro* (light Indian) to describe themselves and their ancestry. This tendency has in part reflected the traditionally higher status for people of Indian descent in Latin America as well as the history of strong enmity between Haitians and Dominicans.[5]

It is this broad variety of Afro-American experiences that I want to contrast with the experience in the United States. At one time, researchers embarking on such a task believed that their comparisons were made easier by looking at Latin American societies as racial democracies free of the kinds of prejudice and discrimination that existed in the United States. Such explanations, like Tannenbaum's discussion, which played a critical part in developing the racial democracy thesis, should be seen in context. Students of race relations who accepted this thesis did so due in no small part to the stark differences between the often rigidly segregated United States of the Jim Crow era and Latin America. If, as we are becoming more and more aware, racism, racial exclusion, and racial hierarchy have been part — indeed, a strong part — of the social history of Latin America, racial barriers nonetheless took on different forms from those in the United States. Exclusions were less absolute. As historian Alejandro de la Fuente reminds us, the ideology of racial democracy that developed in Latin America after the First World War worked to prevent the rigid segregation and often total exclusion from national life that was the lot of Afro-Americans in the United States. And the law did not mandate a separate and inferior

position for Afro-Americans in Latin America. Legal institutions and legal actors discriminated, to be sure, but that discrimination did not have the kind of official sanction — the formal support from the highest courts and legislatures — and the normative and physical power that comes from such support, as was the case in the United States for the first half of the twentieth century and, indeed, beyond.[6]

Like Tannenbaum, I believe that the greater rigidity, the greater tendency toward exclusion, mandated by law in U.S. race relations had its origins in the system of slavery that prevailed in the United States. Tannenbaum saw the different legal systems governing slavery in the New World as having played a critical role in this process. The law in Latin America, he noted, protected the slave's life, his right to maintain his family, and — perhaps most important for future race relations — his right to purchase his freedom through binding manumission contracts and his right to be recognized as a citizen and equal after attaining that freedom. Tannenbaum was not a student of law as such and it is not unfair to say that he presented a somewhat unsophisticated legal history in which he read the relevant codes and assumed that they accurately reflected the legal history of slavery in Latin America and the United States as well. But his essential claims have been reiterated by more knowledgeable students of comparative law, including Roman law scholar Alan Watson, who has argued that the receptivity to manumission that originated in Roman law and continued in the slave codes of the Spanish and Portuguese Empires provide a stark contrast to slave law in Anglo-American jurisdictions. That law, according to Watson and others, was uniquely hostile to manumission and, it should be added, to the rights of free people of African descent. This hostility provides the genesis of the rigidity that has historically characterized race relations in the United States.[7]

This point can be oversimplified and overstated. The history of North American slavery is long and complex. The colonial period is particularly instructive, and we will spend some time in this volume examining it. Slavery existed in every one of the English colonies that would become the United States. Slavery in the North would last for two centuries, longer than the period between the adoption of the Thirteenth Amendment and the present. It would only die a lingering death in that region after the American Revolution. The physical conditions under which slaves lived, toiled, and died and the legal regimes that governed masters, slaves, and