

Ballad of Mr. Pallid and Ms. Shadow

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[T]he way in which everything fits together with a sleep-walker's precision: the desire of most people for a comfortable life, their tendency to believe the speakers on raised platforms and the men in white coats; the addiction to harmony, and the fear of contradiction of the many seem to correspond to the arrogance and hunger for power . . . of the few.¹

Law exercises power to the extent . . . it resists and disqualifies alternative accounts of social reality . . .²

"Follow the yellow brick road . . . follow the yellow brick road . . . follow, follow, follow, follow . . . follow the yellow brick road."³ Who is singing? I hear it in my head. It is just like the movies, when you know something bad is about to happen because the ominous organ music starts to play. Except this isn't organ music, it is voices. Eerily high-pitched, tediously staccato voices, singing the same tune over and over again. Why are we to follow this road? Where does it lead? And what do we do when we come to the apocalyptic fork in the road?

This trip down the yellow brick road, we began together. We, being you, Mr. Pallid, and I, Ms. Shadow. Well, not really together. You started a little ahead of me, Mr. Pallid. But after this jaunt, with the singing and the blind trust in following the yellow brick road, what will happen? Will we wind up at the end of the rainbow or is this just the beginning of the descent into oblivion?

Or will we, as I suspect, not reach the same destination? Regardless of how closely I follow, how precisely I mimic your steps, I will still be Ms. Shadow, and you will remain Mr. Pallid: one of us

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1. Jane Flax, *The End of Innocence*, in *FEMINISTS THEORIZE THE POLITICAL* 445, 445 (Judith Butler & Joan W. Scott eds., 1992).

2. CAROL SMART, *FEMINISM AND THE POWER OF LAW* 4 (1989).

3. *THE WIZARD OF OZ* (Metro-Goldwyn-Mayer 1939).

will reach the pot of gold at the end of the rainbow; the other will endlessly pursue the elusive pot of subsistence.

I. " . . . the way in which everything fits together with a sleepwalker's precision . . . " ⁴

"WE THE PEOPLE of the United States."⁵ It sounds so promising, so all encompassing. WE THE PEOPLE must mean you, Mr. Pallid, as well as I, Ms. Shadow. Right? "Essentially a people share symbols and myths that provide meaning to their existence together and link them to some transcendent order."⁶ The myth that we share, Mr. Pallid, is that WE THE PEOPLE means both you and me.

The symbol of this myth is none other than our Constitution, our framework for laws, our foundation for nationhood. And the transcendent order linking us is that we—you, Mr. Pallid, and I, Ms. Shadow—are merrily skipping down the yellow brick road, hand in hand, side by side. The myth has been promulgated for so long and the symbol has become so sanctified that it is as if it were actually true. If we can just remain in this sleepwalker's precision, we can picture ourselves skipping down the road together, hand in hand, side by side, since the beginning of time until the end.

The idea We became the law WE THE PEOPLE⁷ in 1787. The WE became you, and the sharp contrast between you, Mr. Pallid, and me, Ms. Shadow, became incandescent. But a funny thing happened on the way from the Convention. The symbol of the WE became the myth of the WE. We, but specifically you, Mr. Pallid, had taken the first steps down the yellow brick road with a sleepwalker's precision.

The "three-fifths" clause of the Constitution gave formal recognition to the existence of a system of bondage in this country:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.⁸

This clause whispered our contrasts and, with a wink and a nod, quietly declared a hierarchical system of worth. Taxation is repre-

4. Flax, *supra* note 1, at 445.

5. U.S. CONST. preamble.

6. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 6 (1988).

7. U.S. CONST. preamble.

8. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XVI.

sentation. *Free persons* are taxed. *Indians* are not taxed. And the shadows who each amount to *three-fifths of all other persons* are not taxed.

How did this happen? It began with the stating of contrasts so quietly and so ambiguously that it wouldn't jar us awake. Then the contrasts were stated again, a little louder. And again even louder, until finally it was okay to shout them. Because now the contrasts are so embedded, it doesn't matter if we are asleep or awake. They are the social reality.

You, Mr. Pallid, have taken the first step down the road without me and without glancing back. Did you stop to notice that a part of WE was being reduced to three-fifths of a person? Soon after, part of WE, I, Ms. Shadow, was reduced further:

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.⁹

According to Justice Taney in 1857, this Clause gave constitutional sanction to the right to purchase and to hold this particular type of property for twenty years.¹⁰ But it was only a whisper and only a hint; after all, how could you be expected to hear a whisper above the chorus?

I, Ms. Shadow, have inched out of the realm of being three-fifths of a person and tiptoed into the umbra of being property. I did not go willingly; I was shoved. But it does not matter yet, it is still just a hint and a whisper. Besides, who notices a shadow receding further into the darkness? Listen carefully though, just beneath the chorus you can hear the voices rising above a whisper, speaking in almost conversational tones.

The Fugitive Slave Act of 1793 acknowledged the existence of slavery in America:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.¹¹

The second half of the Fugitive Slave Clause in essence mandated kidnapping. It authorized a slave owner or his agent to cross state lines, seize an alleged fugitive slave, take the slave before a federal

9. U.S. CONST. art. I, § 9, cl. 1.

10. DON E. FEHRENBACHER, *SLAVERY, LAW AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE* 12 (1981).

11. U.S. CONST. art. IV, § 2, cl. 3, *amended by* U.S. CONST. amend. XIII.

judge or local magistrate to receive a certificate upon proof of ownership, allowing slave and owner to return safely home. The voices now have become loud enough to be conversational. I can almost decipher the words of the chorus. The voices are singing something about savages, civilization and Christianity. The myth is moving toward reality. And you, Mr. Pallid, are still skipping merrily down the yellow brick road, humming a tune; although it sounds vaguely familiar, I cannot quite hear the lyrics.

In 1857, the Supreme Court decided *Dred Scott v. Sandford*,¹² in a chorus of seven to two. The "WE" in the Constitution did not mean Negroes. Negroes were never meant to be citizens of the United States:

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, either in social or political relations; 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.¹³

I know this tune; I can hear the words: "Slavery is good," the chorus sings, "we are civilizing the savages and turning heathens into Christians." The conversational tones have become a shout. Unified voices are now proclaiming as a social reality what was once a myth.

Both of us have seen the myth and watched it mutate into a social reality. You were skipping down the road in a sleepwalker's haze, never glancing back; I was watching your back slowly disappear. We clearly hear the chorus now: "Follow the yellow brick road . . . savages into civilized people . . . follow the yellow brick road . . . heathens into Christians."

II. "the desire of most people for a comfortable life"¹⁴

Equality is comfortable. Unanimity is comfortable. Smooth transitions are comfortable. Fairness is comfortable. "[I]n Order to form a more perfect Union,"¹⁵ social equality must have existed since time began.

Your reality must be my reality. Christopher Columbus discovered America and civilized the heathens. His-story is written; therefore, it must be so. Africans were also heathens. Slavery

12. 60 U.S. 393 (1856).

13. *Id.* at 407.

14. Flax, *supra* note 1, at 445.

15. U.S. Const. preamble.

saved these heathens from eternal damnation and made them God-fearing Christians. Slaves were happy on the plantations. They were content. There was someone to take care of them and fulfill their every need. Them 'lil darkies were happy to be taken from an uncivilized existence and shown a civilized existence. Separate is equal because "[w]e the people hold these truths to be self-evident, that all men are created equal."¹⁶

I, Ms. Shadow, am comfortable because the Civil War has been fought. The Union is whole. Slavery is abolished. The Civil Rights Amendments to the Constitution have passed.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.¹⁷

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.¹⁸

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.¹⁹

I have taken my first tentative step on the yellow brick road. Will I ever become a part of the WE? And will the chorus ever be silenced?

You, Mr. Pallid, are comfortable because you have allowed me to step on the yellow brick road. It doesn't matter that you still have not stopped or even slowed your progression. It doesn't matter what tune you are humming. You are comfortable because you have made you a WE, or something close to it.

It would appear, don't you think, Mr. Pallid, that I might skip right on up beside you? Slavery is abolished. *Dred Scott v. Sandford* is overturned. I am now part of the WE; I am a citizen of the United States and I can vote. That is what the Thirteenth, Fourteenth, and Fifteenth Amendments to our Constitution say. And we both know, don't we, Mr. Pallid, that law defines our reality. I think I am going to start to hum my own little tune: "Follow the yellow brick road . . . form a more perfect Union . . . follow the yellow brick road . . . all men are created equal . . . follow, follow, follow, follow . . . follow the yellow brick road."

16. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

17. U.S. CONST. amend. XIII, § 1.

18. U.S. CONST. amend. XIV, § 1.

19. U.S. CONST. amend. XV, § 1.

As I skip down the yellow brick road, Mr. Pallid, I am watching your back. I am comfortable. We are comfortable. And although you were much further ahead, I think that I am getting close. It even looks as if you might be slowing down, but then we stumbled. Actually, I fell down. You tripped but regained your balance and kept on skipping and humming. I remember the date—May 18, 1896. Comfort is subjective, and social reality is mutating:

If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man. . . . If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.²⁰

As I, Ms. Shadow, stand stooped over, brushing the yellow dust off my knees and elbows, I catch my breath and reflect on our WE. I can look ahead and see that I am on the same yellow brick road as you. I can look up and see your silhouette disappearing down the road. And perhaps, Mr. Pallid, it is just the way the bright sunlight reflects off the yellow brick, but as I watch your silhouette, we—you, Mr. Pallid and I, Ms. Shadow—appear to be the same. If it were I skipping down the road and you were the one brushing the yellow dust off your knees and elbows, would you be able to see the difference? I suppose you would know it was not you in front just as I know it is not me. But, Mr. Pallid, could you discern the difference? "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."²¹

If we were a WE, then if you could, Mr. Pallid, would you trade places with me? Would you want to be a shadow?:

How much would it be *worth* to a young man entering upon the practice of law, to be regarded as a *white* man rather than a colored one? . . . Probably most white persons if given a choice, would prefer death to life in the United States *as colored persons*. Under these conditions, is it possible to conclude that the *reputation of being white* is not property? Indeed, is it

20. *Plessy v. Ferguson*, 163 U.S. 537, 549-52 (1896).

21. *Id.* at 551.

not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?²²

While you, Mr. Pallid, were skipping down the yellow brick road, the road was not even in my sight. While you were skipping down the road, I was pulling your cotton, nursing your babies and bowing my head in mock subservience in order to perhaps spare myself another whipping or some other humiliation.

While you were skipping down the yellow brick road, whistling your catchy little tune, I was refused the tools of knowledge. I was refused the love of marriage, except of course for procreation for your benefit. Now, Mr. Pallid, as I watch your silhouette skip ahead of me, I understand that we are to meet on terms of "social equality [as a] result of natural affinities."²³ Separate can be equal.

It matters little that I am losing sight of you, Mr. Pallid, for we are on the same road. It matters less that I am slowly forgetting the exact cadence of your skipping. My mimicry suffers from my hazy recollection as I lose sight of you down the yellow brick road.

I should be comfortable because you have allowed me on the same road. I should be comfortable because separate can be equal. I should be comfortable because in the myth of reality, you, Mr. Pallid, and I, Ms. Shadow, are a WE. We are a WE, because you have allowed me to evolve from property to slave, from slave to free, from free to one who is permitted to chase you down the yellow brick road.

III. ". . . their tendency to believe the speakers on raised platforms and the men in white coats . . ." ²⁴

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."²⁵

Establish justice, but what is justice, Mr. Pallid? Is it homogenous? Is it a WE? Is my justice your justice? If not, will either justice make us comfortable? John Rawls has found that the

22. LEON A. HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 109 (1996) (quoting Brief for Plaintiff in Error at 9, *Plessy*, 163 U.S. 537 (1896) (No. 210)).

23. *Id.*

24. Flax, *supra* note 1, at 445.

25. U.S. CONST. preamble.

justice of social systems depends on the "economic opportunities and social conditions in the various sectors of society."²⁶ Del Vecchio states that "[j]ustice in its true and proper sense is *a principle of co-ordination between subjective beings*."²⁷

Now I ask, Mr. Pallid, if you started down the road before me, and if I, Ms. Shadow, was property first, then a non-citizen, and then begrudgingly given the status of a person, were we ever a WE? Did we ever have the same economic opportunities? Were you, Mr. Pallid, ever given the opportunity to be my property? Was I ever given the opportunity to own you, your wife, your children and your labor? It appears, Mr. Pallid, that you are following the road to economic opportunities, while I mimic your footsteps, following you down the road. But to what? I seek the same economic opportunities as you, but you are so far ahead on the road that you seize the opportunities before I get there. I seek social equality with you, but how much equality can I attain mimicking your steps and being your shadow? I seek justice. But what is justice, Mr. Pallid? Is it homogenous? Is it a WE? Is my justice your justice; if not, will either justice make us comfortable?

IV. "[T]he addiction to harmony, and the fear of contradiction of the many seem to correspond to the arrogance and hunger for power . . . of the few"²⁸

I think, Mr. Pallid, that I have been able to decipher the voices in the chorus. We heard the voices and mistakenly thought that they were addressing you, Mr. Pallid, and me, Ms. Shadow, as WE. How silly of us. The voices were never speaking to WE, Mr. Pallid, because I did not exist. It was all so simple, and yet so complex.

You see, Mr. Pallid, the voices didn't think that I could hear. I was property; I was a chattel; I was nothing. Their hunger for power and dedication to profit made me invisible and powerless, and made you the beneficiary of the myth of equality. That myth started you down the road first.

Who are the mysterious "they"? Who are the voices mindlessly chanting for us to follow the yellow brick road? They are, of course, the men in white coats and the speakers on raised platforms, the platforms which you and I have erected and the white

26. JOHN RAWLS, A THEORY OF JUSTICE 7 (1971).

27. GIORGIO DEL VECCHIO, JUSTICE: AN HISTORICAL AND PHILOSOPHICAL ESSAY 2 (A. H. Campbell ed. & Lady Guthrie trans., 1952).

28. Flax, *supra* note 1, at 445.

coats that we have decided to revere. Was there ever any doubt that you and I would follow the yellow brick road? Was there ever any doubt who would find the pot of gold and who would step into the abyss?

