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The Rank Of A Mere Citizen

Legal complicity with racism in the United States has been an astoundingly potent and yet often hidden force. It must be called out, and redress must be sought.

Many of us are highly critical of the current U.S. Supreme Court, yet we tend to forget the vital role of judges in producing and protecting racism in our country over time. Judges did devastating work in undermining the promise of the post-Civil War constitutional amendments and the early civil rights statutes. On a daily basis, and in ways we can never know, they practiced, imposed, and legitimated racism. Even the published judicial opinions that we do know helped build the curse of institutional racism.

In 1883, for example, the U. S. Supreme Court declared that it was time for former slaves, who had been aided by “beneficent legislation,” to “cease to be the special favorites of the laws.” and to “take[] the rank of a mere citizen.” Thus, less than 18 years after the Thirteenth Amendment abolished slavery, the majority in the Civil Rights Cases totally ignored the vicious and violent deprivations aimed at Black people as Reconstruction crumbled and a return to normalcy became the era’s dominant motif.

The Court declared that “it would be running the slavery argument into the ground” to recognize, as Congress had in the Civil Rights Act of 1875, that racial discrimination in public accommodations across the nation ought to be prohibited.

This decision, along with a host of others by the Supreme Court and by other judges, did much to bury Reconstruction altogether and to launch decades of Jim Crow laws and customs. It illustrates the ongoing complicity of the judiciary in accepting, and yes, in promoting institutional racism.

As our colleague and teacher Chuck Lawrence stated in his recent essay in the *Harvard Law Review*: “[T]he impediment to the achievement of racial equality is our collective national and societal denial of our racism. The law plays a principal role in this collective denial.”

The horrific murder of George Floyd--as well as the many other unspeakable recent deaths at the hands of police officers across the United States--has triggered the growing momentum behind Black Lives Matter. Prompted by the rightful passion of this time, however, is the question of

what lawyers and judges might do in response. It ought to be abundantly clear that we must do something.

I say this for many reasons, not least because, less than two months ago, I became a grandparent for the first time and I am mightily worried about the world we are handing over to the next generations.

In Hawai'i, we have many reasons to feel somewhat distant from the dramatic events of the past few weeks, though we have had large demonstrations and shown considerable passion ourselves. We are justifiably proud of our diversity and we treasure the aloha spirit that really does exist here. And we are rather old-fashioned in our multigenerational families and our close-knit neighborhoods, for example. We thrive on mutuality. And yet....

We, too, have deep fissures and immense gaps in health, education, and economic resources. And we long have had and still know of racism, often relying on "we/they" and accepting the shorthand of stereotyping to make our complicated lives simpler. Police misconduct is also hardly unknown here.

So what should the role of law be as we strive for "a juster justice?"

One part of our duty is to help those who get in trouble with the law. In fact, there can be a symbiotic relationship between those who demonstrate and protest on the outside, and those who represent them on the inside. The participants in the civil rights movement of the 1960s, as well as the antislavery activists over a century before, often made use of the fact that a court room itself may be a "bully pulpit" in efforts to focus righteous change. We should continue to assist those who make "good trouble, necessary trouble," as civil rights icon Representative John Lewis recently put it.

Abraham Joshua Heschel, who narrowly escaped the Holocaust, said that "in regard to cruelties committed in the name of a free society, some are guilty, while all are responsible."

Heschel was the white-haired, soulful looking Rabbi often pictured in the front row marching with Reverend Dr. Martin Luther King, Jr., and Heschel explained that he had an obligation to bear witness actively because "indifference to evil is worse than evil itself."

Yet it is also useful to remember how extensively legal ideas are intertwined with what Langston Hughes called "the dream deferred." A striking example may be found within a lesser known part of Dr. King's "I Have A Dream" speech.

Here is what King said in 1963:

In a sense we've come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the 'unalienable Rights' of 'Life, Liberty and the pursuit of Happiness.' It is

obvious today that America has defaulted on this promissory note, insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked 'insufficient funds.'

And he continued:

But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. And so, we've come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.

This use of an extended metaphor lifted from the dry world of Bills and Notes is brilliant, and it underscores a basic paradox within law. On the one hand, we often need law to "cool the fierce glow of moral passion by making it pass through reflection," as Shalom Spiegel declared at a Convocation on Law as a Moral Force in the 1950s.

On the other hand, Spiegel also noted that we must resist becoming inert through "the mischievous subtlety of the law." He explained: "The sheer inertia of outlived tradition, the dead weight of knowledge of the past, may stifle the living flame of justice." And it is misleading to think of law as a unified thing; law is no single thing nor a hierarchical essence that can be looked up or frozen in time. Law should not be reified.

Nonetheless, the role of law is of crucial importance right now. We are at a moment when the crying need for substantial change must be actually heard and acted upon. The central challenge right now is to use our legal skills to help shape that change, without stifling "the living flame of justice." Law and legal skills remain a necessary link to move from what is to what ought to be.

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