RACISM IN THE LAW*

GEOEGE W. CROCKETT, JR.

RACISM has been an integral part of American law since the first slaves arrived in Virginia in 1619. A century and a half later, a new nation, composed in large part of slave holders, made a Declaration of Independence in which they bore witness to the world that “all men are created equal.”

Eleven years later the citizens of the new nation experienced neither logical nor moral difficulty when they adopted a Constitution that sanctioned human slavery based upon race and color, and decreed that persons of color who were held in bondage should be counted as three-fifths of a man. Thus, the false principle of the inferiority of black people because of their race or color, which over the years had become imbedded in our national consciousness, now became part of our country’s fundamental law.

The significance of this and its effect upon whites was well stated in a recent address by Rudolf B. Schmerl to a University of Michigan seminar on “The Urban Crisis”:

Absolutely everything in the development of the social system of this country, in law, religion, education, politics, commerce, and most certainly in human intercourse, for two hundred years, was a further refinement of this doctrine, that the slave was not a man. This was possible, in part, because the people who were enslaved were reduced to such utter wretchedness, so numbed with shock and despair in a series of experiences which took two lives out of every three persons originally captured for sale, that they did indeed appear less than human. So did the concentration camp inmates appear less than human to their Nazi captors and tormentors. Define a man in line with certain assumptions

* Excerpts from a speech delivered by Judge Crockett to a seminar on “A Black Looks at White America,” held at Wayne State University, Detroit, October 15, 1968.
about dignity, bearing, pride, and courage; create conditions in which such attributes are utterly impossible, for example, a slave ship in which slaves are shackled between decks as little as eighteen inches apart; and you cannot help but conclude that slaves are not men. If slaves are not men, they are inferior to men, and therefore slavery is justified; and since slavery is justified, it needs to be defended, and the best way to do that is to make sure that slaves do not become men.

Racism prospered and persisted in this country not because of racial prejudice, as some would have us believe, but, rather, because racism and the stimulation of color prejudice in whites and blacks was economically profitable to the propertied class, while also satisfying the “status” craving of the poor whites.

Traditionally law has functioned as the handmaiden of the propertied class in our society. So it was to be expected that lawyers in the legislative halls, lawyers on the bench, and lawyers in the executive branch of government would combine their talents to perpetuate by law this peculiarly American doctrine of racism predicated upon a claimed color inferiority.

Initially, control of racial contacts and race relations was a matter of and was maintained by the force of social sanctions and without benefit of law. This was true for more than two centuries after 1619, but with North and South becoming more and more divided upon the question of slavery, it became more and more necessary to amplify the Constitution’s concept of racial inferiority. This was accomplished through such landmarks of legal racism as the Fugitive Slave Act, the Missouri Compromise, and, of course, Chief Justice Taney’s opinion in the Dred Scott case.

Habits of thought nurtured over centuries and handed down from one generation to another are not easily uprooted. Racism in our law has created a national psychosis. Historically and by sacred pledges contained in our Declaration of Independence and our Constitution we are the world’s greatest exponents of the democratic ideal—the equality and the brotherhood of all men. And yet, by law and in practice, we have segregated and declared inferior, and therefore unequal, a tenth of the population because of their black skin. As a nation and as an individual, by the middle of the nineteenth century the white American had developed a split personality
that nothing short of human fratricide could hope to remedy. So en-
trenched had racism become in American law that a Civil War had
to be fought. Following the War three Constitutional Amendments
were added to the Nation's Charter abolishing the principle of Ne-
gro inferiority before the law and proclaiming for white and black
alike a new national right to freedom and to the equal protection
of the laws.

Even these drastic measures did not cure our national malady.
And they failed precisely because their failure was in the interest
of the rich, the powerful, and the well-to-do in our society—those
who dreaded, economically, the cost of employing free men to do
what slaves formerly did for nothing; who dreaded, politically, the
combined power of the poor white's ballot and the free black's bal-
lot; and who dreaded, socially, the downfall of the inferiority con-
cept and the inevitable intermingling, integration, and intermar-
riage that would result from the black man's new sense of dignity,
self-respect, and self-reliance and the poor white's liberation from
the shackles imposed upon him by the lie of black inferiority.

And, again, the law functioned as the handmaiden of the prop-
erty class. The Supreme Court in a series of cases—including Ples-
sy v. Ferguson—literally gutted each of these Civil War Amendments
by reading into them such de-limiting concepts as "State citizen-
ship rights versus Federal citizenship rights," "separate but equal
treatment under law," and "State or public action versus individual
or private action."

An abolitionist-minded Congress attempted in a series of civil
rights enactments to restate the Congressional intent in waging the
Civil War and in subsequently proposing the Amendments which
the people had adopted. Thus in the Civil Rights Act of 1875 the
meaning of these Amendments was spelled out by a preamble which
stated that Congress deemed it essential to just government that
"we recognize the equality of all men before the law, and hold that
it is the duty of government in all its dealings with the people to
mete out equal and exact justice to all, of whatever nativity, race,
color or persuasion, religious or political. . . ."

But notwithstanding this clear Congressional restatement of the
American creed of equality, the specter of "racial inferiority" but-
tressed by law persisted, aided especially by these proprietyed class-oriented decisions of the United States Supreme Court.

It has taken the Supreme Court more than a hundred years to come around to a repudiation of these cases and to an acceptance of those principles of equality proclaimed in the 1875 Civil Rights Act. And while the Supreme Court waited and obstructed, thousands of black folk were lynched; tens of thousands were kept in a state of peonage; hundreds of thousands never learned to read or write; and untold millions eked out a precarious survival amid the crime, the poverty, the filth, and the disease of a hundred urban ghettos.

In the process of this hundred years of waiting, black people, too, have developed a split personality. The supreme law of the land establishes their freedom and guarantees them equality of treatment; but they accept and act upon this guarantee at their peril. And this is so because each day the men who are charged with interpreting and applying the law equally give the lie to this guarantee. So the black man even now is in doubt from day to day and from community to community what the law of the day, as applied to him, really is.

The Warren Supreme Court and the Kennedy-Johnson administration have returned our written law to the original intention of the Civil War Amendments. It is hoped this return is permanent. Today with such opinions as the St. Louis case outlawing private discrimination in housing (Jones v. Mayer Co., 392 U.S. 409 [1968]), the school desegregation cases and others abolishing the "separate but equal" doctrine in all aspects of public life (Brown v. Bd. of Ed., 347 U.S. 483 [1954]), the Virginia interracial marriage case outlawing antimiscegenation statutes (Loving v. Virginia, 388 U.S. 1 [1968]), and the several Federal Civil Rights Acts enacted during the last seven years, we think we see a clear intention by the national government to eradicate all racial distinctions from American law. Much will depend upon the actions of the new administration.

Our task as lawyers and judges is no longer one of erasing racial connotations from our statutory and decisional law; our task now is to change first our own subconscious racial biases and the practices which flow from this and then to change the habits, the think-
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ing, and the practices of those who are charged with implementing the law. This is no mean task. Our “split personality” manifests itself whenever we are confronted with issues involving or related to race or color. Three and a half centuries still call out to us that black is black and white is white “and never the twain shall meet.” We must turn our backs, resolutely, against this call.

How else do you get people to discard 350 years of believing in separatism? that black people are property? that they have no rights? that they are inferior? and that they can and should be treated differently and separately with impunity?

How else can we hope to change the thinking of officials who still believe that any discrimination based on race or color is legal so long as it is not “State action”? and that “equal protection of the laws” does not mean the same protection for everyone?

How else can you expect to change the mores of the policeman on the street, or the sergeant at the precinct station, who clings to a belief in black “inferiority” because that belief feeds his ego and is essential to the maintenance of his own “superior” image of himself?

How else do you get the message over to white employers, school administrators, housing developers, hospital boards, and the like that “tokenism” will not satisfy the demands of equality under law; that too frequently it tends to exacerbate the situation by showing that racial barriers can be broken down if there is a will to do so?

And how, except through more and more personal communication, do you change the thinking of that black nationalist whose despair has turned to bitter hatred of all white people? who asserts his claim for a “Black Republic” in the South? and who suspects and sees sinister motives in everything that a white person says or does?

That white policeman who bristles at the sight of a black male and a white female walking hand in hand down an urban thoroughfare never heard of the Supreme Court’s decision in Loving v. Virginia. When he insults the white girl and physically abuses her Negro escort, he is reflecting 350 years of indoctrination at the hands of lawyers and judges, as well as laymen.

That Negro who feels uncomfortable and “out of place” in the presence of whites; that black man or woman who is prone to in-
terpret every act and expression of a white person as a sign of his personal racial bias; that Negro and all others like him or her are reflecting what fifteen generations of white Americans have never permitted them to forget, namely, that in their eyes he is different; he is “inferior” to all whites regardless of his accomplishments or their deficiencies.

So that while the “Supreme Law of the Land” no longer countenances racial distinctions, the day-to-day “law” as understood, accepted, and acted upon by the people and the forces who really control our social order remains still very much racist.

Relatively few decision-making officials in government today will openly concede this. Instead, racism in the law today is camouflaged under such terms as “administrative” or “judicial discretion.”

Thus, when our civil service laws provide for the appointment of any one of the “top three” on the list of eligibles and the black one of the three is repeatedly passed over, this is not racism; rather, it is officially referred to as an example of “administrative discretion” exercised for the “good of the service”! When, during an urban racial upheaval, as in Detroit in 1967, the overwhelming bulk of those arrested are black people and the prosecutor and the judges insist that, as a matter of policy, bail in every case should be not less than $10,000, this is not “racism” in the law; it is publicly justified as an acceptable legal device to keep “those people off the streets”! And when politicians of the Strom Thurman and George Wallace stripe seek to undermine the Negroes’ recent judicial gains by castigating the Warren Supreme Court and calling for the election of candidates who support “law and order” and “separate but equal,” they are not trying to turn back the judicial clock a hundred years and restore racism in our law; instead, to hear them explain it, they are genuinely concerned about “crime in the streets” and the maintenance of safety of the individual.

One might inquire parenthetically why such genuine concern does not lead these politicians to support more adequate appropriations to eradicate the conditions of poverty, ignorance, alienation, and hopelessness which feed crime and which bring about a disrespect and a disregard for “law and order”; and why, instead, they persist in the wanton squandering of our national resources upon a racist war in Vietnam?
Finally, there is another aspect of our subject which must not be overlooked. This aspect is seen in a combination of developments which, taken together, demonstrate the revolutionary changes in black-white relations in recent years; developments which, if allowed to continue, signify an end to racism in our law in theory and in practice.

First and foremost among these revolutionary developments is the black man's growing consciousness of himself as a person and as a group to be reckoned with in the affairs of this nation. This is the true meaning of Black Power. It is just as simple as that. And its most potent manifestation thus far has been at the ballot box in the election of black public officials. If this trend continues—and it will unless we are to have a violent revolution—racism in the administration of our laws will soon be a thing of the past.

The second revolutionary development to be noted is that black people and poor white people are beginning to identify more and more. They are beginning to understand that the interests of the two groups are not and need not be in conflict (as they necessarily were during slavery and for the one hundred years of post-Civil War black second-class citizenship) and that racism, which began in this country as a caste distinction, is today a matter of class distinction. There is, therefore, no longer any justifiable basis for a race struggle or racial conflicts in which black is pitted against white. Instead, the struggle today is a class struggle in which black and white are to be found on both sides of our national issues; and the most pressing of these issues is the expeditious elevation of 35,000,000 poor people—black and white—from a level of poverty so as to bring them into the mainstream of life in the most affluent society the world has ever known. Integration, intermingling, and intermarriage (which is frowned on by black nationalists and white "backlash" alike) is a key to our continued progress in this area—for it is only through such social contact and communication that we shall each overcome our "split personality" on the question of race.

The third and last of these revolutionary developments is apparent in the reaction of the Establishment itself. It is a reaction characterized by fear; a fear of moving too fast and at the same time a fear of not moving fast enough. It is a fear that was more or less
dormant for a century under the shelter of the de-limiting Supreme Court decisions mentioned above, but which is now revitalized by the freedom-expanding rulings of the High Courts and also by the racial upheavals in our cities.

The real significance of this fear is that, at long last, the Establishment feels compelled to face up to what one writer has called:

... a lie ... we have lived for a hundred years ... the unspoken truth that a nation with such high pretensions to world leadership in science, culture, and democratic government could have tolerated for so long, in every section of the country, and in every aspect of its national existence, a way of life inherited from a system of human chattel slavery. ... It is an unpleasant fact, an upsetting fact, one which is easier submerged than recognized, easier ignored than acknowledged. [Prof. Arthur Kinoy of Rutgers University Law School.]

Today, at least, the Establishment acknowledges the lie. It remains to be seen if they are still frightened enough to go ahead with corrective measures.

_Detroit, Michigan_