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HUMAN RIGHTS, ECONOMIC JUSTICE AND U.S. EXCEPTIONALISM

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While the human rights framework recognizes all rights as inherently interrelated and necessary to the full realization of a dignified life, economic justice—as it's litigated at least—is often forced to stand on its own, reduced to a "benefit" or "entitlement" and isolated from the larger context to which its demands are linked. Yet, when working with immigrant communities or communities of color, there can be no demands of justice that do not also address systemic economic inequalities that have been built into our economic, political and legal systems by design.

Much of the legal racial justice work in this country is led by institutions that come out of the civil rights era and continue to be bound to both the vision of those movements as well as the limitations, both in terms of the framing of rights and of the remedies sought. We refer to civil rights when in fact we are talking about economic justice. The struggle to uphold the principle of non-discrimination was primarily fought in relation to public accommodations, education, housing and employment. While the demands of the civil rights movement were always about dignity and the full recognition and equal protection of rights before the law, the goals were often neoliberal and reformist, often reduced to more equitable access to the same inequitable institutions and systems that continued to perpetuate discrimination. In part, that is because the U.S. only addresses *some* civil and political rights and ignores the remaining economic, social and cultural rights; not because they are seen as less significant, but just the opposite. They are so significant that to recognize them would directly challenge the economic model of capitalism that our democracy is tied to, fundamentally shifting political and financial power in this country. When Martin Luther King Jr. began to center economic rights in the Poor People's

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Campaign which targeted systemic exploitation of the poor (and recognized that white supremacy sustained both a permanent owning and underclass), he and the movement began to experience increased state violence, precisely because their demands were no longer reformist, but rather structural and in some ways abolitionist.[1]

Over time, civil rights institutions have grown closer to embracing the human rights framework and to understanding that civil rights are just one set of rights; a set that has coopted the discourse of human rights but has also limited its demands. There has been a slow acceptance of the framework as championed by advocates—not necessarily lawyers—who, perhaps, feel that to embrace a "new" rights rhetoric will mean abandoning one they have so closely been identified with in history and the public consciousness. Yet, that very reluctance shows how lawyers and legal institutions often slow progress down (to the extent that the human rights framework is progressive). As lawyers, we must be mindful that rights' struggles are always about dignity and to the extent that a rights framework assists in achieving that, it should be pursued. But, when the law actually impedes progress and stifles demands for dignified living, the law must be changed, ignored or disobeyed.

Since its enactment, the law as it relates to poor people and people of color in the U.S. is willfully blind in its refusal to see systemic oppression, placing the burden on each individual to show, for example, that they have experienced racist abuse, class oppression and anti-poor discrimination and gender biases. In the context of discrimination, the burden is always on the victim to prove that their racist boss, misogynistic landlord or xenophobic teacher intentionally discriminated against them, one worker/renter/student at a time. In a 1978 case on affirmative action, the Supreme Court explicitly said the court was not interested in remedying systemic racism or discrimination, and that only individualized grievances based on racist experiences could be adjudicated by courts.[2] Justice Blackman disagreed in a separate

[1] A *Moral Agenda Based on Fundamental Rights*, *Poor People's Campaign*, https://www.poorpeoplescampaign.org/demands/ (last visited Sept. 8, 2019).

[2] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978).

opinion, noting, "in order to get beyond racism, we must first take account of race."[3] However, it was the court's opinion that found resonance in Justice Roberts' well-known statement thirty years later that, "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[4] As we reflect here on the continued judicial unwillingness to consider the context that the Fourteenth Amendment was passed in to remedy the legacy of slavery and racial apartheid for *all* Black people, we see a deep divide in where the jurisprudence has been headed (an increasingly narrow construction of racially permissible considerations for remedial purposes) and where movement demands are at (the Black Lives Matter platform lays out a vision of intersected rights that directly challenge the legal, political, economic, social and cultural structures set up to perpetuate a permanent sub-citizen class). As a signatory to the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[5] since 1994, the U.S. has shown the politization and co-opting of human rights language for purposes of shaming other countries or justifying foreign interventions under a pretentious legal lens, while those of us in the legal community have yet to find our collective voice to publicly shame the U.S. on its massive failure to live up to its international legal commitments.

Our constitutional and civil rights jurisprudence is so limited in terms of the justiciability of rights that not only does it refuse to contemplate or analyze collective rights or systemic discrimination, but the remedial framework only gets further narrowed each time the courts review them. As it is, any assertion of rights that seek to be adjudicated can only be done on an individualized basis. Even in the increasingly challenging class action capacity (as close as we get to collective rights), one still has to prove that the harm alleged injured all, yet in their individual capacity, not as members of a class based solely on their membership in that class. The courts, as well as the Constitution, prefer a color-blind system that discourages looking at structural racism or anti-poor bias. And yet economic justice is inevitably about class struggle and the shifting of power

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[3] *Id*. at 407.

[4] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[5] International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

structures that empower low-income workers to take control over their labor, earnings and wealth generation.

The decades-long attack on labor rights and the eradication of labor protections by the courts has aided in dismantling organizing efforts for collective demands that challenge the exploitative systems—in particular capitalism—that benefit off of low-wage labor. Ironically, this year the International Labor Organisation celebrates its 100-year anniversary,[6] and yet it is harder than ever to organize workers, negotiate workplace conditions, monitor and enforce dignified workplace conditions and ensure the minimal guarantees for worker protections. This is especially true for low-wage workers whose labor has historically been exploited, namely people of color, immigrants, and women. For example, under the New Deal era when advances to social and economic rights, such as a nationalized healthcare system and social security, were developed, Black and immigrant workers who were farmworkers, domestic workers, and home health care aides—work that is historically racialized, gendered and invisible—were excluded from the Fair Labor Standards Act of 1938,[7] considered to be a progressive law that guaranteed workers minimum wage and hour protections.

The individualized burden on each of us to seek economic justice one worker at a time also means a very piecemeal approach to legal action and legal reform, set up to guarantee minimal impact in terms of structural change. In the face of the corporate state and both the increased regulation of poor people's lives while decreasing regulation of industry, workers must sue one corporate actor at a time, hoping that their "win" will translate to a collective one on behalf of other workers. Even areas that are historically and intrinsically linked such as immigration and labor have taken years to advance, as shown by the recent actions in "A Day Without Immigrants" in 2017[8] after President Trump took office. Workers

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[6] *ILO @ 100: A year of celebration*, INT'L LAB. ORG. (Sept. 3, 2018), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_644023/lang--en/index.htm.

[7] 29 U.S.C.S. § 201–219 (LEXIS through Pub. L. No. 116-17).

[8] Liz Robbins & Annie Correal, *On a 'Day Without Immigrants,' Workers Show Their Presence by Staying Home*, N.Y. TIMES (Feb. 16, 2017),

who participated in "A Day Without an Immigrant" to draw attention to the workplace abuses they experience and to stress their role as a permanent source of underpaid, exploited labor that the U.S. economy depends on (yet often scapegoats) were also fired by some employers.[9] Over the past decade, the National Labor Relations Board has begun to recognize that immigrant workers participating in actions that are directly related to their ability to organize as workers and participate in workplace justice is in fact protected concerted activity as contemplated by the National Labor Relations Act and should be protected as such.[10] This is despite the fact that this country was built on slave labor and immigrant labor.

And yet, as we look forward to the promise of human rights guarantees, it is clear that the language of rights has been useful in holding up responsibility for the lack of compliance with them. In the organizing context, the human rights framework has helped "legitimize" demands for dignity and has provided a common language for linked struggles, including across borders. The framework has also assisted in re-envisioning demands and contextualizing them in an interconnected, intersectional network of rights, which in and of itself allows for a systemic understanding of oppression. To the extent that movements—which come with their own political analysis and understanding of state and corporate violence—can strategically use the human rights framework to articulate demands that otherwise have not found resonance, are not recognized or are explicitly contrary to states' economic, political and legal models, then the framework has found its fundamental utility. The law, and any rights framework, must ultimately rise up to meet dignity where it is at and where it demands to be met, rather

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https://www.nytimes.com/2017/02/16/nyregion/day-without-immigrants-boycott-trump-policy.html.

[9] Bourree Lam, *The Fallout From 'A Day Without Immigrants*', THE ATLANTIC (Feb. 21, 2017), https://www.theatlantic.com/business/archive/2017/02/day-without-immigrants-2/517380/.

[10] Advice Memorandum Concerning EZ Industrial Solutions, LLC Case 07-CA-193475, Nat'l Labor Relations Bd., Office of the Gen. Counsel (Aug. 30, 2017); Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy, Nat'l Labor Relations Bd., Office of the Gen. Counsel (July 22, 2008); *see also* Kati L. Griffith & Tamara L. Lee, *Immigration Advocacy as Labor Advocacy*, 33 BERKELEY J. EMP. & LAB. L. 73, 73 (2012).

than lowering our demands for a dignified life to where the law has become comfortable at. That is the challenge for all of us who put this profession, our work, and our lives in service of people and struggle.