

MARK DEWOLFE HOWE AND THE FIGHT FOR RACIAL EQUALITY

Louis H. Pollak *

“THE greatest brutality of our time,” wrote Mark Howe, “is racial inequality. . . .”¹ The apparent simplicity of his statement belies the complexity of feeling and thought which underlay it. There was of course the moral imperative to do away with iniquity. But there was also the historical imperative to bring American law and life into conformity with principles built into our national covenant almost a century ago and still unimplemented. Without the conclusive force of history, morality alone would not — for Howe, lawyer and historian — have justified the corrective action of the Court on which he lavished his relentless scholarship:²

Of course the decision of the justices was consistent with their own moral judgment of the social institutions in question. The source of the law which the Court proclaimed was not, however, that predilection. It was the will of those who have made the Fourteenth Amendment law, confirmed by the nation’s increasing awareness that an easygoing tolerance of racial injustice had for too long permitted first things on our schedule of constitutional commitments to come second, third, or fourth.

When dealing with segregation the Court has properly relied upon an explicit national commitment less than a century old. It is not, I submit, of crucial significance that no evidence tells us conclusively that the draftsmen of the Fourteenth Amendment

* Dean and Professor of Law, Yale Law School. A.B., Harvard, 1943; L.L.B., Yale, 1948.

¹ M. HOWE, *THE GARDEN AND THE WILDERNESS* 148 (1965).

² *Id.* at 170-71. By contrast, Howe felt:

that in many of its recent decisions on church and state the Court has promulgated interpretations of history, not in order to tell accurately the story of the past, but in order to legitimate its own judgment of policy. The result of this process of lawmaking not infrequently has been the enunciation of doctrine that bears only the most remote relationship to the presuppositions of the society which the doctrine is designed to govern.

that aspiration, like history, is a seamless web — that when we talk of civil liberties we are discussing civil rights, that when we deal effectively with civil rights we must deal courageously with economic misery, that when we take military action with respect to the world around us the achievements that we have sought at home are likely to be postponed.

Id. at 167-68. See also Howe, *Religion and Race in Public Education*, 8 *BUFFALO L. REV.* 242 (1959).

intended to outlaw separate but equal facilities for Negro citizens. It is enough to know that they meant to prohibit all state action which supports a caste system. No honest observer of American life can deny, I think, that when the state puts Negroes in separate railroad cars, in separate slums, in separate schools, in separate jobs, the nation's promise of equality has been violated. Of course the burial of Jim Crow is a painful ceremony for those who loved his peculiar ways. The judges who conduct the services, however, are not ministering for themselves alone. They are fulfilling the will of the nation as expressed in the prohibitions of its law and reflected in the affirmations of its tradition.

Howe was not content simply to chronicle the Court's recent initiatives in the field of civil rights and vouch for their authenticity. He helped to move the process forward. This he did, not at all flamboyantly, but in quiet contradiction of his mildly acid conviction (from whose sweep he did not exempt himself) that "the general run of flaccid beings who make up the bulk of mankind" lack the capacity for action. "If you take a restraining hand from the impulses of most of us we will not set many fires or agitate many rebellions. Our doubts and our skepticism will take command of conduct and prevent us from doing appreciable damage or distributing measurable benefits."³

The "measurable benefits" which Howe brought to the cause of racial equality were manifold: As a teacher he challenged hundreds of Harvard and Radcliffe students — law students and undergraduates alike — to be properly impatient of the gap between the law's promise and society's performance. At the same time he gave to his students a craftsman's sense of how to use the law and legal institutions to restore the law's integrity. One measure of what Howe meant to his students is the pioneering *Harvard Civil Rights-Civil Liberties Law Review*, established, with his warm support, one year ago.⁴ Another measure is the grief that clung to the hundreds of young people who filled Memorial Church on Howe's funeral day.

Howe did not confine his teaching to Langdell and the Yard. He also signed on as a member of the extraordinary law faculty established by the N.A.A.C.P. Legal Defense Fund, which has conducted a notable series of seminars for scores of Southern trial lawyers who have for years carried the hazardous, un-

³ Howe, *Felix Frankfurter*, 78 HARV. L. REV. 1526 (1965).

⁴ The *Review*, as its name suggests, bears continuing witness to Howe's view. See Howe, *Foreword*, 1 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1966).

glamorous and unremunerative burden of civil rights litigation at the local level. But Howe did more than teach the working civil rights bar — he joined that bar, spending many weeks in the base-line courts of Mississippi as “a private in the ranks.”⁵

It was this, more than the link with Holmes, which made it necessary and proper to conclude Howe’s funeral with the singing of a hymn not to be found in *The Harvard Hymnal* — “The Battle Hymn of the Republic.” It is martial music attuned to a practitioner of peaceful ways — one who taught, and embodied the teaching, that it is open to us to “make law an effective instrument for advancing the personal freedoms and human dignities of the American people.”⁶

⁵ The encomium, which one suspects Howe would have treasured even while wryly disclaiming entitlement to any form of honorable mention, comes from Jack Greenberg, Director of the Legal Defense Fund.

⁶ Howe, *supra* note 4, at 1.