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ARTICLES

RIOTS, RACISM, AND THE COURTS

Judge Stephen R. Reinhardt*

This is a time of great challenge and great despair. The passing of the Cold War which was so massively debilitating to our economy should have allowed us to turn our attention to the twin dangers that threaten to destroy America: poverty and racism. Given this nation's political leadership in recent years, it is not surprising that we have failed to do so. But now, we have been handed another chance. We have been shown a glimpse of the future: riots, racial hatred, armed warfare, and the military occupation of our cities. Fortunately, we have also been given the opportunity to forestall that future and to prevent the ugly dissolution of our society. If we seize that opportunity, we will have to act forcefully; we will have to rid ourselves of our pious self-righteousness, our self-defeating attitude of racial superiority, and our thinly concealed enmity toward those we consider different. We will have to deal with the needs of those we have denied a fair and equal opportunity: the poor, the disadvantaged, and the disenfranchised.

This will require significant personal sacrifice on all our parts. The alternative, however, is to await the inevitable: the

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* Circuit Judge, United States Court of Appeals for the Ninth Circuit. This piece is a commencement speech delivered by Judge Reinhardt in May 1992 to the graduating class of Golden Gate University School of Law. The speech was delivered shortly after the riots which took place in Los Angeles, California, in response to the verdict in the Rodney King trial.

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separation of our people by race into armed camps, the creation of permanent sub-groups held in a state of suppression by military might, and the institutionalization of criminal conduct as the primary form of commercial enterprise in large parts of society.

If you think I am exaggerating, look again at the recent television and newspaper pictures from Los Angeles: the Korean-American community with its men lining the streets in front of their businesses carrying rifles or semi-automatic weapons exchanging gunfire with members of other minority groups. Look again at the looters and the roving groups of Blacks and Hispanics. Look also at a recent report showing that in Washington, D.C., 42 percent of African-American male residents between the ages of 18 and 32 are presently incarcerated, on probation or parole, or awaiting trial. Finally look at the flight of white Americans to the suburbs and the rapidly declining Caucasian population in our cities. Unthinkably and despite all the advances we have made in the area of civil rights, open racial warfare is now possible.

Over a year ago, I addressed a group of very conservative law students at Stanford who were members of the Federalist Society. I quoted a 1989 study by the National Research Council which said: "We cannot exclude the possibility of confrontation and violence . . . . The ingredients are there: large populations of jobless youths, an extensive sense of relative deprivation and injustice, distrust of the legal system, frequently abrasive police-community relations, highly visible inequalities, extreme concentrations of poverty, and great racial awareness." To this, I added, "the potential for a recurrence of the urban unrest and riots of the late 1960's is ever-present. A whole generation of young Blacks is being lost. The divisions between different groups in our society are widening. Unless we continue to make substantial efforts toward swift and full integration, we are headed toward disaster."

The economic prognosis for minorities is grim. Forty-five percent of black children live in poverty, a figure computed after family assistance and other governmental benefits are added to household income. While white households have a median net worth of $39,000, that of black households is only $3,397 — one-

eleventh of the white median. The economic status of Blacks compared to Whites has deteriorated since the 1970's and continues to deteriorate. The rich are getting richer; the poor are getting poorer. And notably, Hispanics, Native Americans, Asians and others are all affected by problems of their own — problems that cry out for our attention. In fact, preliminary figures show that substantially more Hispanics than Blacks were arrested during the recent Los Angeles riots. What that means, no one is certain.

We do know that "rioters" in Los Angeles ranged from hardened professional criminals who took advantage of a fortuitous opportunity to engage in violent criminal conduct to ordinary law abiding individuals who were angered and frustrated by what they felt to be a grievous demonstration of the racial injustice that permeates their lives. These people suddenly saw much-needed food and goods readily available and were overwhelmed by a combination of raw emotions and their conviction that white society would never treat them fairly or afford them the opportunity to obtain those necessities by legitimate means.

Public officials and political candidates who still refuse to understand the need to solve the underlying problems, and instead are interested only in trying to escape the blame for their own failures or shift that blame to others are ensuring a repetition and escalation of the violence. Blaming the rioters is easy. But accepting responsibility for our own failures requires a different breed of person — a breed we find too infrequently in high public office. It requires leaders who possess both courage and compassion.

I address you today as fellow members of the legal profession. For better or for worse, law schools produce most of our nation's leaders and some of you may one day serve in political or judicial office. But I want to speak to the larger group — to all of you who will practice law, private or public, civil or criminal. Most of us cannot do much about the larger problems of racism and poverty that confront our nation. But each of us can do something, and collectively, that can be a lot.

As lawyers, we can and we must restore to the minorities of this land the belief that they will receive justice in our courts. If

we accomplish nothing else in our lives but to assist in restoring that faith, we will have helped ourselves, our children and our nation immeasurably.

In the wake of the Los Angeles riots, a nationwide poll showed that 84 percent of African-Americans believe that they do not receive fair or equal treatment in our courts. To me, that figure is shocking. It means that our judicial system is failing. We have lost the confidence of those who most need to believe in the fairness of the judiciary.

Obedience to law is most likely to occur when there is respect for the legal system—for its fairness, for its sense of equality. Without that respect, only brute force can command obedience. Practically, we cannot, in this nation, enforce law by might. There are simply not enough policemen, not enough National Guardsmen, not enough regular troops to perform that job adequately. So we are compelled, like it or not, to maintain respect for law, for our courts, by our deeds. We must demonstrate that our courts stand for justice or we must face the consequences.

What is most disturbing about this distrust of the judicial system is that only a few years ago it was the federal courts—and particularly the Supreme Court of the United States—that offered the greatest hope to the nation's minorities. It was the Supreme Court that acted to end segregation in this country when neither the executive nor the legislative branch had the will or the courage to do what common sense and the Constitution demanded. It was the Supreme Court, dedicated to the expansion of individual rights and liberties, that said this nation could no longer continue on a course of inequality, that all Americans must be treated fairly under the law, that government-sponsored racial separation must end. And in an unbroken series of far-reaching decisions, the federal courts, led by Chief Justice Earl Warren, expanded the rights of all citizens and helped transform this nation into a land in which African-Americans for the first time were afforded the full rights of citizenship, a land in which our Constitution flourished. Until a few years ago, African-Americans with problems knew they could look to the federal courts for help. They knew they would find a sympathetic audience, that their interests would be protected,

and that the civil rights laws of our nation would be vigorously enforced.

All that has changed. The message the new Supreme Court has delivered to minority communities is clear: we no longer care. We have other concerns. Look elsewhere for help. In 1989, in a series of major civil rights decisions, the Rehnquist Court let minorities know of its attitude toward civil rights laws. The Court made it far more difficult for minorities to win discrimination cases, while making it much easier for white males to challenge the legality of consent decrees regulating hiring practices. A judicial revolution has occurred—a revolution that will not easily be reversed. A Court that once served the poor, the oppressed, and the disadvantaged now has entirely different clients, entirely different interests, an entirely different agenda.

The Supreme Court continued on its anti-civil rights course this term. In *Presley v. Etowah County Commission*,[1] the Court overruled the Justice Department, the agency charged with administering the voting rights laws. African-Americans in Etowah County, Alabama, had, for the first time in recent memory, accumulated enough political strength to elect a Black to their county board of supervisors. The white majority on the board responded by removing from individual supervisors all power to make decisions regarding their respective districts and giving that power to the board as a whole. The Supreme Court held that the Voting Rights Act was not violated. Is it any wonder Blacks believe they are not treated fairly in our courts?

And civil rights decisions are not the only cases in which the Rehnquist Court has demonstrated its hostility to the pursuit of individual rights in federal courts. The Court has erected a series of procedural barriers—some in the name of federalism—that serve to limit the opportunity of minorities and poor people to have their grievances redressed. Concepts such as mootness, ripeness, abstention, and standing have been employed to close off access to the federal courts and to deny federal remedies to people whose constitutional rights have been violated. Illustrative of these procedural techniques is the Court's

1. 112 S. Ct. 820 (1992).

decision in *City of Los Angeles v. Lyons*.[2] *Lyons* held that a black victim of a police chokehold could not sue to bar further use of that technique because he could not prove that *he* would be choked again. Of course, Lyons was not the only one who could not meet that standard. No one else could either.

After *Lyons* came *McCleskey v. Kemp*.[3] In *McCleskey*, the Court said, openly and unashamedly, that institutional racism in our courts is of little consequence as far as individual black defendants are concerned. Unless a black man about to be executed can prove that racism was the specific cause of *his* conviction or sentence—another standard that can rarely, if ever, be met—the Court will not consider a challenge based on the fact that Blacks are treated differently from Whites, no matter how persuasive the evidence.

These decisions showed the African-American community that the federal judiciary is no longer interested in protecting the rights of minorities, that federal judges are far more concerned with protecting the interest of white males. To minorities—and particularly to black Americans—this was a bitter blow. The age of Earl Warren, William Brennan, and Thurgood Marshall was the golden age of civil rights. Minorities were given the feeling that someone cared, that government cared, that the law was on their side. Understandably, with the Rehnquist Court in full sway, they no longer believe that. Their earlier belief gave them hope. Their current belief leads only to despair—and to disrespect for the law.

There are other aspects of our laws and sentencing procedures that have undermined the faith of minorities in the judicial system: the disparity between sentenced for possession of crack, a substance used principally by minorities, and possession of cocaine, a favorite of wealthy Caucasians; the harshness of some of our other narcotics laws and their disparate impact on young, unemployed black males; and the drastic difference in treatment of the types of offense most frequently committed by minorities and those of which Caucasians are most often the perpetrators—lenient sentences for white-collar fraud or theft of

2. 461 U.S. 95 (1983).
3. 481 U.S. 279 (1987).

millions of dollars, and harsh punishment for more traditional crimes involving far smaller amounts of money or property.

There is a final, overriding reason why Blacks lack confidence in the federal courts. By their appointments, Presidents Reagan and Bush have ensured that the federal courts will not be representative. Instead, they are a bastion of white America. They stand as a symbol of white power. I will report only on the courts I am most familiar with—the federal appellate courts, the second-highest courts in the land. Because Blacks were rarely appointed to so rarefied a position in the past—only Presidents Truman, Kennedy, and Johnson had made any such appointments—President Carter made a herculean effort to redress the existing inequity when he took office.

In 1976 there were only two black federal appellate judges on the bench. President Carter appointed a total of fifty-six judges to the federal appellate courts, and nine—16 percent—were Blacks. Starting in 1980, however, Presidents Reagan and Bush dramatically reversed the course. In his eight years in office President Reagan made a total of eighty-three appointments to the federal courts of appeal. During that time he succeeded in finding only one Black he deemed worthy of appointment. George Bush, with thirty-two appointments thus far, has also been able to locate only one African-American he thought qualified to serve—Clarence Thomas. Now that Justice Thomas has been rewarded with an even higher office because of his outstanding legal abilities, there are no Blacks appointed by Bush on the courts of appeal. In President Bush's view, Clarence Thomas is apparently all there is out there in black America. And as the Carter judges age, we can expect the now extremely small percentage of African-American appellate judges to diminish even further—a sorry indictment of the federal judiciary, and yet another compelling message to African-Americans that the legal system belongs to others.

I do not mean to suggest that the courts are the principal cause of all of today's problems or even the civil disturbance we have recently experienced. There is plenty of blame for all of us to share — Caucasians and African-Americans, rioters and non-rioters alike. Certainly the political leaders of this nation must accept a large measure of responsibility for our failure. Their

policy of "malignant neglect" is coming home to roost. And I am not here to suggest that you as lawyers can solve the problems of poverty and racism by yourselves. I am here instead to suggest that there are things you can do to help alleviate these problems as you enter upon your professional life and begin the careers you have worked so hard to realize.

I suggest that you can do your part to ensure that all individuals are treated with dignity and respect. You can insist that the laws be administered fairly and equally and that the judicial system function in a just manner. When you see an injustice, you can speak out, you can complain to the bar association, you can notify the Commission on Judicial Performance, you can file an action. You must remember that at all times that you are part of a profession with a particular responsibility: to see that fairness and justice is done and that equal treatment under the law prevails. You more than anyone can ensure that young African-Americans have reason to regain confidence in our legal system, in our laws, in our courts and in our judges.

It will take time, but you can help change the underlying philosophy that presently guides our judiciary. You can help restore to both the federal and state courts a fundamental concern for individual liberties and individual rights. You can breathe fresh meaning into our Constitution. As our judicial philosophy changed once, so it can change again. History will long remember the era of Chief Justice Earl Warren. History will record that time as a noble period. And history will also record the time when we return to that judicial philosophy of concern, compassion, understanding and tolerance for all. History will record the efforts of those of you who dedicate yourselves to law and justice and help restore our true Constitutional values. That is your challenge and your opportunity. I hope for all our sakes that you succeed.