Cleveland State Law Review

Volume 41 | Issue 2 Article

1993

America's Counterrevolution - Unlearned Lessons

Nathaniel R. Jones
United States Court of Appeals for the Sixth Circuit

AMERICA'S COUNTERREVOLUTION—UNLEARNED LESSONS

THE FIFTY-FOURTH CLEVELAND-MARSHALL FUND LECTURE

NATHANIEL R. JONES[1]

"America's Counterrevolution - Unlearned Lessons", is not a reference to the American Revolution dramatized by the war in which the yoke of British domination was overthrown, or the industrial revolution by which this nation moved from an agrarian society to a major industrial power. Rather, it is about America's social revolution.

That revolution did not commence for many persons with the adoption of a Constitution in 1787. Some sixty five years later, in 1852, speaking on behalf of an excluded racial group, America's great abolitionist, Frederick Douglass, in his famous July 4th, 1852, oration at Rochester, New York, declared:

> I am not included within the pale of this glorious anniversary. The blessings in which you this day rejoice are not enjoyed in common. The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your father, is shared by you, not by me. This Fourth of July is yours, not mine.[2]

One hundred thirty years later, in 1987, Justice Thurgood Marshall, during the nation's observance of the bicentennial of the United States Constitution, felt compelled to remind his countrymen and women:

> I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention. Nor do I find the wisdom, foresight and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war and momentous social transformation to attain a system of constitutional government, and its respect for the individual freedoms human rights, we hold as fundamental today.[3]

The significance of America's social transformation was driven home to me in 1986. I traveled to South Africa to participate in a symposium for that country's judges. They were interested in learning more about the American

---

[1]Circuit Judge, United States Court of Appeals for the Sixth Circuit.

[2]FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 441 (1856).

[3]Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

social revolution—which saw this nation change from a state that constitutionally sanctioned human degradation in the form of slavery and segregation, into one that enshrined in its basic charter human rights and guarantees of equality before the law for all persons. The revolution, in what Justice Marshall calls our "system of constitutional government", made our legal system the wonder of the world, which others constantly seek to emulate.

Our "system of constitutional government" represented the extension of a social contract between government, those who had been enslaved, as well as their descendants. The benefits of that social contract were previously enjoyed by other Americans. In fact, the contract has since been renegotiated by virtue of Congressional civil rights enactments and revised enlightened social policy that now outlaws discrimination based upon religion, gender, ethnicity, age, and most recently Americans with disabilities. In implementing the broadened protections for newer groups there has been a noticeable absence of the kind of acrimony, violence and public recrimination that was associated with attempts to implement remedies designed to eliminate racial discrimination. This results from the unarguable reality that our nation has historically treated race and racial minorities differently. It is this view of race that led black Americans to resort to the legal system and to petition for the resultant intention by government and the courts. A difference in treatment continues even today.

The social revolution narrowed the gap in difference in treatment accorded persons regarded as "different." When the Supreme Court majority constitutionalized "separate-but-equal" in *Plessy v. Ferguson* in 1896, dissenting Justice John Marshall Harlan wrote:

> But in view of the Constitution in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is colorblind, neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. . . .[4]

It is clear that Justice Harlan was writing about the same social contract that Justice Marshall was later to make reference in his 1989 bicentennial speech.

What is the social contract that evolved as a result of the Civil War, and the adoption of the 13th, 14th and 15th Amendments? It is found in the Constitution, most specifically in those three amendments. By virtue thereof, the nation is legally and morally bound to some very fundamental propositions—among them—that slavery was abolished forever within the United States; that all persons born or naturalized in the United States are citizens, and no State shall abridge privileges or immunities of citizenship, nor deprive any person of due process of law or of the equal protection of the law, and the right to vote shall be inviolate. It has become necessary, over time, to

[4]Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

invoke section 2 of these particular Civil War amendments[5] that permit Congress to enforce them with appropriate legislation. It is this process that spurs the social revolution. The lessons of the social revolution, incomplete though it is, has been countered in its state of incompleteness.

In order to understand what is required of Americans as they find themselves in this counterrevolutionary period with respect to civil rights, there must first be an understanding of the nation's racial history and the role that law has played in that history. It should be noted that the efforts to obtain specific performance of the social contract were carried forward for the first half of the Twentieth Century by exslaves and their descendants, who were joined, from time to time, by courageous white allies. This was done largely by appeals to conscience because the Reconstruction Era laws had been nullified. At least since the period of World War II strenuous challenges were made to win the cooperation of the Federal government in efforts to revitalize legally enforceable remedies and the system of racial segregation that infected a broad range of American institutions and facets of American life. Commencing in the late 1950's, Congress began enacting a number of civil rights statutes[6]—and this process was accelerated in the 1960's. Largely in response to the prolonged campaign of consciousness raising, a series of United States Presidents—Truman, Eisenhower, Kennedy, Johnson, Nixon and Carter supplemented decisions of the courts with Executive Orders and programs designed to eradicate discrimination and extend equal opportunities.[7] Without question, the landscape of America changed—and opportunities for black Americans increased. However, a reaction, ballooned into what I characterize as a counterrevolution, began to sink its roots into the soil of the nation's discontent.

There was, without question, a political exploitative dimension to this reaction. With the success of the direct action campaigns of the Sixties in which segregation and discrimination were confronted at their source in the South and in the North, there followed several seasons of civil disorders, that sparked growth in the ranks of the counter-revolutionaries.[8] As affirmative action was extended to admissions policies at schools, and the Civil Rights Act of 1964 was amended in 1972[9] to cover public employment practices of states and cities, persons who felt adversely affected by these programs constituted another

---

[5]U.S. CONST. amend. XIII and amend. XIV.

[6]DENTON L. WATSON, LION IN THE LOBBY (1990).

[7]Nathaniel R. Jones, *The Rocky Road of Racial Remedies; Rights, Revision, Retreat*, 10 ST. LOUIS U. PUB. L. REV. 1 n.7 (1991); CITIZENS COMMISSION ON CIVIL RIGHTS, ONE NATION INDIVISIBLE, THE CIVIL RIGHTS CHALLENGE FOR THE 1990'S (1989) [hereinafter, ONE NATION INDIVISIBLE].

[8]UNITED STATES KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 19-22 (1968) [hereinafter KERNER COMMISSION].

[9]*See generally* WATSON, *supra* note 6; Clarence Mitchell, *An Advocate's View of 1972 Amendments to Title VII*, 5 COLUM. HUM. RTS. L. REV., 311 (1973).

group of the disaffected. Their numbers swelled into an overwhelming political force—a force that became a significant factor in determining the outcome of the 1980 national election. The string of Republican and Democratic national administrations that had supported enforcement of civil rights through the variety of executive actions, programs and court pronouncements was ended. The new situation was best described in 1989 by the bipartisan Citizens Commission on Civil Rights in its report, *One Nation, Indivisible.* Concerning the Civil Rights Challenge for the 1990's, it stated:

> During the 1980's, many of [the] methods of enforcement fell into disuse. Victims of discrimination and underfunded private groups have been forced to shoulder the burden of enforcing most civil rights statutes although those laws place primary responsibility on federal agencies. Whether measured by the large number of privately litigated cases reported, or by privately funded studies of the extent and nature of discrimination, this major lapse in federal enforcement has permitted illegal discrimination to flourish in our society.[10]

With the levers of government firmly in new hands, the civil rights policies that had been formulated over time were drawn into question, slowed down, and in some respects, reversed. This negative action, until the Nineties, was largely—from the standpoint of governmental action—limited to the Executive branch. The courts, however, held firm. However, as the personnel of the courts began to change through the screening and selection methods utilized by the Reagan and Bush administrations,[11] the judicial branch began to respond more favorably to the importunings of the Justice Department and the Executive Branch by undertaking a reexamination of the doctrines and propositions with respect to racial remedies that had long since appeared to be settled.

For instance, in June of 1989, the United States Supreme Court handed down five major decisions in the employment area that virtually doomed the ability of persons to obtain relief for race and gender discrimination claims.[12] Those decisions set off two years of bitter controversy—and debate—between the Executive Branch and the Congress. Quotas became the bad word. The debate did not subside until President Bush signed into law, the Civil Rights Act of

---

[10] ONE NATION INDIVISIBLE, *supra* note 7, at 27.

[11] A. Leon Higginbotham, *The Case of the Missing Black Judges*, N.Y. TIMES, July 29, 1992, at A21; Nathaniel R. Jones, *Whither Goest Judicial Nominations, Brown or Plessy? Advice and Consent Revisited*, 46 SMU L. REV. 735, 738-39 (1992); ALLIANCE FOR JUSTICE JUDICIAL SELECTION PROJECT, *Justice in the Making, A Citizens Handbook for Choosing Federal Judges* (1993). *See also, Judicial Diversity*, DETROIT FREE PRESS, July 11, 1992; Neil A. Lewis, *Selection of Conservative Judges Insures A President's Legacy*, N.Y. TIMES, July 1, 1992, at A13.

[12] Wards Cove Packing, Co. v. Atonio, 490 U.S. 642 (1989); Lorance v. AT&T Technologies, 490 U.S. 900 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Paterson v. McLean Credit Unions, 491 U.S. 164 (1989).

1991, the purpose of which was to overturn the effect of those five "unsettling" Supreme Court decisions.

In discussing the social contract, represented by the 13th, 14th and 15th Amendments, the focus must be on the law and the legal system. It was, after all, the law that relegated black Americans to subhuman status, reaffirmed that status with the Supreme Court's decisions in the *Dred Scott*[13] case and *Plessy v. Ferguson*[14] case. Whenever the legal system became rigid and unresponsive to the demands for change, the subjugated felt compelled to go outside of the legal system to seek redress. There have been instances of this being done, most notably the civil disorders of the 1960's and the perception, as recently as 1992, that the guarantee of justice miscarried in the Rodney King case in Los Angeles. I feel compelled to cite the circumstances surrounding that case in the context of the civil disorders of the 1960s as an example of a lesson unlearned.

In 1968, the Kerner Commission,[15] appointed by President Lyndon B. Johnson in the wake of a series of tragic urban riots in the mid-1960s (including Los Angeles, Cleveland, Detroit, Newark and Cincinnati), addressed the underlying causes for those disorders. The historic report that grew out of that commission's work declared that each disturbance was precipitated by an encounter between the police and the minority community. Each catalytic event was followed by an insurrection that saw bottled-up frustration, unredressed grievances and unmet needs explode into mindless, senseless acts of destruction. The report recognized that the situation was precipitated by a breakdown of the legal system.

Now, nearly a quarter century later, in response to what is widely viewed as a miscarriage of justice, another series of social disruptions occurred. What millions of Americans viewed on a videotape in connection with the violent seizure of Rodney King and the jury's exoneration of the police officers involved in that incident led an overwhelming number of Americans to believe that the criminal and jury system failed miserably.

The Fourth Amendment's protections against unreasonable seizure and the Fifth and Fourteenth Amendments' protections against deprivations of life and liberty without due process of law inure to every single American—no matter how ugly that person's conduct may have been. Nothing that may have preceded what we saw on the infamous videotape entitled police officers to suspend Rodney King's constitutional rights and summarily administer corporal punishment.

Duly constituted authorities must respect individual rights. When authorities violate our constitutional guarantees, our legal system must provide redress. When the system breaks down and no redress is afforded, the likely result is an unleashing of collective rage. And since that rage is incendiary in nature, it ignites the social dynamite stacked in the urban areas where racial

---

[13]Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

[14]163 U.S. 537 (1896).

[15]KERNER COMMISSION, *supra* note 8.

minorities are warehoused. That is what occurred in Los Angeles. It can be repeated elsewhere unless we address some fundamental problems in our society.

In 1968, the Kerner Commission, in facing the issue of rage, race, and social dynamite found: "What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it and white society condones it."[16]

Dr. Kenneth B. Clark, one of the final witnesses appearing before the Kerner Commission, in expressing concern that the commission's recommendations would be ignored, as previous warnings had been, testified: "I read this report . . . of the 1919 riot in Chicago, and it is as if we are reading the report of the investigating committee of the Harlem riot of 1935, the report of the investigating committee of the Harlem riot of 1943, the report of the McCone Commission on the (1965) Watts riot . . . . It is a kind of Alice in Wonderland with the same moving picture reshown over and over again, the same analysis, the same recommendations, and the same inaction."[17]

The manner in which the venue for the first trial was changed raised serious questions in some minds as to whether the legal system was manipulated. Now, some of the police officers involved were tried and convicted for a violation of King's federal civil rights.[18] Moreover, black defendants charged with the brutal beating of a white truck driver were tried in the California Superior Court.[19] During the trial, further controversy stirred when the prosecutor removed a black judge from presiding over the trial. Bear with me as a *New York Times* story of August 27,1992, that reported on the matter:

> The Los Angeles County District Attorney acknowledged today that he skirted the truth when he tried to explain Tuesday why his office had removed, on a peremptory challenge, a black judge who had just been assigned to try the case of three black men charged with beating a white truck driver at the outset of the riots here four months ago.
>
> That acknowledgement, by District Attorney Ira Reiner, was the climax of a day of heated public exchanges between his office and the judge, Roosevelt Dorn of Los Angeles County Superior Court.
>
> Mr. Reiner said this afternoon that the real reason for the challenge to Judge Dorn was that there had been a number of past objections about his "judicial temperament." Mr. Reiner said he gave a different reason to reporters on Tuesday—that Judge Dorn's schedule would

---

[16] *Id.* at 1.

[17] *Id.* at 483

[18] *See, e.g.*, Jim Newton, *2 Officers Guilty, 2 Acquited*, L.A. TIMES, April 18, 1993, at 1.

[19] One defendant was acquitted of his attempted murder charge. A co-defendant was convicted of a lesser charge of misdemeanor assault. *See, e.g.*, Chip Johnson, *Lawyers Split In Reaction To Verdicts*, L.A. TIMES, Oct. 21, 1993, at 9.

not allow him to devote full time to the case—as a way of sparing the judge's feelings.

In an interview late today, Judge Dorn rejected Mr. Reiner's newly stated reason, just as the judge had rejected the earlier one at a news conference this morning.

* * *

This morning Judge Dorn said at a news conference, rarely called by judges, that Mr. Reiner's office had lied. Judge Dorn said a supervising Superior Court judge, Cecil Mills, had planned to relieve him of all other duties so that he could preside at the beating trial.

Judge Dorn said he was angry because "it went out through the country that a black judge was not able to efficiently handle his calendar." He declined to address the issue of race, saying he could not read Mr. Reiner's mind. But he urged Mr. Reiner to rescind the challenge.[20]

Combine these developments with the questions raised when the appointment of African-American and Hispanic judges are contrasted with those appointed during the Reagan-Bush administration and the Carter administration. There were 475 judges appointed by these two Presidents. As you may recall, President Carter appointed 37 Blacks and 16 Hispanics in four years. In the twelve years of Reagan and Bush, only 18 Blacks and 21 Hispanic-Americans have been appointed.[21] Thus, as Judge Higginbotham warned in his July 29, 1993 New York Times op-ed piece, blacks—as judges—are becoming an endangered species.[22]

This analysis bears upon the current state of the social revolution, at least to the extent that it implicates remedies for racial discrimination. These remedies have, for over a decade now, been severely impacted by powerful counter forces. As I earlier noted, the civil rights remedial thrust has been broadened in recent years to encompass claims of gender, ethnic, age, and now of the physically handicapped. The only category of victim that continues to draw the fire of the counter revolt is that with racial claims. This arises, in part, out of a belief that issues of race and color are history and should no longer be of concern to the government, most particularly the courts. To the extent that enforcement of remedies continue, they are deemed to be preferential in nature and a form of reverse discrimination. Because of the difficulty that Americans have in seeing a nexus between the institution of slavery and contemporary social disadvantage of a type that justifies continued entitlement to racial remedies, public resistance remains intense.

The historic victims of racial discrimination in many instances, have had reimposed on them the burden of proving that "water is wet," before being

---

20 *Prosecutor Alters Motive for Removing Black Judge*, N.Y. TIMES, August 27, 1992, at A18.

21 *Id.*

22 *See* Higginbotham, *supra* note 11.

entitled to judicial relief. In some respects, this has led to a total denial of judicial relief, which mocks the notion of a social contract between the government and its citizens. It is for this reason that I feel compelled to draw attention to the subject addressed in this presentation. Race and law, we must remember, have been at the center of each of the nation's most traumatic social crises. We were reminded of that during the urban disorders of the 1960's and most recently, in the disturbances surrounding the Rodney King case.

The basic lesson yet unlearned is that the societal changes that must be made are systemic and institutional. Lawyers have a special role to play in helping Americans to understand how law has shaped institutions and how those institutions, in turn, have influenced individual attitudes about people and policies. The social contract that promised equality under the law for all Americans has yet to be fully enforced. Specific enforcement of that contract remains the nation's great unfinished task. Lawyers must take the lead in helping Americans assume that obligation.

One of the results of this breach of the social contract has been the abandonment of hope that positive change can come about within the framework of the system of law. Estrangement grows, cynicism increases, withdrawal from social interaction becomes an appealing escape. This isolation and retreat from the mainstream of thought, educational and economic stimulation, and values, spawn social depravation with the most disastrous of consequences.

The definitive reason for rejecting the counterrevolution and for getting on with our social contract was highlighted in the 1968 Kerner Commission report:

> Discrimination and segregation have long permeated much of American life; now they threaten the future of every American .... The destruction and the bitterness of racial disorder, the harsh polemics of black revolt and white repression have been seen and heard before in this country.... It is time now to end the destruction and the violence, not only in the streets of the ghetto but in the lives of people.[23]

Complicating the grim picture thus painted are the altered demographics as well as other shifts that have occurred which impact on American communities. The courts and lawyers cannot escape the resulting implications. Problems associated with abortion, employment and housing discrimination make it imperative that judges and lawyers, as principal actors in the legal system, be conversant with the social currents that swirl all about us and splash against the doors of the courts and other institutions that affect the lives of citizens.

It is no longer sufficient for judges and lawyers, for instance, to be learned in the law of contracts, or the restatement of torts, or knowledgeable about commercial transactions. Those areas of the law must be understood against a broader sense of the reality about the problems of the homeless, the high dropout rates, racial and ethnic clashes, behavioral aberrations, dysfunctional

---

[23] KERNER COMMISSION, *supra* note 8, at 1, 13.

families, drug abuse, poverty, teenage pregnancies, child abuse, consequences flowing from the lack of adequate prenatal care—and a host of other pathologies.

But sadly, there has been a retreat where forward movement was required. For instance, the retreat from racial inclusiveness on the federal bench over the past dozen years is occurring at the very time when the legal system is coming face to face with the problems catalogued above. It must be further observed that elements of a number of these problems are alien to the life experiences of a bench that is becoming increasingly more homogeneous. Effective justice could likely be the victim.

One way to avert this calamity is to require judges to be more sensitive and aware of the problems faced by citizens who, heretofore, have had little impact on the legal system.

With the altered demographics and the other shifts occurring that impact on our communities, the courts cannot escape the resulting implications. Recent restrictive Supreme Court holdings will also affect the types of cases that will be filled. Some examples are: school funding, problems associated with abortion, employment and housing discrimination, and welfare benefits. I will reiterate. It is imperative that judges and lawyers be conversant with the social currents that swirl all about us and wash against the doors of the courts and the various institutions that affect the lives of citizens. It is only with this knowledge that judges and lawyers can effectively deal with the pressing societal conflicts that face us daily.

There are signs that the counterrevolution has been overtaken by positive developments during the past year. For one thing, the federal government once again appears poised to use its power in an affirmative manner with respect to civil rights. With the appointment of Drew S. Days, III as United States Solicitor General, and the call for racial healing from the highest officers in the land, a civilizing dialogue is becoming a part of our national discourse. State courts are also reflecting an awareness of the need to respond to injustices. If this continues, the "unlearned lessons" may become the "learned lessons." And every American will be the better for it.