Black Rage Confronts the Law

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Too many people are suffering
Too many people are sad
Too little people got everything while
Too many people got nothing.
Remake the world . . .
Be you black, Be you white.
—Jimmy Cliff, “Remake the World”

Chapter 14

“Remake the World”

What is the future of the black rage defense in America's courtrooms? To answer that question we must first look at the social construction of crime. Second, we need to look at how the cataclysmic economic changes taking place today will affect African Americans. We can then look at two areas where the black rage defense is expanding and suggest situations in which such a defense is most appropriate and useful.

Crime is real. However, the depiction of crime in America is often fictitious. The media's drive for profits results in the overreporting and sensationalizing of murder and assault. Stories are considered newsworthy if they sell newspapers or grab the attention of fidgety remote control-wielding television viewers. The Center for Media and Public Affairs reported that the three network television news shows broadcast four times as many crime stories in 1995 as in 1991, even though FBI statistics show that serious crimes actually decreased during that period.

There is a social construct to crime. The way in which antisocial behavior is characterized, classified, and punished molds the way people think and feel about crime. The savings-and-loan rip-off, fraudulent corporate cost overruns, and white-collar crimes cost the taxpayer far more than
street crime. Corporate violations of health and safety laws result in thousands of worker injuries and deaths. Corporate crimes against the environment pose a larger threat to the future of society than car theft and robbery. These costly crimes are committed almost completely by white males, yet the social perception of the criminal is that he is a black male.

A telling example of the institutional racism that infects our concept of crime is the controversy around the different punishments for possession of powdered cocaine versus crack cocaine. In federal court possession of five grams of crack draws a mandatory five-year minimum while possession of five grams of powdered cocaine has no mandatory minimum and first-time offenders usually receive probation. One has to possess a hundred times more powdered cocaine than crack to be sentenced to five years. This, plus law enforcement's admitted choice to target the crack world over the cocaine world, has resulted in large numbers of poor African American men and women going to federal prison instead of middle-class white men and women.

Sentencing disparity is not limited to the crack—powdered cocaine distinction. In 1995 an official study of all eighty thousand federal convictions over two years showed that African Americans receive sentences that are on average 10 percent longer than those of whites for similar crimes.

Combining state and federal jurisdictions, almost one third (32 percent) of African American men 20–29 years old are incarcerated, on parole, or on probation. This represents an increase of 10 percent over the last five years. Men are not the only ones who are being entangled in the criminal law web. Since 1989, African American women have experienced the greatest increase in involvement with the criminal justice system—a 78 percent jump.

Institutional racism is prevalent in every area of criminal law. A 1996 study in California showed that once arrested, whites have their charges reduced more often than African Americans and Latinos, and that white offenders received community-based rehabilitation placements at twice the rate of African Americans.

In 1995 Paul Butler, a professor at George Washington University Law School, shocked the legal community by advocating that African American jurors in nonviolent cases such as theft and drugs engage in jury nullification by refusing to convict black defendants. Butler was not shooting from
the hip; he is a former federal prosecutor and had written a well-documented piece. He argued that a system of white supremacy "creates and sustains the criminal breeding ground, which produces the black criminal." He correctly asserted that rehabilitation is no longer a goal of the criminal law system and concluded that the consequence of the racism in the criminal justice system is that the black community is losing valuable human resources. He suggested that jurors engage in a social cost-benefit analysis and use their power to refuse to be part of the assembly line that sends black men and women to jail.

Although the social construct of crime is based on fiction and tainted by racism, crime itself is real and frightening. In a 1994 *National Law Journal* poll 62 percent of people said they were "truly desperate" about personal safety. That was an almost 100 percent increase since 1989. Thirty-eight percent of African Americans said they have been victims of crimes involving violence or the threat of violence, a substantial increase since 1989. In order to understand the reality of crime, I try to put myself in the jury box. At the inception of a trial jurors are always asked the following question: "Have you or anyone in your family been a victim of a crime?" If I were a juror, this would be my answer: "My sixty-year-old mother was knocked unconscious during a mugging in Hollywood. A few years later her friend was murdered during a street robbery in front of her apartment house in Venice, California. My father had his head split open in Chicago when he helped an older man being harassed by four young men. Years later, as he was walking home he was smashed in the face by a teenager for no discernible reason. He and other passengers were robbed at gunpoint at the subway station. His home was burglarized numerous times. His car was stolen and burned. One of my brothers had a random bullet come through his second-story window. One of my other brothers, while working at a retail store, was thrown to the floor by robbers, who stepped on his neck and held a gun to his head. Another time a gun was pulled on him at the basketball court. A gang of teenagers attacked him, hitting him with chairs and locks, which resulted in thirteen stitches in his head. My stepfather, while in his sixties, was sluged in the face and robbed by two men. My sons have been mugged. Our cars have been stolen and stripped beyond repair. My youngest son has had two friends murdered. My wife was robbed at gunpoint. Another brother had a gun put to the
side of his head in a robbery. As he raised his hand in a reflex to push the revolver away he touched its cold steel and froze, knowing he was an instant away from death.”

Is crime real? Is the threat of crime terrifying? Of course. But putting more and more people in prison will not change this reality. If California were a country, it would have the world’s eighth-largest economy. Prisons are its third leading industry. Investment counselors are actually advising their clients to put money into prison construction as a safe, profitable venture. Nationally, criminal law repression is the growth industry of the nineties. But three-strikes laws and more punitive measures do not change the fact that 95 percent of people in jail will return to the community. Most will return uneducated, brutalized, and filled with rage.

Will crime go away? Given the predicted future of the economy, the only thing that will go away are jobs for what once was a productive, hard-working, semiskilled and unskilled working class. It is noteworthy that the U.S. secretary of labor, a cutting-edge Marxist magazine, and one of the giants of American sociology all concur on much of the economic reality of the 1990s. Robert Reich has likened the conflict between the new technologies and old industrialism to “tectonic plates colliding,” destroying the old mass-production system and causing the “economic earth to crack open.” Cy. Rev, a socialist magazine that analyzes the cybernetic revolution, explains that the new economic changes are being driven by a fundamental shift in how wealth is produced. Information technology is the new means of production. One of cy. Rev’s founders, himself a former steelworker, gives a poignant example of the change from physical to intellectual labor. He worked at U.S. Steel in Chicago, eventually moving from unskilled labor at the blast furnace to a five-year program learning to be a machinist. As a machinist in the mass-production economy he would have been ensured a good salary and work almost anywhere in the country. But information technology took what he had learned, imprinted it on a chip, and inserted the chip directly into the lathe. Now the chip runs the machine, and his job was reduced from complex and stimulating work to simply pushing buttons at the beginning of the shift to input that day’s production program. One worker could monitor four machines, so three workers lost their jobs. Soon the giant U.S. Steel mill was employing only a fraction of its previous workforce, and a few years it later closed alto-
gether. A study of former steelworkers from this plant showed an increase in divorce, sickness, and failed mortgages and significant feelings of anger and violence.

Reich and cy. Rev agree that corporations, driven to compete and maximize profits, are changing workers’ relationships to their jobs, creating a new group of people who fall outside the economy. Now that layoffs are permanent, Reich suggests that we should use a new word to describe these workers—“castoffs.” These castoffs will have little or no productive role in society.

Many people have warned of the negative impact of the technological revolution on minority communities. As far back as 1970, Sidney Willhelm in *Who Needs the Negro* forecasted that the destruction of the mass-production economy would change the situation of African Americans from “exploitation to uselessness.”

Alvin and Heidi Toffler, the “Third Wave” economic theorists admired by both Al Gore and Newt Gingrich, pointed out that just one day before the Rodney King riots began the *Los Angeles Times* published a list of the top one hundred U.S. companies. Missing from the list were the mass-production manufacturers of autos, steel, textiles, tires, and cement that previously had provided stable, decent-paying jobs for a black proletariat. The Tofflers warn against the writing off of entire minority communities such as South-Central Los Angeles.

In the midst of a torrent of statistics on increasing poverty at the low end of the scale and articles analyzing the death of the industrial age, Harvard sociologist William Julius Wilson has written a detailed and profound study of the consequences of these changes, entitled *When Work Disappears* (1996). Wilson’s thesis is that a poor but working community is “entirely different” from a poor and unemployed community. In a concrete study of three neighborhoods in Chicago, he shows that long-term joblessness rends the social fabric of the community. Ninety-five percent of these neighborhoods have been and still are African American. In 1950, 70 percent of black males in those neighborhoods were working. In 1990, only 37 percent were working. Williams argues persuasively that this concentration of joblessness robs people of what they need to grow and prosper. The structure provided by getting up and going to a full-time job every day translates into discipline and a sense of responsibility, which
form a productive personality. Chronic unemployment causes a chronic illness of spirit. When young men and women have nothing to look forward to, they develop despair, cynicism, and a fatalistic attitude toward their lives.

Williams shows how the decline of the mass-production system has meant the end of work, which in turn has caused a severe disruption of support networks. The church, the family, and civic organizations—all of which played a positive role in counterbalancing poverty and racism—have been damaged by years of persistent unemployment. With the supportive culture of their communities wrecked by forces beyond their control, the citizens of these neighborhoods have been left isolated and hurting. Is it any wonder that crime takes root and thrives amid devastation?

When African Americans such as Butler look at the appalling numbers of their community members in prisons, they see the detrimental consequences of a white supremacy construction of crime. They cry out, “You cannot put every young black man in prison!” When the average white person looks at the same statistics, he believes that they are the natural result of blacks being more criminally inclined than other races. The black rage defense is a tool to expose the fallacy of such racist thinking. When shown how racial and economic oppression shape a defendant’s actions, other people begin to realize that African Americans are not inherently criminal. The jurors who acquitted Steven Robinson, James Johnson, and Henry Sweet had to confront their own stereotypes and make a connection between societal racism and criminal behavior.

The previous chapters have emphasized psychiatric and self-defense cases. There is another area of law in which the black rage defense is growing and where its capability of overcoming racial stereotyping will be severely tested. This field of criminal law is death penalty mitigation. If a person is convicted of a capital crime, he is entitled to a separate hearing. At that “penalty phase,” a minitrial takes place in which the prosecutor introduces “aggravation” evidence. This is evidence that portrays the defendant as an evil person whose crime is not a result of social forces but rather of a “malignant heart.” The defense is allowed to introduce “mitigation” evidence. The courts have held that a defense lawyer has a legal responsibility to bring all evidence to the jury’s attention that “humanizes” the defendant. This duty grows out of the nature of the sentenc-
ing hearing, which is “defense counsel’s chance to show the jury that the defendant, despite the crime, is worth saving as a human being.” The courts have ruled that evidence of one's cultural background is admissible. In one case, the Ninth Circuit Court of Appeals determined that it was ineffective aid of counsel to fail to produce evidence of the defendant's Thai culture, “including Thai concepts of remorse and shame which might well have bridged a cultural gap between the jury and the accused.” These rulings afford precedent for admitting evidence of black culture and the effects of racial and economic discrimination.

The few lawyers who specialize in death penalty cases are well versed in preparing a social history of their clients. The challenge for all lawyers doing such work is to integrate the fundamentals of the black rage defense into their presentations at both the trial and the appellate levels.

The black rage defense is a strategy used primarily in criminal cases. However, there are times when criminal and civil law intersect. In such situations the basics of the black rage defense may be used in both areas. An example discussed in earlier chapters was the James Johnson cases. The racism practiced by Chrysler Corporation contributed to Johnson's mental illness, providing an insanity defense in the criminal trial and creating a basis for disability in the workers' compensation hearing. This is not an isolated example. There is great potential for black rage-type legal actions, if only lawyers would not be frightened by age-old and narrow interpretations of the rules of evidence. The cases analyzed in this book are part of a legal history that is constantly being shaped by innovative pleadings, new conceptual arguments, and fearless advocacy. What is permissible in court is determined by struggle. In 1996 a case unfolded in Brooklyn that epitomizes the power of such creative legal action.

The Noble Drew Ali Plaza housing project is located in the Brownsville section of Brooklyn. Three hundred seventy-five African American families and eight Hispanic families reside there. The project was owned by three white men (Linden Realty), who hired an all-white group of on-site managers. The project was subsidized by the federal government, and rents were set by the government at fair market rates of $650 per month for a one-bedroom to $950 for a four-bedroom apartment. Each family paid 30 percent of its adjusted gross income, and the rest was paid by the federal subsidy.
During the seven years in which this virtually all-black project was run by an all-white group, conditions deteriorated to the point where living there became an environmental nightmare. Tenant Charlene Burwell and her six children were forced to spend three days with raw sewage, including human excrement, overflowing from the toilets, sinks, and bathtub. Yvette Dozier constantly complained about the rotting bedroom floor, fearing for the safety of her two little children. No repair was made, and one day Dozier actually fell through the floor to the apartment below and herniated a disc. Barbara Kelley had an eleven-year-old daughter who was seriously disabled with cerebral palsy and respiratory illness. They lived on the sixth floor and elevators were always broken. When her daughter Rachel needed emergency medical care, the medical workers could not take her down the stairs on a stretcher. As the terrified girl gasped for air, they had to carry her to the roof, cross over to the adjoining building, carry her down to that building's elevator, and finally rush her to the hospital. During one year Rachel needed emergency medical treatment six times—and each time the elevators were broken. Serena Audain lived with her two children, three and six years old. In just one week she caught eight rats in her apartment as they crawled in through holes in walls and cupboards, which the management had not fixed. Rats roamed unchecked in all the buildings.

All the tenants suffered freezing cold in winter, sewage backup with a persistent nauseating stench invading their homes, water leaks, inadequate security, broken fixtures, and management indifference. As Burwell would state in her affidavit, "If we were criminals and lived in a penitentiary, the way we live would be considered cruel and unusual punishment."

Linden Realty was not the sole cause of this despicable situation. The federal government disregarded its own legal responsibility to ensure "safe, decent, and sanitary" housing to the tenants. The Department of Housing and Urban Development (HUD) paid the owners over $15 million in subsidies during a seven-year period. One of the tenants put her finger on the problem: "Even when we pay white people's rents, they still give us black people's services, which is no services at all."

Brooklyn Legal Services attorney Richard Wagner filed a complicated federal lawsuit against Linden Realty on behalf of the Tenants' Association. Wagner has a reputation as a brilliant legal thinker who has demonstrated
an unswerving commitment to racial justice. Within six months the case was won. Title was taken away from the owners, and HUD agreed to do almost $5 million in repairs and renovations, after which ownership would be transferred to the Tenants’ Association.

Wagner was not content with this victory. He wanted the previous owners to pay for the damage they had done to the lives of the tenants. Barred from suing for damages by constraints placed on Legal Services by a conservative Congress, Wagner took the case to private attorneys. He described in powerful terms the human consequences resulting from seven years of living in deplorable, dehumanizing conditions.

Any child, whether white or black, would find life at a Noble Drew Ali Plaza physically miserable. Any child would find it difficult if not impossible to perform well at school. Any child would feel embarrassed and humiliated at the way they are forced to live.

But I submit that not any child would blame herself for these conditions. Not any child would associate her environment with “the way black people live,” and think of the very concept of decent living conditions as being white and slumlike conditions as being black.

The fatalism, nihilism, loss of self-esteem and individual ambition, and, ultimately, destruction of the future human potential that is experienced by the black children is more a function of racism than physical environment. IT IS BLACK RAGE TURNED INWARD AND THE EMOTIONAL, SCHOLASTIC AND ECONOMIC DAMAGE IT DOES TO ITS VICTIMS LASTS A LIFETIME.9

Wagner was dismayed by the attitudes of most attorneys he approached. Instead of being excited about developing a strategy to translate black rage into legal damages, they muttered about how future scholastic and economic damage would be difficult to prove. They viewed the situation only through the prism of profit-loss, afraid that the task of pushing the courts forward in recognizing the potential economic and psychological damages caused by racism would be outweighed by the time, energy, and risk of losing that the case entailed. Fortunately, a few lawyers around the country think otherwise. One of them is Mercedes Marquez in Los Angeles. For ten years Marquez has accepted the challenge of proving the harm done to people of color by slumlords and an uncaring government, winning a $600,000 jury award among others, and recently settling a case for $2.5 million.10 As more tenants organize against life-crippling housing
conditions, we need lawyers who will expand the black rage defense to civil actions and educate opposing lawyers, judges, and juries to the destructive effects of present-day racism.

One cannot read about rats biting children at Noble Drew without thinking about Bigger Thomas in Richard Wright's novel *Native Son*. The book opens with Bigger trying to protect his mother, sister, and little brother from a large rat. "A huge black rat squealed and leaped at Bigger's trouser-leg and snagged it in his teeth. . . . Bigger took a shoe and pounded the rat's head, crushing it, cursing hysterically. . . . His mother sank to her knees and buried her face in the quilts and sobbed." Bigger Thomas turned his rage outward, eventually killing two people. As Rick Wagner interacted with his clients, he saw children and teenagers who also turned their fury outward, becoming violent and predatory. He argued that "these children are as much the victims of black rage as those who turn it inward, except that they find ways to share their pain with society in a way that society does not like but for which it refuses to accept any responsibility."

The Noble Drew housing project is an example of existing racism. Unfortunately, as much of the public is unable to understand black poverty and crime as the result of past discrimination, it is therefore incumbent on lawyers defending children who have grown up in slum housing to expose the present-day racism. A black rage defense would show the intersection of greedy private landlords and an indifferent government that fails to enforce the tenants' right to decent, safe housing. Whenever the government prosecutes a young person who has grown up in a place like Noble Drew, the government itself should be put on trial for its willful acceptance of the dehumanizing practices of slumlords. We can and must show how present-day racism warps these defendants just as racism in the 1940s deformed Bigger Thomas.

Since the black rage defense is by definition a discussion of race set in an intensely emotional context, it is necessary for lawyers, legal workers, and defense committees to think through the social and philosophical ramifications of each case.

The different black rage cases analyzed in this book allow us to draw some conclusions about when the defense is appropriate and what elements give it the best chance of winning. The potential for the jury to empathize with the defendant should be an overriding concern, informing
all tactical decisions. The strategic questions to be considered are as follows:

1. What is the nature of the crime? A property crime is qualitatively different from a homicide.
2. Who or what is the target of the crime? A robbery of a bank that has refused a loan to a burned-down black church is more understandable than a robbery for personal gain. An attack on a person who has racially humiliated and abused a defendant is quite different from a random assault on a passing motorist.
3. Is there a concrete connection between the crime and the defendant's personal history of racial oppression?
4. Has the defendant suffered serious economic hardship?
5. Does the personal history of the defendant tie into the motivation for the crime in a sympathetic manner?
6. What is the attitude of the defendant? Does she see herself as a victim, blaming everyone else for her problems? Or does she present herself as a proud person struggling in a hostile environment?
7. Are there elements of the defendant's culture, either positive or negative, which can be explained to a judge or jury as contributing causes of the crime?
8. Is the defendant capable of taking the stand and, with proper preparation, making a good impression?

The weight one gives to each element will differ depending on the type of case—self-defense, riot situation, duress, diminished capacity, insanity, or mitigation. The presentation will differ depending on whether one is trying to persuade a jury to acquit, a district attorney to reduce charges, or a judge to lower a sentence. In a civil case there will be other elements to consider. But one must always analyze the interplay between a system of white supremacy and the client's personal history and culture.

Peter Kim, a Korean American student at the University of California at Berkeley and a member of the rap group San Francisco Street Music, has written that "the Black Panthers were more than black." He means that the Panthers' messages of pride and empowerment and their programs of breakfast for children, health care, senior citizen security, and food distribution were relevant to all poor communities regardless of race. Similarly, the black rage defense is not limited to African Americans. The main
thrust of the defense is to tie together individual behavior and societal conditions. That is why a black rage–type defense was used successfully in a self-defense case for Native American Patrick Hooty Croy and in an insanity case for white ex-convict John Zimmerman.

The black rage defense refutes the idea that there is a lower class of people who are inherently criminal and can be written off by society. It tries to educate people about the oppressive structures and behaviors in society that produce and increase criminality. It has been said that ignoring race is a privilege that only white people have. This defense forces whites, for a critical moment in time, to give up that privilege and think about the consequences of a system of white supremacy. The black rage defense is not based on race hatred. Rather, it is an antiracist defense, and those who use it should shape their strategies to embrace all people and to teach that society must share the responsibility for crime. This is certainly not a new concept. Indeed, the essence of the black rage defense may have been best stated by the Arabic philosopher, artist, and poet Kahlil Gibran more than seventy years ago:

   The righteous is not innocent of the deeds of the wicked,
   And the white-handed is not clean in the doings of the felon.
   Yea, the guilty is often times the victim of the injured,
   And still more often the condemned is the burden bearer for the guiltless and unblamed.
   You cannot separate the just from the unjust and the good from the wicked;
   For they stand together before the face of the sun even as the black thread and the white are woven together.