

AMERICA'S TACIT PASS-CARD SYSTEM

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The question for today, the question of civil rights, is a question of vital importance and significance, and I want to be able to give you a fair appreciation of what the landscape looks like, so I'm going to be even a little bit fanatic today. I will leave some of my rhetorical flourish to the side, so as to be able to go directly to the point and give you an appreciation of what the options are now in 1991, given the various debates that have transpired in recent years about the question of civil rights.

In facing this question about civil rights options, I want to put it in context, and perspective as well, and one of the things I need to do in order to do that is to remove some contemporary issues. Then we will understand what are the underlying issues that I'm going to talk about ultimately.

Among those contemporary issues, of course, none are of greater significance than the question of what happened in Los Angeles in the Rodney King affair. Most of you are aware of it, most of you have heard endless discussion of it, have heard it reprehended with great indignation by almost everyone who's ever spoken about it. I must say to you that from the beginning I, too, have reprehended it and I, too, have spoken out about the need for systematic changes in order to deal with this kind of event.

But, today, I have a special concern. That concern is the character of our reaction to the Rodney King affair. I'm concerned that we have drawn the boundaries of our concerns too narrowly, that we've drawn the boundaries along the grounds of race, which, therefore, will permit this particular event, this very brutal beating, to become a symbol of division rather than the symbol of unity it could have inspired.

Let me put it in historical context for you. You may have read about the murder of Emmett Till somewhere along the way, which took place in the United States, in roughly 1955-56. It was a lynching that took place in Alabama, if I remember correctly, which electrified the entire country. The outrage that was expressed throughout the country spontaneously was extraordinary, given the fact that lynching was a fairly common experience in the American south, and this looked like just one more lynching. At the time it occurred, it wasn't treated like just one more lynching. It was treated as insufferable human abuse, which the society no longer could support. As a consequence, that event served as a catalyst for what then became, in full-fledged fashion, the civil rights movement. I don't doubt but that even Rosa Parks in some small measure was able to say, "I've had enough, and I'm not going to the back of the bus anymore."

Because of what happened in the case of Emmett Till and the general public outrage about it, the reaction to that murder didn't divide the United States into black and white; it rather united black and white in outrage that such practices could take place. That the complete rule of vigilantism, rather than

the rule of law, seemed to dominate a section of the country, came to be something that everyone had an honest concern with.

It seems to me that the response to the beating of Rodney King is not unlike what happened in the case of the murder of Emmett Till (thank God it didn't take a murder to produce that kind of response this time). We got there at a much lower pain threshold than we had to in 1956, but the initial outrage was an outrage that rather united than divided. Now, there's no question in the case of Emmett Till that what happened happened because he was black. It was a systematic practice against blacks and there was a code, unwritten perhaps, but a code that seemed to legitimize lynchings of black people in those days.

In the case of Rodney King it may be true that the officers responsible had a racial animus, but it is not the case that there is as systematic an assault upon black people by police today as there was a systematic lynching in 1956. It was a more ambiguous case, in other words. It is not clear that police abuse is reserved for blacks, even though it's very clear that blacks receive a full measure of police abuse and, therefore, the reaction to the Rodney King beating that ties diverse communities together, carries with it the opportunity for different communities to express their outrage without regard to the question of racial distinction, to raise high the standard for the treatment of ordinary citizens, whatever their backgrounds, with full confidence in principles of fairness.

We ask, how is it that such a thing could take place in any metropolitan police department in the United States? And some people will, of course, say (it would appear rightly so), that's an academic question. Why do you ask how is it? We see it every day. It happens not only in Los Angeles; it happens everywhere.

It's only a couple of years ago that we had an extraordinary event take place in the city of Miami, in which people were slain, shot by a police officer standing on the ground as they rode by on their motorcycles. And we saw what followed in that case: riots all over town, there in Miami, subsequent investigations, and their community greatly torn by racial tension. This is not new, and we can't treat it as new. Yet one of the things we have to recognize is that there are people, other than black people, who are abused by the police. We have to recognize that the climate in which the Rodney King beating occurred was not simply a climate of systematic violence aimed at black people, but a climate that produced even some degree of tolerance for certain forms of abuse, certain forms of abuse lawfully applied, it seems to me.

First, let's account for this inclination that police might, acting on their own, treat people who appear to be unpopular, to appear to be out of the protection of the law, with complete disregard for their fundamental rights. I have been, for the last two-and-a-half years, almost three years, raising very high the cry that we have seen slip away certain established laws of conduct on the part of police departments in dealing with ordinary citizens.

Those laws of conduct were challenged in the response to the anti-abortion demonstrations led by Operation Rescue. The responses to them were not, as we usually see given nonviolent social protest, to arrest the protestors when they violate the law of misdemeanor trespass, or whatever the case may be, and then to process them through our legal system, to charge them fines, to give the minimal sentences those kinds of offenses usually earn.

With Operation Rescue, it was different. It started out with pain compliance. Pain compliance, which means, literally, forcing people to move at the cost of running the risk of injuring them. That is what pain compliance is. Characteristically, pain compliance is applied to people who actively resist arrest, not passive resisters. All police training aims pain compliance at active resisters. People, for exam-

ple, who are under the influence of PCP, who are thought to be dangerous, are thought to have to be restrained whether by compliance, or taser guns, or mace, or any of the other devices that the police have legitimately developed to control dangerous situations.

But, we found that passive demonstrators, unlike other social protesters, were having mace sprayed in their faces, not while they actively resisted, but while they simply stood or sat there passively. When we saw their arms being broken with nunchuks, when we've seen their bodies dragged and their heads bouncing off of curbstones, what we were witnessing was not a "get-tough" policy aimed at Operation Rescue (though that may be where it came from), what we were witnessing was a slow erosion of the social and moral consensus that there is a place in the United States for nonviolent social protests, and that you don't punish the protestors—you arrest them, you follow ordinary procedures, you do it efficiently—but you show regard for human dignity, for human rights, through the entire process.

Well, that broke down for the last three years, and as I wrote in *The Wall Street Journal* in the Fall of 1989, "What we're seeing right now, with Operation Rescue, in the end is going to break down for all kinds of unpopular people; it is not going to stop with Operation Rescue."

I honestly believe that what you've witnessed in the case of Rodney King is nothing other than police, as individuals, policemen taking the lesson from being asked to beat people up in one case, and applying it in other cases where, perhaps, they're all too willing to beat people up. We had relaxed our otherwise stringent standards and having relaxed them, we left no rule of discipline for the police departments to follow.

Now, the question of course is, why would police departments have to get tough with Operation Rescue? They haven't been asked to beat up other demonstrators though, of course it does happen once in awhile. We saw, this January, demonstrators in San Francisco—protesting the war in the Gulf—being beaten with billy clubs in much the fashion that Rodney King was. Again, I think, as a direct consequence of what happened to Operation Rescue.

By and large, we don't find that happening to nonviolent social protesters. By and large, if they passively resist, they then are carried away on stretchers, or policemen gather on either side of them to convey them to the point of arrest. Often enough, you even have the whole thing ritualized. The policemen walk up and announce, "you're under arrest." Then the protestors get up and go with them. There are many ways to handle it that are peaceful, which were evolved, of course, out of the civil rights movement in the 1960s.

The people who ran the civil rights movement paid a dear price to evolve these standards for handling nonviolent social protest. They paid the price with their bodies, because they were treated quite violently, not just water hoses, but dogs, and batons, and all kinds of violence was inflicted upon their persons until the point where society as a whole expressed its view that this is unacceptable.

Well, now, almost thirty years later, what the civil rights protestors won is slowly being destroyed because there is a different kind of protest movement, which is not protected, which does not even enjoy general social approbation. Lacking that social approbation, leaders in communities all across the country have put pressure on police departments to get tough with the anti-abortion protesters. What they're really getting tough on, I submit, is that just consensus that protected nonviolent social protests, a consensus that we're all going to need again one of these days, I'm quite certain.

I believe that created the atmosphere in which Rodney King was beaten and, therefore, those responsible for the atmosphere go well beyond the chief of police. Those responsible are all those city and other officials who have, some tacitly and some explicitly, urged this "get-tough" policy against Opera-

tion Rescue. Our police departments—we had members of the city council stand by as people's arms were broken, applauding the police as they carried out these get-tough operations.

This changes the framework, this changes the foundation for the discussion of civil rights, because what it means is, unless we're able to speak up in protest of all police abuse, whoever the victims are, we lose our moral authority when we speak up about the abuse of Rodney King. Unless we can hold responsible all the leadership that produces all the police abuse, we're unable to hold any of the leadership responsible for any police abuse.

When I say, therefore, that the case of Rodney King gives us an opportunity to unite, what I mean it is gives us a chance to look back over the last couple of years to see what we've done wrong: to say how we've created an atmosphere in which such violence has become acceptable: and to raise anew the high standards by which we expect police departments to avoid violence in handling the arrests of citizens. We expect them to avoid violence, we don't simply wish for it, we don't think it's merely a good idea—it is a requirement of the rule of law, and we expect it no less for the Rodney Kings of the world than we do for the Operation Rescue protestors.

Now, what's that going to mean, the bottom line, is that it's not enough to ask for Chief Gates to resign. In fact, it may be wrong to ask Chief Gates to resign when, in doing so, all you're doing is providing a scapegoat. What you're saying is, Chief Gates and some police officers who have a racial animus are the cause of the problem, namely, the beating of Rodney King, and when they're gone, we can go back to business as usual, using the police department in ways police departments should not be used to get tough with people whenever the powers that be think you ought to get tough with them.

Well, the real challenge is to say no more get tough with citizens when you arrest them, no matter what their crime. You use only the force necessary to execute an arrest, you assure public health and safety through the whole process. If you're going to handle a protest situation, the job of the police is first to assure public safety, to establish order, then to proceed systematically to arrest people without injuring them. And once you're able to do that you can say to police, "... and by the way, if you find someone alone in the dark of night—even though we're not watching you—we expect you to live up to the same standards." You've got to do both if you want to do either. The people from Operation Rescue must defend Rodney King. The people who are concerned about Rodney King must defend Operation Rescue.

When you look at this question in this light, you can see, I think, the strongest ground on which to contemplate what's happened to civil rights in the United States. We've had a history of thirty-five years of rapid change and enormous development which has left most of us entirely confused about what is meant by the term civil rights in our country.

Why are we confused? Well, let me give you one reason for which we may be confused. There has not been a year that anyone of virtually all of you have lived in which there has not been passed a civil rights bill. Think about that for a minute. Of course we have the landmark Civil Rights Act of 1964—a tremendously important Act. Why important? Because it put an end to petty apartheid in the United States. Most of you sitting here were born in a country in which petty apartheid does not exist, but you are the first generation to have been born in this country without petty apartheid. Just before it existed, and it was ended by the 1964 Civil Rights Act. There was a 1965 Civil Rights Act; it dealt with voting rights. There were Civil Rights Acts every single year thereafter and there continue to this day to be Civil Rights Acts.

We remember, of course, that the 1990 Civil Rights Act was vetoed by President Bush, and so you may think perhaps 1990 didn't pass one, but I remind you of the Americans with Disabilities Act that was passed in 1990—that was a Civil Rights Act. There are Civil Rights Acts on the agenda for this year as well.

Now, how can it be possible that every year for virtually 25 years running, you need a new Civil Rights Act? You may ask yourselves that question. Why is it we don't seem to be able to get it right when it comes to civil rights? Can't we write one law that settles the question? What are the complexities that make it so difficult for us to resolve this question of civil rights?

Well, certainly, one of the complexities is this very issue of not knowing who it is that ought to have civil rights guaranteed. For whom do civil rights exist? Are they a special property of some, but not others? Are they for everybody, but not the same for everybody? Or is there one, embracing, universal expression that applies for all Americans? Well, you know, it's not easy to answer those questions, because you find people debating it constantly on every side. And people think, no, you do have to have special laws that target special needs and that means targeting special people. So you must always change laws, amend laws, introduce new laws, and deal with the question of civil rights from the perspective of dealing with the question of who are the particular communities or particular backgrounds you care about.

Let's look at the 1991 Civil Rights Act, which has already been introduced in Congress under the title, "HR1," and its alternative, the Administration's 1991 Civil Rights Bill. We will see very clearly what are the tensions that have made constant legislation a part of all discussion of civil rights. For where do we still separate? You heard it discussed last year—the quota problem, the "Q" word. The bill in Congress aims, its defenders say, to resolve problems of employment discrimination above all. It says, and very deliberately it says this, it's designed to protect minorities and women against discrimination in employment. The Administration response says that that bill can only protect minorities and women through quotas, and so the Administration has proposed a bill that will not rely upon quotas, according to the Administration's own testimony.

Is the word quota in either of the bills? No. How do you get to the argument for quotas? Well, it's very straightforward. The Administration says that the House bill imposes such severe restrictions on employers or corporations, that they can not defend themselves against a lawsuit unless they use quotas, because any statistical disparity in their work force will automatically expose them to a lawsuit. They can't expect to win those lawsuits and, therefore, to avoid the expense of losing a lawsuit, they will use quotas to avoid statistical disparities, producing the result that all hiring or advancement in our society, educational or otherwise, will be based on quotas. That's the Administration's argument. The Administration said what it wants to do instead is to codify what they call the *Griggs*' Rule. Now that's overly complicated for me to introduce this afternoon, but let me summarize it in this fashion.

There was a Supreme Court case in 1972 called *Griggs vs. Duke Power Company*, in which the Court said it's alright for corporations to use tests to select employees so long as the tests are fair, so long as people of differing backgrounds passed the test at similar rates. If they don't pass the test at similar rates, it still may be alright for corporations to use the test if the corporations can prove that the test is necessary for the conduct of the business. That's the *Griggs*' Rule.

Now, you notice in that what came to be called disparate impact. If a selection process affects one group differently from another, automatically it is suspicious, and so a company is brought into court to explain why this difference came about. Then, it's necessary for it to show that whether there's a difference or not, the business can't run without using this selection process. That's the *Griggs*' Rule.

How will it change under the new law? The new law says it's not enough to say you can not run your business without it; you must also demonstrate that there isn't an alternative process that wouldn't achieve the same result in running your business. It just makes the standard of proof a little higher and more importantly, it displaces what's called the "burden of proof." It says to the employer, it's not up to the plaintiff, the person who says, "You're injuring me," to prove that your process discriminates—it's up to you to prove that it does not discriminate or, if it does, that's the only way you can run your business. That will be the new standard.

It's thought that most people can't meet that standard and, therefore, they will avoid the test by imposing quotas. But the Administration, by saying it wants to codify the *Griggs*' Rule without the new standard added indicates it will avoid those quotas.

Now, I have demonstrated before, that quotas are not new in the United States. We need not wait for a new law before we deal with the reality of quotas. We began to deal with the reality of quotas out of the *Griggs*' decision itself. In fact, to tell you the truth, there were quotas before the 1964 Civil Rights Act was passed. Back in those days, the quotas mainly applied to labor unions and the debate about them took place mainly between Republicans and Democrats in Washington. What was at stake was which party would have the greatest leverage with the labor union. When the 1964 Civil Rights Act was passed, most of the legislators engaged in the process made very long speeches in Congress about color-blindness and the law not intending to use quotas as a basis for making decisions.

Very shortly after it was passed, almost all practices in the country began to use various forms of racial preference. Not necessarily quotas, racial preference is a broader term than quotas. It just always turns into quotas. Sometimes it was only a loosely applied quota, but racial preferences nevertheless were always used. Now, what is the consequence of that resort to racial preferences? Well, I'll share with you one example that's very recent, so that we can begin to understand what I mean when I say it's important to us to find terms of common discourse that bring us together, rather than separate us, if we expect any progress in civil rights. I'll give a specific proposal concerning that in a moment, but, for now, consider this evidence.

The state of Kentucky reported just two and a half years ago to the Commission on Civil Rights, that it had finally succeeded in its attempt to increase the employment of black Kentuckians in the state work force.

It started in 1971 or thereabouts, but actually, more literally around 1974. The state looked around and saw that it had a work force of only 3.9 per cent black employees—although the black population in the state was 7.3 per cent of the total, so it adopted a vigorous affirmative action policy after a year or two of debate. In the very next year the black state work force reached 5.8 per cent. The year after that it was 6.6 per cent. The year after, 6.6 percent and, the fourth year, 1981, it was 7.2 per cent. In 1983 it was 7.3 per cent, in 1985 it was 7.3 per cent, in 1987 it was 7.3 per cent, today, it is 7.3 per cent. I ask you to think about that for a minute, then ask yourself what it means.

It started with less than the general population ratio, reached the population ratio, and never changed thereafter. We're talking about a work force of 40,000 people. What are the chances this could happen at random—that over the space of almost eight years you could retain exactly the same percentage of black people out of the state work force? I will tell you: the chances are considerably less than the chance of intelligent life existing somewhere else in the universe! It's deliberate. It's not by chance that it turned out that way. So, what it means, is that Kentucky adopted a quota, whether it calls it a quota or not. What does a quota mean in this context? It means that in Kentucky people are being discriminated against because they're black, when they apply for state employment. For if their employment would increase the number of blacks beyond the quota, it is not accepted.

Most people talk about quotas from the point of view of the people who are being denied jobs as if it is automatically the case that minorities gain jobs from quotas and everyone else loses jobs. Everyone else, by the way, is white males, I hope you understand that. When we speak of minorities and women we define the universe and the only thing excluded from the term minorities and women would be white males.

So people talk about quotas as if white males are the ones who lose jobs and everybody else gains them, but, as these figures from Kentucky show, minorities and women, too, lose jobs the minute you impose a quota, which is interpreted as placing a ceiling on their participation in any given line of endeavor.

How does that work? We know in California, because we saw that ceiling applied to Asians at the University of California. For several years at Berkeley and at UCLA we saw that Asians were not being admitted in proportion to their success rates on all the standard measures. Because there were "enough" to let them all in would permit more than their quota.

Now, the reality of quotas then already exists—we don't need a new Civil Rights Act to create it. This is why I'm in disagreement with the Administration's bill. You see, the Administration's bill pretends that there are no quotas when, indeed, there are. What we really need is to face, honestly, the existence of quotas and to have a new, large-scale, national debate about the question, the underlying question, *can we live without them?* Can we accomplish fairness without quotas? Can we progress in terms of the differing circumstances of people of differing backgrounds without quotas?

I happen to believe the answer to that question is "yes," that there are better remedies. It takes, of course, people of good will and people intending to make a difference for the advantage to be installed and to prevail, but I happen to believe the answer to the question is yes, it can be done.

This is the second reason that I'm concerned with the alternative that the Administration has proposed. For one of the best things about the House legislation that has been proposed is, for the first time in the modern era, it gives recognition to the fact that there are long-established legal practices in the Anglo-American world that have always served to defend people, but which have not been used broadly in the field of civil rights. I'm talking about what are called tort-like processes, litigation.

Where individuals who have been injured go into court, carry their case before juries, and win appropriately, punitive damages and, of course, compensatory damages.

Now, the Administration happens to disagree with me about this. I want to read to you from its justification of its own bill where the Administration questions the wisdom of any punitive and compensatory damages and wants to put a cap on any punitive and we're going to accept that we're all in this together, then we're going to have to find a common expression for those things we hold most dear; then we're going to have to rely upon those common expressions, those common practices to defend things we hold most dear.

We will get our new Civil Rights Act in 1991, I expect, and it's too early to tell whether it will turn in my direction towards tort-style litigation, or turn back towards quotas and other practices that deny us. One thing I am fairly certain about—unless we make the turn, things are only going to get worse, no matter how many new laws we pass.