Race, Racism and American Law

Third Edition

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This book is dedicated to all those who throughout America's history have risked its wrath to protest its faults. Courageous black athletes mounted a famous protest against racism at the 1968 Olympic games. That protest, like so many that preceded it, constituted a prophecy:

> The dramatic finale of an
> Extraordinary achievement
> Performed for a nation which
> Had there been a choice
> Would have chosen others, and
> If given a chance
> Will accept the achievement
> And neglect the achievers.
> Here, with simple gesture, they
> Symbolize a people whose patience
> With exploitation will expire with
> The dignity and certainty
> With which it has been endured . . .
> Too long.
>
> DB

Preface to the Second Edition

The title of this book and the Bernice Loss pen and ink drawing based on the photograph of Olympic medal winners John Carlos and Tommie Smith retain the function they served in the First Edition: to provide notice that this book is concerned with American racism initiated by whites against blacks. It is intended to facilitate discussion and understanding of the role law has played, both in the systematic subordination of black rights, and in the ongoing process by which the law has been utilized to ease if not eliminate racial badges of servitude.

While not the only victims of racism, African-Americans are by far the largest and most active of the country's racial minorities and thus are the appropriate focus for a detailed study. The body of civil rights law is now enormous and its impact substantial, but it is apparent that despite perennial expectations and hopes, racial problems continue to grow in size, complexity, and importance. During the last three decades, court decisions and legislative enactments concerned with racial problems have received more public discussion and have been more generally hailed and more roundly condemned, than those of any other area of judicial or legislative activity. And yet for all the furor they have caused and all the change in racial patterns and policies attributed to them, these civil rights cases and laws are today increasingly regarded as either obsolete or insufficient.

We have witnessed hard-won decisions, intended to protect basic rights of black citizens from racial discrimination, lose their vitality before they could be enforced effectively. In a nation dedicated to individual freedom, laws that never should have been needed face neglect, reversal, and outright repeal, while the discrimination they were designed to eliminate continues in the same or a more sophisticated form. In many respects, the civil rights cases and laws of the 1950s and 1960s are facing a fate quite similar to civil rights measures fashioned to protect the rights of blacks during an earlier racial reconstruction period more than a century ago.

Statements such as those above determined the area for discussion in this book. They are intended to spark study and discussion of the materials at both a scholarly level and at the more pragmatic level that lawyers may find useful as they attempt to fashion legal remedies for

black clients who, having won the symbols, seek the substance of equal opportunity.

The discussion of legal decisions involving racial issues is now a familiar part of many law school classes, not only in constitutional law and civil rights courses, but also in contracts, torts, property, and other sectors of the traditional law school curriculum. Generally, the usage of racial cases in such contexts is intended to serve the needs of the subject matter. There is seldom an opportunity to review the impact of racial decisions on racial problems.

Preface to the Third Edition

In the preface to the Second Edition, I appraised the erosion through executive inaction and judicial neglect of hard-won precedents protecting the rights of African-Americans. I predicted with what proved distressing accuracy that "the civil rights cases and laws of the 1950s and 1960s are facing a fate quite similar to civil rights measures fashioned to protect the rights of blacks during an earlier racial reconstruction period more than a century ago."

Professor Alan Freeman, reviewing the Second Edition,[1] wonders how, given its "despairing" tone, one teaches a civil rights course using this book. His question is far more urgent in 1992 than it was a dozen years ago. Students enrolling in civil rights courses are still those seeking racial justice through law, but only the most sanguine of traditional doctrinal-oriented teachers can attempt to explain current decisions on the basis of stare decisis, constitutional interpretation, or simple logic.

The Third Edition is intended to respond to Professor Freeman's question. While it includes citations and summaries of a representative group of the more important civil rights cases decided during the last decade and a few new Racism Hypos that may better facilitate discussion of current issues than did those in the Second Edition, its most important function is to provide additional perspectives from which to consider developments in racial law that for the most part have undercut the gains made during the 1960s and 1970s.

While each teacher will organize and present this material differently, I recommend that those adopting this book for classroom use give serious consideration to utilizing one or more of the approaches set out below. I think these participatory models or variations of them will increase interest and enhance understanding of the social forces that shape judicial doctrine and public policy.

The Racism Hypo Approach. The course is structured so as to use the problems (either those contained in the materials or similar cases or hypotheticals prepared by teacher or students) as the vehicle for discussing the major units of class coverage. For example, each student (or teams of two) might be asked to select a racism hypo at the beginning

1. Freeman, Book Review, 90 Yale L.J. 1880, 1881-1888 (1980).

of the course. A schedule or docket is prepared and, while there may be an hour or so of overview discussion to introduce each chapter, the major issues are covered in the context of an adversarial presentation of both sides of the hypo. Students may prefer to construct their own hypothetical cases rather than use those set out in this book.

The advocates make their arguments to the class that serves as a court or legislative body. Two students, serving as "chief justices" during each argument, are responsible for recognizing student-justices wishing to question the advocates and insure that all major issues are addressed during the argument. At the conclusion of the argument, the class convenes as a court in conference to decide the case. Again, the student chief justices chair the conference. While a general expression of views is appropriate, each student at some point in the conference should indicate which side should win with a summary of the reasons why.

This process never fails to gain far better class preparation and participation than the traditional lecture-discussion format. Moreover, the teacher, having structured the process, is freed from the always daunting task of keeping the class going. She can take a back seat and interject relevant points and special expertise as the occasion arises. This "out-of-the-spotlight" position does not mean she is not in charge. Indeed, this vantage point provides a better sense of how individual students and the class as a whole are doing in both wrestling with and understanding the difficult issues in this constantly changing field.

Some portion of student grades should be based on their advocacy, service as chief justices, and everyday preparation and participation. A traditional final exam can be used to complete the grading process, though a final paper of ten pages or so serves as a better means of gauging course competence.

The Student-Written Final Exam Approach. An interesting variation on the final exam is to ask each chief justice team to prepare an exam question (answerable in one hour) based on the issues covered in their case and a ten page summary of the law and policy considerations needed to write a decent answer to their question. After teacher review and editing, each exam and summary response is duplicated and distributed. By the end of the course, each student would have a provocative final exam question and the necessary information to address it for each major portion of the covered material. On final exam day, each student receives one of these questions to answer. I do this on an open book basis. Students are permitted to bring their exam summaries as well as the text and their notes to the exam. The challenge is to address the issues in an interesting and hopefully unique way. At the end of the hour, exam answers are collected and redistributed to the chief justice teams who wrote them. For the next hour or so, these teams grade the student answers relying on marginal comments but also indicating whether in their view the answer was "excellent," "very good," "acceptable," or "inadequate." The

teacher should then review the answers and student comments, add her own, and award the final grade. Answers or copies of same—along with student and teacher comment—should be returned to the students who wrote them.

Student Reflection Approach. In this approach, students are requested to write a two-page response after reading each class assignment. This should not be a quick summary of the doctrine covered in the assignment but rather a personal reflection, for example, on what the student thinks about the material, how it relates to the course, or how some life experience bears on the readings. The teacher should read these reflections prior to class and, ideally, write a few sentences of comment on each paper. During the class, the teacher may read a few papers to initiate class discussion and should encourage students to share their writings. After some hesitation in the first few classes, students are quite willing to read their views. In what proves a very time-consuming but rewarding process, I both read and give back to each student a written comment varying in length from a paragraph to a page or more in a course of 25 to 30 students. Obviously, in large classes, a rotating system of papers is needed. Students, working on a schedule, can themselves read and comment on student-written reflections.

Professor Charles Lawrence has used this classroom technique in recent years with great success. Discussing this approach, Lawrence writes:

> Reflection pieces serve several purposes. Students come to class prepared. But more than that, they come having already engaged in the process of experiencing the harmony or dissonance between the perspectives described in the readings and their own. The assignment privileges experience and the forceful articulation of that experience. Each week I am newly impressed by the thoughtfulness of these pieces. I am struck by their honesty, by the students' willingness to risk making themselves vulnerable, by their bravery in their criticism of my manifested bias or myopia as well as that of the cases and the authors assigned. The power of these pieces is not just in their usefulness as a method for discovering new insights gained from a diversity of experience and perspective, but in the authority they give to voices of those who have come to experience themselves as without authority.[2]

Empowerment is the essential component in Professor Lawrence's "written reflection" process. Students, particularly those who hope to devote their professional careers to working with the disadvantaged in our society, need as much self-confidence and esteem as we can provide them. The student participation that is the hallmark of each of the teach-

2. C. Lawrence, The Word and the River: Pedagogy as Scholarship as Struggle 18 (Mar. 13, 1989) (unpublished manuscript).

ing approaches suggested here both serves this function and follows the maxim that one learns best by doing. It also provides the prerequisite for learning so lacking in legal education: feedback. Here, the student receives frequent comment from both teacher and student peers.

The students work very hard on their papers and I find them both good in the quality sense and filled with insight and new learning about a subject—race—that has been my area of expertise throughout my professional life. I find in the students' work and the class discussions based on that work important new ideas, insightful observations, and poignant experiences that belong in the racial literature. In place of a final exam, students might be requested to prepare a longer paper (ten pages or so) that develops themes discussed in their earlier papers, class discussion, or perhaps areas of interest not much mentioned in the materials or class discussion.

Because each of these approaches aims toward similar goals, courses should be tailored to meet demands of time, class size, and teacher and student preference. I can't guarantee that using these pedagogical techniques will make the current civil rights decisions more palatable, but they will enhance student understanding and strengthen the relationships between the teacher and those individuals—our students—who are both our reason for teaching and our major teaching reward.

Acknowledgments

I want to thank those teachers who adopted and remained commited to the Second Edition and its supplements, long after both the number and direction of new precedents called for replacement. Even so, this Third Edition would have been even more tardy were it not for the untiring efforts of Ms. Linda Singer and Ms. Erin Edmonds. Both women began their work with me as student research assistants and then continued their labors after gaining their J.D. degrees from the Harvard Law School in 1991. In addition, Cassandra Butts, Julie Ferguson, Lisa Henderson, Tynia Richard, and John Hayakawa Torok, contributed research and editing efforts. Secretarial assistance was provided by Sheryl Jackson, Dan Gunnells, and Michelle Degree.

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