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RACE, RACISM, AND AMERICAN LAW

Sixth Edition

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Derrick Bell

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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.

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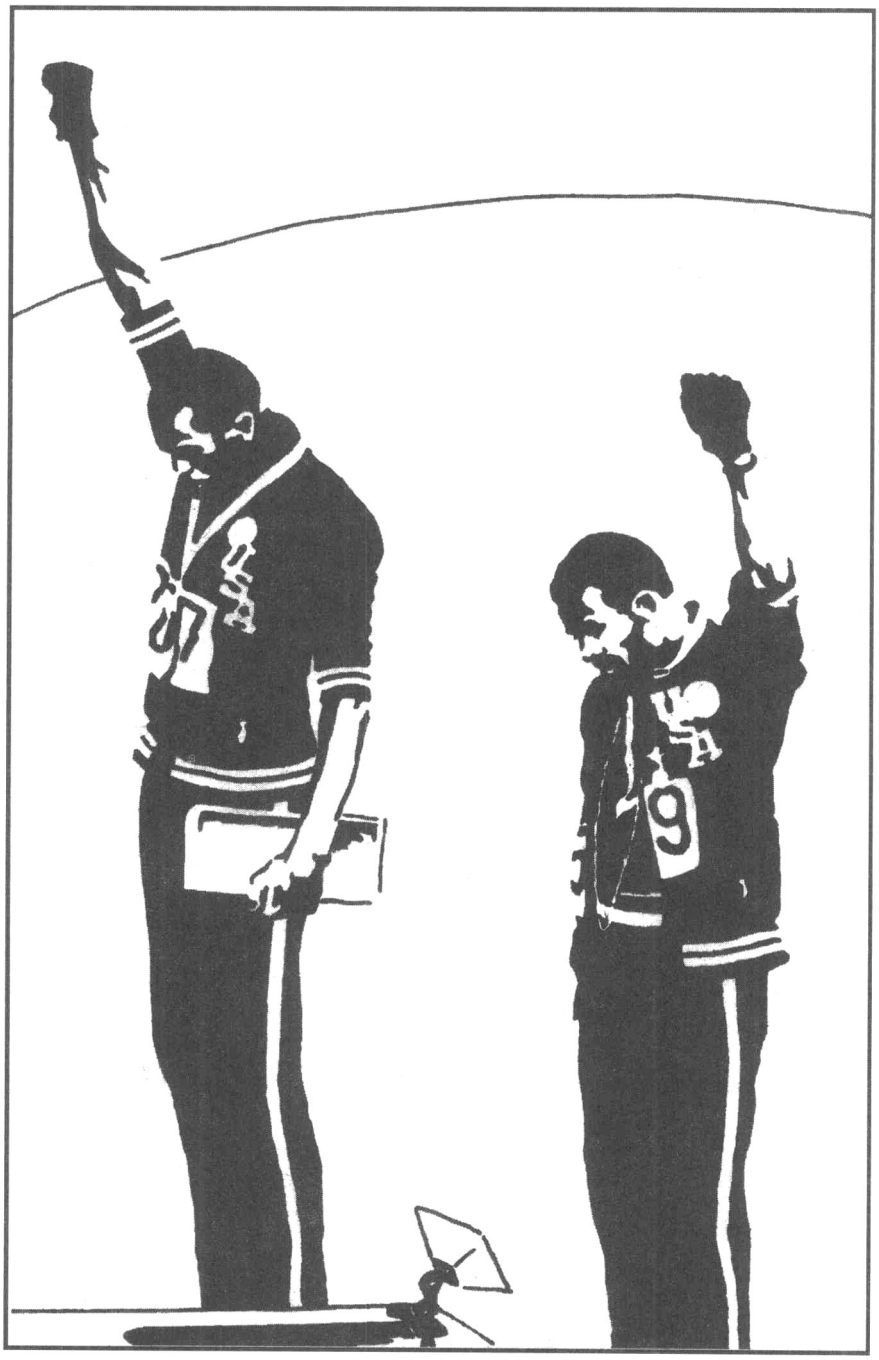
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Preface to the Sixth Edition

Thirty-five years after publication of the first edition of this text in 1973, the pessimism expressed there during what many believed were the closing phases of the long civil rights crusade, unfortunately has proven all too accurate. Overt expressions, actions, and policies growing out of beliefs in white superiority or racial priority have diminished. We have learned that this progress has often occurred for reasons without the involvement of lawmakers in the legislatures or the courts. Indeed, hard won victories in the courts and statutes have often failed to provide expected gains.

The contemporary illustration of a history-long pattern is Brown v. Board of Education, a decision that on its 50th anniversary in 2004, had not been reversed, but was deemed irrelevant by all save those who continued to believe that through reverence, its revival might be achieved. Such continued faith in what was a viable precedent, does not provide either guidance of what went wrong, nor offer direction as to more promising new strategies.

Chapter 1, American Racism and the Relevance of Law, takes a detailed look at a 1935 essay by Ralph Bunche, A Critical Analysis of the Tactics and Programs of Minority Groups. Dr. Bunche, writing three-quarters of a century ago, expressed insights and offered suggestions of real value in understanding current resistance and the limited ability of law to alter deeply held views by much of the public. Given widespread opposition to judicially recognized racial injustice, the courts and the law generally have little alternative to reversing or seriously limiting reforms.

Dr. Bunche would not be surprised by the popular rationale that further civil rights policies are no longer needed because racism is a thing of the past and continuing complaints of discrimination are simply whining by those minorities who prefer preferences over performance. The courts to a large extent are now handing down decisions in race cases that reflect this belief. The Supreme Court's current policy of applying its strict scrutiny yardstick to any racial classification overturns the traditional view that this tough-to-overcome hurdle was intended to protect discrete and insular minorities from discrimination fostered by hostile majorities. Now, turning this standard on its head, the Court — in most instances — is protecting members of the majority against modest policies intended to ameliorate generations of overt racial prejudice.

Ignored in the rush to proclaim color blindness as the judicial panacea to claims of racial injustice is the fact that virtually all policies adopted as protections against racial injustices suffered by blacks and other people of color in this country

actually prove of more value to whites. The widespread opposition to affirmative action, an opposition not eased by either court decisions that have rendered such policies very difficult to maintain, or the fact that whites in general, and particularly white women, have benefited from policies of affirmative action far more than have people of color. Now, as a century ago, the idea that racial remedies for blacks also help whites remains a difficult one to convey. Racial issues in law rather than moving toward resolution have been inundated with the fictions that contradict racial reality.

As this edition is readied for publication, Senator Barack Obama seems on the verge of becoming the first black to gain the nomination for president by a major political party. In the process, his well-organized campaign has gained tremendous support from all segments of the population, an event that many felt would not happen in their lifetimes. That said, it is unlikely, even if Senator Obama survives the many challenges to his nomination and election, that this historical first will alter significantly the continuing racial barriers that most people of color face in all the areas reviewed in this edition.

Chapter 2, Race and American History, contains a detailed review of how racial laws and policies in this country have led many to wonder with Tilden J. LeMelle whether in the absence of recognition that racist practices are seen as a threat "a society such as the United States is really capable of legislating and enforcing effective public policy to combat racial discrimination in the political process and elsewhere." He says "history presents no instances where a society in which racism has been internalized and institutionalized to the point of being an essential and inherently functioning component of that society ever reforms, particularly a culture from whose inception racial discrimination has been a regulative force for maintaining stability and growth and for maximizing other cultural values."

Chapter 3, The Quest for Effective Schools, substantially revises the education materials in previous editions to focus on recent decisions, including the 2007 *Seattle-Louisville* cases that subjected to quite strict scrutiny and then rejected the modest efforts school districts attempted to gain some racial diversity in its schools. There is more coverage of school desegregation alternatives in private and public settings, including innovative approaches to motivating and teaching students whose economic and cultural backgrounds have provided little understanding of how scaling seemingly impassable barriers can be achieved.

Chapter 4, Fair Employment Laws and Their Limits, reviews both the continuing and growing racial disparities in every area of the job market. Discrimination in employment is ever present if harder to discern. Victims are finding Title VII and other antidiscrimination policies harder than ever to utilize effectively. Case development has shown a greater willingness to protect defendants than to recognize the more subtle but still effective means of discrimination. As a result, employment cases are harder to bring and even harder to win.

The chapter refers to studies showing that these laws are only minimally effective in reducing prejudice and enhancing opportunity for black workers. Most such claims, when resolved by courts, are dismissed on pretrial motions. When employment discrimination plaintiffs do get their claims to a jury, they fare worse than

plaintiffs in other civil actions. This ill fate continues on appeal, with federal appellate courts reversing plaintiffs' victories at a higher rate than defendants' wins in employment discrimination cases. As a result, lawyers are reluctant to take these cases on a contingency basis. Although the Court's 2007 decision, Ledbetter v. Goodyear Tire & Rubber Co., is an exception, defendants are usually more willing to negotiate and settle job bias claims brought by white women.

Chapter 5, Discrimination in the Administration of Justice, has shown little change for the better since the Fifth Edition. Given their percentages in the population, a disproportionate number of those sentenced to death are black and Latino. Even so, public support for the death penalty has diminished as a result of the use of DNA evidence that has freed defendants who had served many years while awaiting execution.

Beyond the death penalty, though, the statistics show a continuing pattern of bias. The number of blacks and Latinos serving often-lengthy prison sentence have increased. Almost 1 in 4 black men between the ages of 20 and 30 are under the supervision of the criminal justice system on any given day. For white men in the same age group, the corresponding statistic is 1 in 16. Black persons are more likely than whites to have been shot at by police, 18 times more likely to be wounded and 5 times more likely to be killed. Prosecutors are more likely to pursue full prosecution, file more severe charges, and seek more stringent penalties in cases involving defendants of color, particularly where the victim is white. Minority offenders are also sentenced to prison more often and receive longer terms than whites convicted of similar crimes and with similar records. As of 2007, more than 60 percent of the people in prison are now racial and ethnic minorities. For black males in their twenties, 1 in every 8 is in prison or jail on any given day. Of the 2.2 million incarcerated individuals, 900,000 are black. These trends have been intensified by the disproportionate impact of the "war on drugs," in which three-fourths of all persons in prison for drug offenses are people of color. The chapter covers the generally harsh decisions that explain these statistics. Calls for legislative reform are resisted by officials who fear they will face "soft on crime" charges that may endanger their reelection.

Chapter 6, Voting Rights and Democratic Domination, records the continuing frustration by courts seeking judicially manageable standards for determining the validity of electoral districts apportioned equally through computerized techniques capable of effectively gerrymandering lines to favor one political party over the other. And, as indicated by its decision in Georgia v. Ashcroft, the Court is looking more broadly in determining whether redistricting plans adopted to ensure the effective inclusion of black votes can meet that standard without the creation of safe-black districts. In the area of individual voting rights, it appears that the Supreme Court's approval of a state's requirement that perspective voters produce a government issued photo ID at the polling place, Crawford v. Marion County Election Board, 553 U.S. ____ (2008), will be the first of several challenges to proposed state laws proposed to prevent voter fraud, but Opponents of Voter ID laws, enacted or being considered in several states, maintain that they will discourage voting and in particular black and Latino voting for reasons quite similar to those that led to invalidation of poll taxes.

Chapters 7, 8, 9, and 10 cover developments in the areas of Property Barriers and Fair Housing Laws, Interracial Intimate Relationships and Racial Identification, Public Facilities, and The Parameters of Racial Protest. In each area, despite surface compliance with antidiscrimination policies, there remain serious problems of exclusion, discrimination, and exploitation operating just below the surface with effects that are both serious and extremely resistant to traditional litigation approaches. Most civil rights advocates would agree that laws intended to bar racial bias for those seeking to buy or lease personal residences have not been very effective, relying as most do on action by those alleging discrimination. The once steadfast resistance to interracial sex and marriage has lessened steadily over the years, but problems remain in policy differences on interracial adoption. The relative openness of most places of public accommodation is evidence that the fear of economic loss and the hope for gain is a more powerful engine of change than either law or public resistance. And racial protests that have always walked the fine line between activities that gain attention while saying within boundaries that lawyer can argue are constitutionally protected, have a difficult time during times of war when all but the most peaceful (and likely ineffective) protests can be deemed unpatriotic and unworthy of protection.

Chapter 11, Racism and Other "Nonwhites," has been updated with further coverage given the treatment of Indians and policies ranging from genocide to subjugation and exploitation. It covers as well the racial experience of Chinese, Japanese, and Mexican Americans in this country as well as the continuing racial problems faced by the Aborigines in Australia and the Maori in New Zealand. In addition, the section titled, "September 11, 2001," added in the Fifth Edition, has been updated to address racial components of anti-terrorist policies instituted by the Bush Administration in the wake of the one of the most devastating attacks in American history. These policies have included overt racial profiling with race and ethnicity used as proxies for affiliation with terrorism. There have been large numbers of immigration-based detentions, including purely preventive based detentions, of persons from certain countries or ethnic or religious backgrounds. The federal government has also imprisoned a large number of foreign persons in Guantanamo Bay, Cuba, and in unknown locations abroad without formal charges or access to lawyers. In addition, the government has also failed to extend traditional legal procedures to U.S. citizens being held as enemy combatants. It has detained foreign nationals and a small number of U.S. citizens, and has also conducted secret wiretapping and secret searches without a showing of probable cause or criminal wrongdoing.

As in past editions, most of the Sixth Edition chapters contain racism hypos, hypothetical cases providing a detailed set of facts that can provide the basis for simulated appellate case arguments with students representing each side. This is an excellent way to facilitate discussion of both the depths and the parameters of racial issues in each of the subject areas. Utilizing this approach serves as a vehicle for teachers at both the law school and undergraduate levels who want to lift the

teaching of race relations law beyond the reading of cases and discussion about what the cases meant.

Beginning with the Second Edition, published in 1980, I reduced edited cases to summaries, recognizing that legal opinions in the racial field often reflect rather than set society's patterns and practices. This editorial change (cushioned by a companion volume of edited Leading Civil Rights Cases) reflected my concern that for all the furor they sometimes cause and all the change in racial patterns and policies attributed to them, the studying in detail of the usually lengthy and often multiple opinions in race cases seldom furthers understanding of what the Court has done and why it has done it. Any concern that students are shortchanged by not having the full or only lightly edited opinions of major cases available is resolved by the ready availability of the full opinions on the data bases or from the Supreme Court's website, www.supremecourtus.gov

The key question in the Sixth Edition remains that of the First: What does it mean to say that racism is a permanent feature of American society? Is there an inchoate property right in whiteness? In short, are there components of racial thought, belief, and identification that are critical to the maintenance of social stability in a society marked by enormous disparities in income, wealth, and opportunity? When the poor white person boasts: "Every morning, when I wake up, I thank God that I'm white!," what exactly is he thankful for?

Whatever the answer, it is now apparent that racism is no longer definable by views and actions that are blatantly prejudiced. Rather, as psychology Professor Beverly Daniel Tatum explains, racism is a system of apparent advantage based on race that benefits all whites whether or not they seek it. Except in response to the most overt discrimination, racial remedies, whether judicial or legislative, that appear to interfere with this advantage are opposed when suggested and resisted when approved. This is the answer to the question posed in the Preface of the First Edition where I wondered why the hard-won decisions protecting basic rights of black citizens from racial discrimination are abandoned or become obsolete before they are effectively enforced. My question, pertinent then even in the midst of the greatest surge of positive civil rights gains in American history, has become critically important given the overturning and reinterpreting of the legal precedents even the most pessimistic among us viewed as permanent.

Finally, the Sixth Edition continues the effort of its predecessors to make clear that racism burdens whites as well as blacks and racial remedies benefit all groups. The nineteenth-century Populist leader, Tom Watson, put it well in 1892 when, as a staunch advocate of a union between Negro and white farmers, he wrote: You are kept apart that you may be separately fleeced of your earnings. You are made to hate each other because upon that hatred is rested the keystone of the arch of financial despotism which enslaves you both. You are deceived and blinded that you may not see how this race antagonism perpetuates a monetary system which beggars you both. I have cited Tom Watson in each of the previous editions. It remains a message worthy of being both heard and taught.

In a later era, Dr. Ralph Bunche urged that the only realistic program for any minority group in modern America that can resolve this self-destructive antagonism is one based upon an intelligent analysis of the problems of the group in terms

of the broad social forces which determine its condition. Certainly no program of opportunism and no amount of idealism can overcome or control these forces. The only hope for the improvement in the condition of the masses of any American minority group is the hope that can be held out for the betterment of the masses of the dominant group. Their basic interests are identical and so must be their programs and tactics.

Derrick Bell

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