
PREFACE

This book critically examines the role that law has played in creating, maintaining, and resisting a regime of white supremacy in America. It builds upon, expands, and is in conversation with prior theoretical explanations of our current racial order, including critical race theory. This book is borne of a desire to develop a law school course that reshapes and reinvigorates the conversation about law, race, and inequality. Contrary to assumptions that race is less significant today than it has been in the past, or that racial injustices arise only sporadically and as exceptions to an otherwise egalitarian system, this book makes the claim that race has been and remains central to American law, history, policy, culture, and society. Put differently, we cannot fully understand American law, history, society, or culture without coming to terms with the role that race has played in all segments of American life. Race shapes people's identities, experiences, opportunities, and life trajectories. It influences not only where people live, and where (and whether) they work, but also how they vote and who they love. It has done so in the past and it continues to do so today.

Indeed, it is difficult to find areas of American life that are untouched by race. Racial disparities pervade American society, from incarceration and victimization, to educational achievement, housing, employment, wealth, and immigration status. Despite the monumental legal, social, and cultural transformations of the second half of the 20th century—*Brown v. Board of Education*, the demise of Jim Crow, the enactment of wide-ranging federal civil rights laws, the disavowal of overt bigotry, and the election and (as importantly) re-election of our nation's first black President—race remains with us. From the glorious proclamations of the Declaration of Independence to the Constitution's sanction of slavery, from the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments, to the demise of Reconstruction, we have attempted to overcome race, only to be disappointed by the illusion that race had been overcome.

Because this is a legal text, we are primarily, though not by any means exclusively, interested in the relationship between law and race. Law is both an instrument of racial oppression and a tool of racial liberation. Law established the content and contours of white supremacy. Law established the racial caste system, which dictated the terms of social interactions between the races, such as who can marry whom, who can live next to whom, and even which races could and could not immigrate to this country.

Law is also a setting in which race-related controversies play out. Race-related conflicts arise in just about every area that touches people's lives, from housing and employment to education and child custody. Racial conflict generated a large body of statutory law that now shapes the lives of all Americans. The civil rights laws enacted as a result of racial justice efforts have provided the template for a wide array of

federal, state, and local laws that guarantee an expansive set of rights. One cannot fully understand the development of American law and legal institutions without an appreciation of the centrality of racial conflict in that process.

Moreover, even contemporary legal controversies that are not ostensibly about race may nonetheless implicate race. Racial conflict has spawned generally applicable legal doctrines across many settings. For example, laws that block felons from voting or that prohibit loitering or that tie school funding to local property taxes cannot be sensibly assessed without consideration of their race-related dimensions. The rules that govern police officers, the death penalty, voting, the relation between federal and state governments, the state action requirement—constitutional doctrines in each of these areas have developed partly in response to race-related controversies.

Unfortunately, the intersection of race and the law has been unduly marginalized in many law school curricula and in legal scholarship. Not only is race and law not a required course at practically any law school, it is typically viewed as a specialized, boutique offering, a course the vast majority of students are not expected to take. One cause, and consequence, of this marginalization is that there are few teaching materials that reveal the pervasiveness, complexity, richness, and significance of racial controversies as they relate to the law.

Our creation of this casebook reflects our belief that the best and most effective way for students and scholars to study the intersection of race and the law is to do so in a sustained and systematic manner. It is important, of course, to recognize racial issues as they arise in courses such as contracts, torts, or property. But that sort of intermittent consideration cannot match the depth of engagement and understanding that flow from a more concerted examination of the intersection of race and law across a range of settings. In addition to being a good teaching tool, we hope that this book will help to further and deepen scholarship related to race and the law.

We hope that students benefit from this book in multiple ways. We want students to appreciate the range, depth and richness of those controversies at the intersection of law and race. Conflicts arise in varied settings, and before varied decision-makers, who, in turn, bring to bear a multiplicity of values and considerations. We want students to appreciate the difficulty of the changes that legal decision-makers confront. The legal controversies that we examine in this book are fraught and difficult to resolve because they are subject to legitimate disagreement about what racial justice should entail or about the capacity of legal institutions to realize racial justice goals. So too do legal decision-makers often rely on divergent assumptions about how society operates, and in particular about the extent and magnitude of racial discrimination. A primary goal

then is for students to understand why cases are decided as they are, why controversies are handled in one way rather than another.

Our further hope is that students develop a perspective that is both critical and constructive. Students should be able to evaluate and critique the law. They should also help to make it better. We hope this book will help students to identify improvements in the law, articulate what the law should be, and what the law should do, and how to use the law to advocate effectively for change. For all the instances of injustice that are recounted in these pages, we want students to be able to envision a better future, and to chart a course toward it. We highlight problems to prompt students to think hard about solutions, not simply about how to craft a lawsuit, so much as about the wide range of avenues of reform that law school graduates might pursue. The law is multifaceted and ever changing, and we want students to feel empowered to take part in that process.

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To realize these goals, we have made a number of pedagogical choices in constructing this casebook, some of which differentiate this book starkly from other race and law casebooks. First, we focus on contemporary controversies. Though we include a significant amount of historical material and legal developments, primarily for the purpose of illuminating present circumstances or framing contemporary debates, the casebook aims to confront the racial controversies of the twenty-first century. Thus, at the foreground of our inquiry is what's happening in American society today.

Second, of the many ways that a race and law casebook might be organized—by racial group, by historical period, by theme—we have chosen to structure this book by setting, to focus on one social context at a time. Inasmuch as legal conflicts and legal analysis are invariably fact specific, we consider controversies as they arise in particular social settings, from political participation and housing, to employment, education, and family relationships, among others. More than an organizational convenience, this approach reflects our conviction that the application of legal principles depends very much on the circumstances of particular settings and the myriad interests at stake within each.

Third, this book has a broad conception of law and the source of law. While we recognize the past and continued centrality of constitutional law in racial conflict (and therefore devote substantial space to such cases), we also look beyond that familiar setting. We feature a wide range of primary sources of law—cases, statutes, regulations—and also highlight the varied decision-makers that formulate and enact the rules and practices that shape our society. Law is not the province of judges alone. Federal, state, and local legislators, government lawyers, nonelected government officials, private sector lawyers and business owners, even private citizens—all play a role in giving content to law. We

want students to consider the range of options and possibilities that confront these different decision-makers. We rely extensively on problems, role plays, and other exercises that require students to approach a controversy from the vantage point of different actors in the legal system. We emphasize these sources of law as well because law school graduates are less likely to produce social change through changing constitutional law than through one of the other mechanisms that our book identifies.

Finally, though this casebook recognizes that racial conflict in the United States has been historically understood primarily as the relationship between whites and blacks (or what scholars have called the black-white paradigm), we have also attempted to move beyond the black-white paradigm. The casebook takes into account the changing racial dynamics in the United States, which is the product of the increasing rates of miscegenation, interracial relationships, and immigration of the past few decades. We embrace a multi-racial approach that reflects the broad diversity of American society. We do not limit our focus to African Americans but neither do we treat different groups in distinct sections. Rather, we seek to integrate the similar and contrasting issues confronted by African Americans, Latinos, Asian Americans, Native peoples, and Whites within each of the settings studied. Issues related to immigration are woven throughout the book. We decided against devoting a separate chapter to immigration because we wanted to reflect the extent to which immigration and changing demographics have shaped racial conflict in multiple domains, from voting and employment to education and housing. The materials in this casebook present the myriad challenges that confront a range of legal decision-makers across a wide variety of settings. Our hope is that these materials are as rich and nuanced as the problems of race in contemporary American society.

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