BOOK REVIEW

Derrick A. Bell Jr., RACE, RACISM AND AMERICAN LAW. Little, Brown and Company; Boston & London, 2d ed. 1980. Pp. 655 $23.95.

In this extremely enlightening and practical book, Derrick Bell, the Dean of the University of Oregon School of Law, has chosen to follow up on a subject which he has written on extensively in other works, i.e. race within the context of the American legal system.[1] Dean Bell prefaced this edition by describing his first edition as:

> not only the first casebook devoted to the substantive coverage of the full civil rights field; it also marked a pioneering attempt to combine an intellectually rigorous review of the legal issues involving race with the highly charged emotional component which often marks discussion of racial topics throughout our society.[2]

With respect to this second edition, the Dean enunciates the objective as follows:

> to incorporate the experience and approaches developed through the use of the original volume. To this end, the second edition has been totally rewritten and reorganized in order to better convey a clear understanding of current legal rules, and to provide a basis for discussing new, admittedly unorthodox, but potentially more effective attacks on racially biased policies.[3]

This reviewer was impressed with the book; from the pen and ink drawing on page vi depicting the photograph of the 1968 Olympic victory of John Carlos and Tommie Smith, with their raised clenched fist high in the air; to the indepth analysis of issues contained in the nine chapters constituting *Race, Racism and American Law*.

Dean Bell begins his analysis in chapter one entitled "American Racism and the Uses of History," by focusing on the effect of The Emancipation Proclamation in terms of revealing the primary interests the Proclamation served. For example, the book reveals that:

> Actually, as a legal matter the proclamation freed no slaves, its terms having been carefully limited to those areas still under the control of the Confederacy, and thus beyond the reach of federal law. Slaveholding territories which had sided with the Union were specifically excluded . . . On the political front, the emancipation did open the way for the enlistment of blacks, and by war's end, there were more than 200,000 blacks serving the Union Army.[4]

Chapter one further points out that while northern states abolished slavery in most cases long before the Civil War, these states did not intend the abolition of slavery to be equated with acceptance of blacks.

Of course, an analysis of slavery in an American historical context cannot be complete without reference being made to the infamous case of *Dred*

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1. D. A. BELL JR., RACE, RACISM AND AMERICAN LAW xxvii (2d ed. 1980) [hereinafter cited as BELL, Racism].
2. *Id.* at xxiv.
3. *Id.*
4. *Id.* at 6.

Scott v. Sanford,[5] which the author points out, raised the substantive issue of whether the slave Dred Scott's temporary residence in the free territory of Illinois freed him. The Supreme Court found that Scott was not a citizen of Missouri within the meaning of the Constitution and thus could not invoke the diversity jurisdiction of the federal courts. Chief Justice Taney, not satisfied with the case being disposed of on procedural grounds, chose to manifest his own racist views relative to the issue, by stating that blacks were inferior to whites and that they had no rights which white people are bound to respect.[6]

Race, Racism and American Law further highlights this historical perspective by devoting section 1.13 to the topic of "Reparations for Racism." Citing Professor Arnold Schuchter's study on the subject, section 1.13 enunciates Professor Schuchter's conclusion that any argument for reparations would have to appeal to the morals of the majority in a society. Professor Schuchter states that it was a strong appeal to the morality of the German people which resulted in Germany paying $820 million in reparations to Israel for the resettlement of five hundred thousand Jews. However, the author's prognosis relative to the argument of reparations realizing tangible benefits is bleak because he states that:

> The absence of real economic and political power, the determination, conscious and unconscious, of whites to maintain dominance over all institutions of importance to them and to exhibit aggressive concern whenever any black enterprise appears to be gaining self sufficiency, all of these factors militate against the likelihood that a viable reparations scheme will get beyond the not unimpressive hand-outs by some major church groups.[7]

Chapter two of the book is entitled "Interracial Sex and Marriage." The cases which the author treats comprehensively are *McLaughin v. Florida*[8] and *Loving v. Virginia*,[9] where the Supreme Court struck down state statutes which penalized interracial co-habitation and adultery and interracial marriage, respectfully. Interestingly, the author reveals that notwithstanding the courts strong position against racially bias statutes which attempt to regulate interracial conduct, a survey of his students indicates a strong preference in opposition to interracial sex and marriage.[10]

The author has done an excellent job in terms of highlighting the inconsistencies which courts have adopted in terms of applying the law in situations where race is a factor. A good example can be found in chapter three "Public Facilities: Symbols of Subordination". where the author relates that *Brown v. Board of Education*[11] did not expressly overrule *Plessy v. Ferguson*.[12] The Court concluded that in the field of public education the doctrine of "separate but equal" has no place. While the Supreme Court delayed its implementation of public school desegregation, it experienced no difficulty in ordering the immediate end of state sponsored racial segregation

5. Dred Scott v. Sandford, 60 U.S. 393 (1857).
6. BELL, RACISM, at 15-20.
7. *Id.* at 45.
8. 379 U.S. 184 (1964).
9. 388 U.S. 1 (1967).
10. BELL, RACISM, at 54.
11. 347 U.S. 483 (1954).
12. 163 U.S. 537 (1896).

in a wide variety of facilities. Many of these decisions were summary per curiam orders in which the only authority cited by the Court was *Brown v. Board of Education*.[13] Thus, public facilities such as swimming pools and golf courses were more expediently desegregated than public schools. In ascertaining why this phenomenon existed, the book suggests the following factors:

> (1) the difficulty in justifying official segregation and its implications of racial superiority after defeating, in World War II, forces that espoused super-race ideologies and resorted to racial genocide in their name; (2) the perceived need to compete with Communist powers for the friendship of emerging third world nations without the handicap of explaining official apartheid policies at home; (3) the refusal of more and more blacks, particularly those who had fought in the war, to return home to life under segregation; (4) the unacceptable restraints on full industrialization of the South imposed by rigid segregation laws; and (5) the perception by those in policy making positions that they could no longer afford to honor compromises of the past, in which poorer whites won segregation laws as an alternative to demands for social reform legislation and greater political power.[14]

This phenomenon underscores the point which the book repeatedly makes, i.e. that blacks receive a remedy relative to the racist policies of this society only when it serves the best interest of the majority.

"Voting Rights and Democratic Domination" comprised chapter four and the author treated the subject thoroughly. From a historical perspective, it is highly enlightening yet sad to note, that after a lengthy debate, the fifteenth amendment was enacted by Congress in December of 1868. While its stated purpose was to safeguard blacks against future white supremacy, by guaranteeing the right to vote, it also guaranteed safe Republic majorities in elections for a dozen years. Ratification of the amendment was demanded as a condition precedent for readmittance of those few Southern states still out of the Union, and it was only with their votes that the amendment passed. New York rescinded her adoption of the amendment, and it was rejected by California, Delaware, Kentucky, Maryland, Oregon, and Tennessee.[15]

Additionally, the book describes the various disfranchisement devices utilized by states to circumvent the fifteenth amendment. Devices such as the poll tax, literacy tests, the white primary and in more recent times, district reapportionment and at large elections are covered thoroughly both in terms of their effect and in terms of the judicial challenges initiated by blacks to gain relief from such devices. However, relief was not to be found in the courts and it was not until 1965 when the Voting Rights Act was passed by Congress did it appear that society was serious about alleviating voter discrimination based on race. The constitutionality of the Act was immediatley challenged in *South Carolina v. Katzanbach*,[16] however, Chief Justice Warren Burger cited the fifteenth amendment section two as expressly giving Congress the power to enforce section one of the amendment by appropriate legislation.

13. 347 U.S. 483 (1954).
14. BELL, RACISM, at 93.
15. *Id.* at 131-32.
16. 383 U.S. 301 (1966).

The author observes that notwithstanding Congressional and judicial efforts to eliminate voter discrimination:

> For many blacks mired at the bottom of the economic ladder, the duty to go out and register . . .and go to the polls and vote on election day occupies a very low priority in their problem filled lives. Their experience, influenced and reinforced by poverty, inadequate education, and long-term unemployment, teaches that the exercise of the right to vote is a waste of precious energy and time,[17]

Hopefully, this observation indicates that the book has become outdated because there are encouraging signs that black voter apathy is diminishing. However, the author offers a question which serves as a caveat, i.e. "Would the historic process of disfranchisement (the 1830's), enfranchisement (the 1860's), disfranchisement (the 1890's), and enfranchisement (1960) again come full circle?"[18]

Entitled "Discrimination in the Administration of Justice," chapter five discusses the traditional failures of the justice system to protect black people from violence by whites, civil remedies available to blacks under 42 U.S.C. § 1985(3)[19] and the Constitution, and the problems associated with receiving a fair jury trial. With respect to the latter, for black defendants to successfully argue that blacks have been systematically excluded from the jury, a reliance on statistical disparities between the percentage of blacks eligible for jury service and the number actually called. In *Castaneda v. Partida*[20] the Court held that the black defendant, Partida's conviction for burglary was illegal because discrimination existed relative to the grand jury selection process.[21]

The author also points out that a major problem in terms of blacks receiving justice in the legal system centers around the use of preemptory challenges to exclude blacks from sitting on juries where black litigants are involved. For example, the black defendant in *Swain v. Alabama*[22] was convicted of rape. The jury was all white. The prosecutor had used preemptory challenges to strike from petit jury venire the only six black men eligible for jury service. The Supreme Court affirmed the conviction stating that the "underrepresentation of blacks on jury panel was not sufficient in itself to show invidious discrimination," and further stating that the preemptory challenge is designed to allow one to strike a juror arbitrarily; "the system would no longer serve this purpose if equal protection standards were applicable to one method of exercising challenges".[23]

Chapter six, entitled, "Potentials of Protest, Parameters of Protection," examines the legal status in regard to the judicial protection, or lack thereof, afforded to persons who engage in non-conventional tactics to combat racial discrimination such as boycotts, demonstrations, sit-ins, etc. However, in

17. BELL, RACISM, at 155.
18. *Id.* at 148.
19. 42 U.S.C. § 1985(3) provides a private cause of action for damages against anyone who conspires to deprive, "either directly or indirectly, any person or class of persons of the equal protection of the laws," or any persons who "conspire to prevent by force, intimidation, or threat" to interfere with the right to vote.
20. 430 U.S. 482 (1977).
21. BELL, RACISM, at 243.
22. 380 U.S. 202 (1965).
23. BELL, RACISM, at 250-51.

Chapter seven, entitled "The Quest for Effective Public Schools," the author does an excellent job of examining this very interesting subject.

The "separate but equal" doctrine set forth in *Plessy*[24] was originally established in *Roberts v. City of Boston*[25] where the school system's policy of segregation was held reasonable; however, the case in which the author cites as an accurate barometer relative to easily predicting the demise of *Plessy* is *Sweatt v. Painter*.[26] In this case, the plaintiff, Mr. Sweatt applied to the University of Texas Law School. When his application was denied because he was black, he filed suit to compel his admission. The author describes what occurred subsequently:

> The state district court did not order Sweatt's immediate admission to the University of Texas, but the judge did warn the state that it must either open a law school at the state run Negro University located at Prairie View—an institution described by one author as "an academic hovel that offered college credit for mattress-making, broom making, and other minimal vocational skills—or face the prospect of admitting Sweat to its law school in Austin. The state hired two negro lawyers to teach in some rented rooms in Houston, forty miles away from Prairie Views' campus and called it a law school. At a scheduled review its original order, the judge pronounced the Prairie View Law School substantially equal to the white law schools in Austin. Sweatt appealed. At this point, the Texas legislature decided to build a negro university in Austin. Of the three million dollars appropriated for the construction of the Texas Southern University, one hundred thousand dollars was set aside for a law school that occupied three small basement rooms in an office building eight blocks from the University of Texas Law School and just across the street from the state capitol.[27]

Of course, both *Brown v. Board of Education* (No. I)[28] and *Brown v. Board of Education* (No. II)[29] were covered adequately. This reviewer's eyebrows were raised when the author opined and urged blacks to continue to seek desegregated educations because "so many black schools are in fact, poor places for learning. . ."[30] However, not a single authority was footnoted or cited otherwise in support of his opinion yet, the author footnotes extensively on pages 428-30 in support of the argument that there are numerous black public schools providing quality educational services to children. This researcher is confused by this inconsistency.

Chapters eight and nine, entitled "Property Barriers and Fair Housing Laws" and "The Limited Strategy of Fair Employment Laws" respectively, are distinguished for their practical value in terms of providing useful information to lawyers and layman regarding the subject matter of the respective chapters. Some of the interesting topics discussed includes, "Damages for Intangible Injury in Housing Discrimination," "Black Opposition to Public", "Racism Hypo: Black Mothers on Welfare v. Metropolitan Housing Authority", "Employment Discrimination and Labor Relations Law," "Fair

24. *Plessy*, 163 U.S. 537 (1896).
25. 59 Mass. 198 (1850).
26. Sweatt v. Painter, 399 U.S. 629 (1950).
27. BELL, RACISM, at 376.
28. *Brown*, 347 U.S. 483 (1954).
29. *Brown*, 349 U.S. 294 (1955).
30. BELL, RACISM, at 428.

Employment Laws and Grievance Arbitration Procedures," and "Minority Business Practices."

In regard to the issue of blacks achieving economic parity with whites in the American economic system, the author's assessment reflects the consensus of most knowledgeable persons on the subject, that "the record is not of progress, but despair. The economic status of blacks has shown little hope for improvement. Past and present discrimination is the key to the division between the economic advance for whites and economic stagnation for blacks."[31]

In summation, *Race, Racism and American Law* is a well written educational work that is must reading for lawyers, law students, and laypersons alike. Not only does the book provide a comprehensive analysis of the treatment the legal system has afforded the issue of race from a historical perspective, but the practical value makes the book worth its weight in gold.

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31. *Id.* at 591.