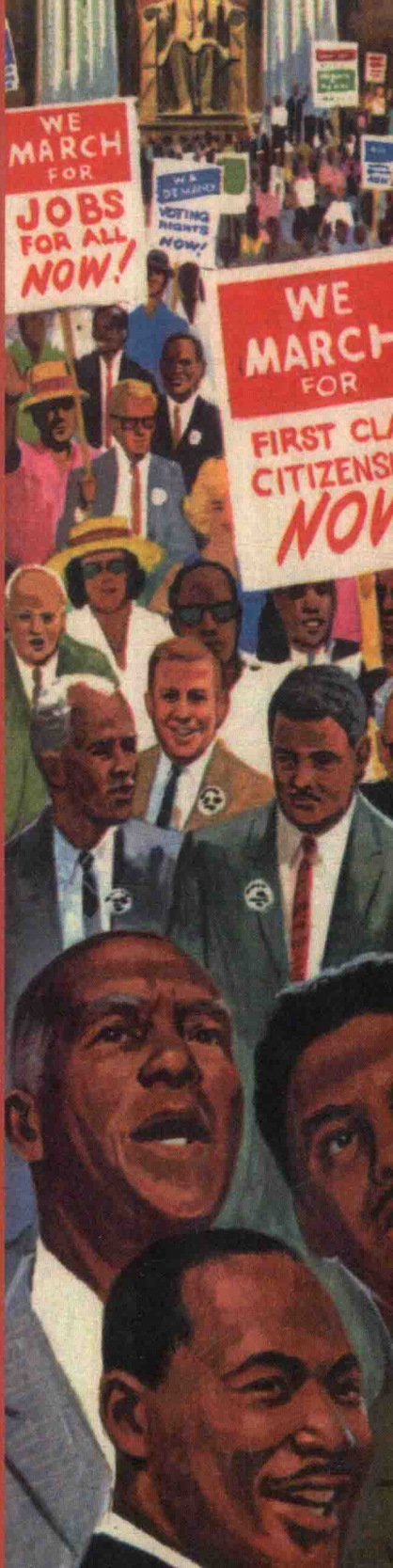
Civil Rights in American Law, History, and Politics



Edited by Austin Sarat

CAMBRIDGE

Civil Rights in American Law, History, and Politics

Edited by

Austin Sarat
Amherst College

CAMBRIDGE
UNIVERSITY PRESS

CIVIL RIGHTS IN AMERICAN LAW, HISTORY, AND POLITICS

Civil Rights in American Law, History, and Politics charts the ambiguous and contested meanings of civil rights in law and culture and confronts a variety of important questions about race in contemporary America. How important is civil rights in America's story of possibility and change? How has it transformed the very meaning of citizenship and identity in American culture? Why does the subject of race continue to haunt the American imagination and continue to play such a large role in political and legal debates? Do affirmative action and multiculturalism promise a way out of racial polarization, or do they sharpen and deepen it? Are there new and better ways to frame our commitment to equal justice? This book brings together the work of five distinguished scholars to critically assess the place of civil rights in the American story. It offers different ways of talking about civil rights and different frames through which we can address issues of civil rights in the future.

Austin Sarat is Associate Dean of the Faculty and William Nelson Cromwell Professor of Jurisprudence Political Science at Amherst College and Justice Hugo L. Black Senior Faculty Scholar at the University of Alabama School of Law. He is the author or editor of more than eighty books, including *The Road to Abolition?: The Future of Capital Punishment in the United States*; *The Killing State: Capital Punishment in Law, Politics, and Culture*; *When the State Kills: Capital Punishment and the American Condition*; *The Cultural Lives of Capital Punishment: Comparative Perspectives*; *Law, Violence, and the Possibility of Justice*; *Pain, Death, and the Law*; *Mercy on Trial: What It Means to Stop an Execution*; *When Law Fails: Making Sense of Miscarriages of Justice*; and the two-volume *Capital Punishment*. Sarat is the editor of the journal *Law, Culture and the Humanities and Studies in Law, Politics and Society*. He is currently writing a book entitled *Hollywood's Law: Film, Fatherhood, and the Legal Imagination*. His book *When Government Breaks the Law: Prosecuting the Bush Administration* was recognized as one of the best books of 2010 by the Huffington Post. In May 2008, Providence College awarded Sarat with an honorary degree in recognition of his pioneering work in the development of legal study in the liberal arts and his distinguished scholarship on capital punishment in the United States.

CAMBRIDGE
UNIVERSITY PRESS

32 Avenue of the Americas, New York, NY 10013-2473, USA

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107039292

First published 2014

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data
Civil rights in American law, history, and politics / edited by Austin Sarat.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-107-03929-2 (hardback)
1. Civil rights – United States. 2. Race discrimination – Law and legislation – United States.
3. African Americans – Civil rights. I. Sarat, Austin, editor of compilation.
KF4755.C58 2014
323.0973–dc23 2013036446

ISBN 978-1-107-03929-2 Hardback

To Ben, with gratitude for all he is

Contributors

Mark Brilliant is Associate Professor of History and American Studies at the University of California, Berkeley.

Devon W. Carbado is Professor of Law at UCLA.

Montré D. Carodine is Associate Dean for Special Programs and Associate Professor of Law at the University of Alabama.

Tanya Asim Cooper is Assistant Professor of Clinical Legal Instruction and Director of the Domestic Violence Law Clinic at the University of Alabama.

Richard Thompson Ford is George E. Osborne Professor of Law at Stanford University.

Steven H. Hobbs is Tom Bevill Chairholder of Law at the University of Alabama.

Ronald J. Krotoszynski, Jr., is John S. Stone Chairholder of Law and Director of Faculty Research at the University of Alabama.

Grace Lee is Associate Professor of Law at the University of Alabama.

Rachel F. Moran is the Dean and Michael J. Connell Distinguished Professor of Law at UCLA School of Law.

Austin Sarat is Associate Dean of the Faculty and William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst

College and Justice Hugo L. Black Visiting Senior Scholar at the School of Law at the University of Alabama.

Susan Sturm is the George M. Jaffin Professor of Law and Social Responsibility and the founding director of the Center for Institutional and Social Change at Columbia University.

Fredrick E. Vars is Associate Professor of Law at the University of Alabama.

Acknowledgments

This volume is the product of a symposium held at the University of Alabama School of Law on March 29, 2013. I want to thank the colleagues, students, and staff who helped make it such a successful event. I am grateful for the financial support of the University of Alabama Law School Foundation. A special word of thanks to former Dean Ken Randall for his unstinting support, for sharing the vision of legal scholarship reflected in these pages, and for making me feel so at home at the law school.

This book is a product of the University of Alabama School of Law symposia series on "Law, Knowledge & Imagination." This series explores the ways law is known and imagined in a diverse array of disciplines, including political science, history, cultural studies, philosophy, and science. In addition, books produced through the Alabama symposia will explore various conjunctions of law, knowledge, and imagination as they play out in debates about theory and policy and will speak to venerable questions as well as contemporary issues.

Contents

Introduction

The Civil Rights Story/The American Story

Austin Sarat

To pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American. – Justice Antonin Scalia

It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior. . . . Because of their 'distinctive histories and traditions,' black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement. – Justice Clarence Thomas

It is widely recognized that the idea of rights is central to America's national identity and its sense of itself.[1] So powerful is our attachment to rights that some scholars see the American story as powerfully intertwined with what they label a "myth of rights."[2] In this myth of rights perhaps nothing plays as important a role as the history of the mid-twentieth-century struggle for civil rights for African Americans. *Brown v. Board of Education* is, of course, the key moment in that struggle, and it has become one of America's "sacred texts," a decision to which almost everyone pays homage even when they act in ways incompatible with its central premises.[3] It is to the spirit of *Brown* that groups seeking recognition continuously appeal, a spirit that today plays a key role in the debate over gay marriage.[4]

Civil Rights in American Law, History, and Politics brings together the work of five distinguished scholars to critically assess the place of civil rights in the American story. This work includes examples of both the "old" and the "new" civil rights histories.[5] It uses the sources and analytics

of both legal and social history. It takes law seriously on its own terms but defines "law" capaciously. It attempts to capture what happens before, after, behind, in front of, and with little relationship to the Supreme Court. It is thus less linear, more multiple. It highlights complexity and contingency. In doing so, it addresses the people, institutions, and legal and nonlegal arenas in which actors and arguments meet.[6]

Civil Rights in American Law, History, and Politics looks backward and forward, connecting the twentieth-century civil rights struggle with new perspectives on the meaning of equality post-*Brown*. It comes on the heels of yet another civil rights decision by the U.S. Supreme Court in which the Court sent a challenge to affirmative action back to the lower court for review on the basis of strict scrutiny and held that under strict scrutiny a university seeking to use affirmative action would have to demonstrate "before turning to racial classifications, that available, workable race neutral alternatives do not suffice."[7]

As this decision demonstrates, even as we celebrate and struggle over the meaning and reach of civil rights post-*Brown*, when it comes to race and racial issues, these are strange times, confused and confusing, for all Americans. This is especially true when the issue of race involves relations between African Americans and Caucasian Americans. It is especially true at a time when we celebrate the triumph of the black middle class[8] while demonizing young black males in our inner cities.[9] Almost seventy years after *Brown* put an end to segregation of the races by law, the question of whether Americans can live with racial differences, and how we can do so, is a very live one. Current debates about affirmative action, multiculturalism, and racial hate speech reveal persistent uncertainty and ambivalence about the place and meaning of race in American culture and the role of law in guaranteeing racial equality. Moreover, all sides in those debates claim to be the true heirs to *Brown*, even as they disagree vehemently about its meaning.[10]

What can we learn about the role of civil rights in the American story, one legitimately might ask, from the fact that two Justices of the Supreme Court, who in many other respects share similar social views, take radically divergent positions about what our country should aspire to in recognizing race and racial difference? One, Justice Scalia, advocates a kind of uniracialist ideal and sees the achievement of that ideal as central to our national identity, whereas the other, Justice Thomas, the only African American on

the Court, speaks in the language of black pride, if not black nationalism. And these differences certainly could be multiplied if we examined a broader array of political views.

American uncertainties and ambivalence about race go at least as far back as Tocqueville's pained observations about the three races in America and their sad inability to live together as equals.[11] In the intervening two centuries they have not been resolved by civil war, legal prescription, mass protest, or inspiring leadership. Today conflict between blacks and whites, and conflict about black-white relations, is as vexing as it has ever been.[12] Race, as Gunner Myrdal reminded us, is the "American Dilemma."[13]

Uncertainty is particularly acute in the legal domain where, over the last six decades, courts and judges have struggled to come to terms with the meaning of the Constitution's guarantee of equal protection of the law. In that period the record of judicial interpretation and understanding of racial equality has taken the form of a back-and-forth movement in which first desegregation, then integration with its accompanying need for busing and affirmative action, and now color-blindness have been the prevailing ideologies.[14] At each turn courts have tried to come to terms with the following issues: Can or should the law see, or see through, the racial mosaic that is America? Is taking race into account to remedy the effects of past racial discrimination a form of racism or a path toward a more racially tolerant society? Can law lead us away from discrimination and racism, or is it hostage to prevailing sentiments and opinions?

Civil Rights in American Law, History, and Politics speaks to these questions. According to the authors whose work is assembled in this book, the significance of the twentieth-century civil rights movement involves more than even its remarkable willingness to say no to one of the great shames of American history. The struggle for civil rights was, in the last century, an occasion for the rebirth of America, a retelling of a story of struggle and liberation. It pointed the way for a new engagement with the problem of difference, of how men and women of different backgrounds and races might live together as equals.

But the idea of civil rights marked a radical departure in the style and substance of our law, and it had a profound impact on the way Americans thought about law's role in promoting social justice.[15] The drama of *Brown*, of an appeal to law to make good on its promises, has in the last six decades been repeatedly reenacted in courtrooms across the United States. And

Brown, even today, provides a powerful template and touchstone through which contemporary racial issues can be seen.

As is now widely recognized, until 1954 the project of establishing the American Constitution was radically incomplete. It was incomplete because, in both chattel slavery and then Jim Crow, the law systematically excluded people from participating fully, freely, and with dignity in America's major social and political institutions on the basis of their race. But *Brown* changed everything. "*Brown*," J. Harvie Wilkinson contends, "may be the most important political, social, and legal event in America's twentieth-century history. Its greatness lay in the enormity of the injustice it condemned, in the entrenched sentiment it challenged, in the immensity of law it both created and overthrew."[16] It stood for the proposition that "race is an impermissible basis for governmental decisions."[17] Yet it did not end the indignities that the law itself had heaped on African Americans. *Brown* was at once a turning point and a source of resistance, a point of pride and an object of vilification. Its legacy, like the legacy of all great historical events, is, even today, contested and uncertain.

Like Lincoln's Gettysburg Address, the text of *Brown* is marked by surprising brevity, but also by startling vision. It was, in Richard Kluger's words, "the turning point in America's willingness to face the consequences of centuries of racial discrimination."[18] It altered the course of constitutional history by sweeping away the legal and philosophical underpinnings of segregation, and, in so doing, took a giant step toward the realization of the vision of respect for persons that, from the beginning, has animated our Constitutional vision. Like Lincoln's Gettysburg Address, *Brown* reminds us, again in Kluger's words, that "[o]f the ideals that animated the American nation at its beginning none was more radiant or honored than the inherent equality of mankind. There was dignity in all human flesh, Americans proclaimed, and all must have a chance to strive and excel."[19]

As the then-editors of *The Yale Law Journal* put it in their celebration of the thirtieth anniversary of *Brown*, "No modern case has had a greater impact either on our day-to-day lives or on the structure of our government."[20] And what was true more than two decades ago is no less true today. Yet ours is a time of revision and mixed views about the civil rights movement and its legacy. Whereas some commentators have noted that it has not resulted in the elimination of racism in American society, others suggest that the civil rights movement in general and *Brown* in

particular have been given too much credit for sparking racial progress. "[F]rom a long-range perspective," Michael Klarman argues, "racial change in America was inevitable owing to a variety of deep-seated social, political and economic forces. These impulses for racial change . . . would have undermined Jim Crow regardless of Supreme Court intervention."[21]

For scholars like Klarman, the victories of the civil rights movement stand not as a monument to law's ability to bring about social change, but instead as a monument to its failure to do so. In their view, whatever racial progress America has achieved cannot be traced back to *Brown*. "[C]ourts," Gerald Rosenberg contends,

> had virtually no effect on ending discrimination in the key fields of education, voting, transportation, accommodation and public places, and housing. Courageous and praiseworthy decisions were rendered, and nothing changed. . . . In terms of judicial effects, then, *Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform.[22]

And some scholars now say that the integrationist vision, which is most closely associated with *Brown*, is inadequate to deal with the continuing subordination of African Americans in contemporary American society.[23]

All told, the story of civil rights in America is far from a happy one. The legacy of that story is today seen in what Hazel Carby calls "political apartheid"[24] and in Carol Greenhouse's description of the "criminalization" of racial minorities.[25] And as the continuing controversy and confusion surrounding race all too dramatically reveal, the civil rights movement unsettled as much as it resolved; it opened up new avenues for contestation, new ideas about how Americans should think about race, new challenges for law.

While the chapters in this book look back on the civil rights movement to assess its legal and cultural significance, they also examine its contemporary meaning and hold on the future. They do so in a time of turmoil in the American debate about race. As Wilkinson argues, "America stands at a critical juncture with respect to its race relations – a juncture every bit as important as that which confronted the Supreme Court in 1954."[26] Where once the integrationist ideal and equal opportunity were the preeminent ideals of racial justice, today each is seriously contested. Today criticism of affirmative action as well as the development of black

nationalism and multiculturalism undermine, or at least challenge, integration for hegemony in the story of racial progress.

Civil Rights in American Law, History, and Politics charts the ambiguous and contested meanings of civil rights in law and culture and confronts a variety of important questions about race in contemporary America. How important is civil rights in America's story of possibility and change? How has it transformed the very meaning of citizenship and identity in American culture? Why does the subject of race continue to haunt the American imagination and play such a large role in the political and legal debate? Do affirmative action and multiculturalism promise a way out of racial polarization, or do they sharpen and deepen it? Are there new and better ways to frame our commitment to equal justice?

Chapter 1, by Devon W. Carbado and Rachel Moran, considers the place of civil rights in the American story through a survey of major cases in U.S. legal history. They begin by examining the country's history of legalized slavery, rejection of the citizenship rights for black Americans in *Dred Scott*, and the abolition of slavery. They note that blacks were not the only group denied citizenship in American history. Mexicans, Chinese, and others have been viewed as racially inferior and unfit to participate in processes of governance.

Indeed, until relatively recently, the story of civil rights in America's law, history, and politics was as much one of denial as of extension of rights, of exclusion as of inclusion of groups. Law has played a key role in establishing caste-like systems in the United States. Carbado and Moran see this dynamic at work in cases such as *Pace v. Alabama*, which affirmed the constitutionality of laws banning interracial marriage. *Pace* held that policies that maintained "separate but equal" standards between races did not violate the Fourteenth Amendment. This line of argumentation was crucial for the decision in *Plessy v. Ferguson*. In *Plessy* the court ruled that a man who was one-eighth black and seven-eighths white could be denied seating in the whites-only train car because the segregated cars met the "separate but equal" standard.

The story of civil rights that centers on *Plessy* is one in which racialized persons tried to identify themselves as white in order to obtain a privileged position in America's racial caste system. They took up the Supreme Court's invitation to minorities to do what the authors describe as "litigate [their] racial identit[ies]." This invitation was central to the litigation in

Hudgins v. Wrights, in which three women had to prove to a Virginia court that they were descended from free Native Americans as opposed to black slaves. In *Lum v. Rice* Gong Lum refused to self-identify as either white or black and was thus denied entrance to an all-white school. The Supreme Court upheld that denial. Prior to this case, Takao Ozawa had applied for naturalization on the grounds that he could be considered white, because his light skin had allowed him to assimilate into white culture. Nonetheless, the court denied him naturalization rights.

Chapter 1 examines cases in which members of other minorities litigated their racial identities. Those cases involved Arab Americans, Native Americans, and Mexican Americans. Carbado and Moran point out that in some of those instances the social subordination resulted from race-based policies that considered race more openly than today's allegedly color-blind civil rights. Thus, as is now well known, in World War II, Japanese Americans were subject to special curfews and mandatory evacuation to internment camps, both of which actions were found constitutional.

But *Brown v. Board of Education* altered the civil rights story and opened avenues for challenging explicit racial classifications in several areas. For example, plaintiffs in two cases, *Perez v. Sharp* and *Loving v. Virginia*, successfully challenged antimiscegenation laws. Yet, Carbado and Moran argue, these cases were the first of many that advocated color-blindness in law while allowing for the continued existence of segregation in fact. This de jure versus de facto tension can be seen in the recent history of litigation surrounding affirmative action. In *Regents of the University of California v. Bakke*, the Supreme Court struck down universities' racial quota systems but ruled in favor of university affirmative action programs that reviewed candidates holistically and could be justified as contributing to a diverse student body. Yet in *Shaw v. Reno*, the Court ruled that creation of majority-minority districts, a tenet of the 1965 Civil Rights Act, was unconstitutional if the districts were drawn solely along racial lines. Similar to *Bakke*, the Court ruled that race could be taken into account when drawing the district lines, but that it could not be the sole factor in the decision.

In 2000, the Court struck down the voting process for the Office of Hawaiian Affairs, which is responsible for the interests of indigenous Hawaiians. The Court found the electoral process unconstitutional because only those descended from indigenous Hawaiians were allowed