FOREWORD

The Unfinished Business of Race

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Justice is not blind, and with respect to race, it most certainly is not colorblind. The law "makes race." It does so by narration: defining and inscribing the meaning of racial categories, assigning specific legal rights and privileges, establishing the parameters of individual and collective social identities, and directing the distribution of material resources. The legal construction of race and corresponding racialization of individuals and groups pose fundamental questions regarding one's position in the prevailing social order: Who is free? Who is a citizen? Who is white? They also raise questions regarding the policies and practices that police racial regimes: Who can immigrate? Who can marry whom? Who can vote? Who is in a protected class?

In the volume you have before you, editors Devon W. Carbado and Rachel F. Moran have assembled a stellar group of contributors to explore these questions. Their approach constitutes the beginnings of what they call a "race law canon." They use and extend the methods and theoretical insights of Critical Race Theory ("CRT"), an insurgent approach to racial studies that while deeply concerned with the law, transcends "mere" legal studies to examine the broader racial foundations and racial structures of U.S. society.[1] CRT exhumes the atrocities of our historical past and confronts their continuing curse; it articulates the ways in which race, gender, and class inequality converge and interpenetrate; and it focuses our attention on the problems of structural discrimination, unequal treatment, and the incomplete nature of democracy in our social order.

The cases presented here, famous, not-so-famous, and infamous, compellingly capture the "back story" behind race law. They highlight various forms of claims-making among litigants, offer insightful doctri-

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1. CRT has also been applied to racial theory and race law beyond the U.S., for example in Brazil and Europe. *See, e.g.*, Celina Romany, *Critical Race Theory in Global Context*, *in* Crossroads, Directions, and a New Critical Race Theory (Francisco Valdes, Jerome McCristal Culp, and Angela P. Harris, eds. 2002); Tanya Katerí Hernandez, *To Be Brown in Brazil: Education and Segregation Latin American Style*, 29 NYU Rev. L. & Soc. Change 683 (2004-2005).

nal analysis of legal opinions, and assess the broader impact of the issues of racial injustice that continue to reverberate in their wake. *Race Law Stories* helps us to discern the significance of these cases: the stories that constitute the volume illustrate how race is understood, how racism is challenged, and how race is reinscribed in ways that perpetuate forms of domination and oppression. While the cases presented here are stories of repression, injustice, and the denial of civil and human rights, they are also stories of self-assertion and self-activity, of insurgency and insistence in the quest for equality, justice, and freedom.

Taken as a whole, the stories narrate how race is constantly being reinterpreted: as natural fact, social fact, or mere illusion; as scientific truth or common sense; as pressing and immediate conflict or mere relic of a benighted past. Our own theory of racial formation was in part inspired by a similar story, a court case (*Jane Doe v. the State of Louisiana*[2]) that revealed the state's capacity to assign social identities — and hence social status and "life-chances" — by enforcing the irrational and seemingly arbitrary rules of racial classification.[3] In 1977, a forty-three-year old woman, Susie Guillory Phipps, who self-identified as white, was designated as black in her birth certificate in accordance with a 1970 Louisiana state law that deemed anyone with more than 1/32nd "Negro blood" to be black. She unsuccessfully sued the Louisiana Bureau of Vital Records to change her racial classification to "white." Her story illustrated the profound relationship of racial meanings to racial social structures (what we termed *racial projects*) and the ways race is continually being contested and re-formed through a process of racialization. "Representing" race, narrating it, telling stories about it (as Susie Guillory Phipps did in her lawsuit), is at the core of the racial formation process.

The legal cases presented in *Race Law Stories* are narratives of racialization, the construction of racial identity. Racialization shapes the very terms of individual and group existence and legal standing. Race law stories are not only bivariate: black/white; they are multivariate. In contrast to the prevailing black/white model of race in the United States, the stories and cases presented in this volume involve a number of distinct racialized groups who in specific historical moments find themselves contesting their subordinate social definition and location in the U.S. racial hierarchy. Are Native Americans a "political" as opposed to a "racial" group? Can Japanese be considered white? In what ways are Mexican Americans white and how does this affect the group's legal standing?

2. Doe v. State of Louisiana, 479 So. 2d 369 (La. Ct. App. 1985).

3. *See generally* Michael Omi and Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s* (2d. 1994).

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One of the key themes that emerges from *Race Law Stories* is the ideology of colorblindness and its fundamentally contradictory character. On the one hand, colorblindness can be called upon as a rationale for forcibly dismantling the historical legacy of segregation and discrimination. On the other hand, it can be evoked to question the legitimacy of policies and practices, both state-based and private, designed to mitigate racial inequality. In addition, as several of the stories suggest, colorblindness and inequality often coexist, sometimes quite comfortably, sometimes not. Colorblindness and racism can be mutually sustaining.

The *Brown v. Board of Education* decision, the most significant race case of the twentieth century, is illustrative of these contradictions. *Brown's* legacy remains deeply contested and unresolved. What has been particularly difficult for the popular imagination to grasp is the idea, as articulated most notably after *Brown* by Justices Thurgood Marshall and Harry Blackmun, that we need to "notice race" in order to challenge the patterns of persistent racial inequality and to advance a more democratic and emancipatory social and political agenda. A common belief of contemporary colorblind racial ideology is that with the right tools, the right policies, the right "stories," we can "get beyond" race. A key lesson to be drawn from the race law canon being founded here is that such an optimistic perspective is not only a utopian but a potentially dangerous goal. "Getting beyond" race is a chimera, an idea that contains within it the specters of forced assimilation and the achievement of racial uniformity, if necessary by violent and repressive means.[4]

Our society was founded on racial difference and conflict. No master narrative, no magic formula, can undo this historical fact and the immense racialized social structure it has generated and sustained. Despite Justice Harlan's ambiguous and contradictory claims to the contrary, the U.S. Constitution itself remains a racial document.

Race matters are still unsettled and new challenges continually appear. The increased visibility and state recognition of multiracial identities create a new set of issues with respect to civil rights enforcement, among other things. In 1997, a proposal to add a separate multiracial category to the Census was rejected by the Office of Management and Budget's ("OMB") Interagency Committee for the Review of Racial and Ethnic Standards. Instead, the thirty-agency task force recommended that OMB Statistical Directive 15 be amended to permit individuals to "mark one or more" racial categories when identifying themselves on the Census or other government forms. This recommendation was adopted by the OMB, but the ability of individuals to check more than one racial

4. For more on this point, see Eric D. Weitz, *A Century of Genocide: Utopias of Race and Nation* (2003); Zygmunt Bauman, *Modernity and the Holocaust* (1991).

"box" has led to significant debate about data collection and presentation: sixty-three racial combinations are now possible (126 possibilities when combined with the "ethnic" category of "Latino/Hispanic").[5] With respect to civil rights monitoring and enforcement, an individual who is of one "minority" race and white is now classified as belonging to the minority race. If one identifies with two or more minority races, the race that a complainant alleges was the basis for discrimination becomes the focus of scrutiny. All this opens up a Pandora's box regarding self-identity and social location. Individual and group identities, access to political rights such as citizenship, and "life-chances" are thrown into doubt once more by state management of racial meanings and categories. The overall legal consequences of assuming or assigning multiracial identities thus require further, indeed permanent, scrutiny and review.

Many of the cases in *Race Law Stories* highlight both the convergences and contradictions between "race science" and commonsense or popular understandings of race. In the current period, it has been widely assumed that biological notions of race and racial difference have been thoroughly discredited and replaced with an understanding of race as a social construction. But as Angela Onwuachi-Willig notes in the conclusion of her chapter, "biological race is making a comeback." In the field of pharmacogenomics, "ethnic designer drugs" are being researched and developed that assume biological, genetic differences between the races. NitroMed's drug BiDil, specifically marketed to blacks who suffer from congestive heart failure, is a controversial example of using an individual's race as a handy proxy for ascertaining that individual's susceptibility to disease and responsiveness to drug treatment.[6]

One can tell a similar story with respect to DNA evidence in the field of forensics, which has led to the exoneration of unjustly convicted inmates. But, as Onwuachi-Willig notes, DNA evidence also has been utilized as a high-tech tool for racial profiling by law enforcement agencies. The determination of a suspect's race, based on shaky predictors, raises troubling questions regarding the deployment of genetic information in criminal investigations. While DNA ancestry tests have become a popular way for individuals to trace their "roots," they also have been employed to determine, among other things, membership in American Indian tribes. Black Seminole Freemen sought DNA testing in order to regain tribal benefits denied them when the Seminole Nation of Oklahoma changed its constitution in 2000 to exclude black members who

5. The issues of multiracial classification and their policy consequences are addressed in Joel Perlmann and Mary C. Waters (eds.), *The New Race Question: How the Census Counts Multiracial Individuals* (2002).

6. On the development of BiDil see Jonathan Kahn, *How a Drug Becomes "Ethnic": Law, Commerce, and the Production of Racial Categories in Medicine*, 4 Yale J. Health Pol., L. & Ethics 1 (2004).

did not meet the tribe's blood-quantum requirements.[7] These conflicts and contradictions, and a host of others, suggest that the current reinscription of race as a biological category will provoke ongoing legal claims regarding the relationship of social identity, science, and structural inequality.

The impressive historical sweep and depth of analysis in *Race Law Stories* inspires us all to consider the dynamics of race and racism in the "post-civil rights" era. What has changed in the racial system of the United States since the rise and fall of the civil rights movement? What, if anything, remains of the "old" white supremacist racial regime? What was accomplished by all the blood, sweat, and tears expended in the cause of civil rights, perhaps the most significant social movement in the nation's history?

Today the meaning and effectivity of the race concept is in crisis. "[C]risis," Gramsci wrote, "consists precisely in the fact that the old is dying and the new cannot be born: in this interregnum, morbid phenomena of the most varied kind come to pass."[8] In this crisis, the "post-civil rights" ideology of colorblindness collides head-on with the intrinsic and ineluctable presence of racial rule and racial domination. We can see this collision in operation when we examine any of today's pressing racial issues, for example, racial profiling.[9] Indeed, many of the race law stories examined in this volume, though based in the historical past, remain sources of racial crisis in the twenty-first century. Discrimination in education, housing, or employment; the equal application of citizenship policy and immigration law; the recognition of voting rights; and indeed human rights are as endangered today as they were in an earlier time.

Perhaps what is most revealing in the stories presented in this volume is the courts' insistence on their prerogative to interpret the meaning of race and to determine what aspects of a litigant's identity, behavior, or appearance are race- (or gender-) based.[10] Courts remain free to invoke or ignore both scientific claims and assertions of common sense. The arbitrary character of the race law canon is in the end the greatest

7. Ziba Kashef, *Race for a Cure,* ColorLines 40 (September/October 2007).

8. Antonio Gramsci, *Selections from the Prison Notebooks* 276 (Hoare and Nowell-Smith eds. 1971).

9. In *(E)racing the Fourth Amendment*, 100 Mich. L. Rev. 946 (2002), Devon Carbado argues that racial profiling reveals the ways that racial rule continues to remain both coercive and despotic in a period often seen as "post-civil rights," i.e., *after* the enactment of reforms that supposedly assured racially-defined minorities of equal treatment by state agencies.

10. As Paulette Caldwell notes in this volume, court decisions that refuse to consider "the interactive and mutually-reinforcing impact of race and gender as well as their independent effects" reveal a simultaneous avowal and disavowal of the power to decide both what is "racial" and what is "gendered." The judicial system operates here with the same colorblind disengenousness that the 1896 Supreme Court showed in *Plessy*.

evidence for the centrality of narrative in civil rights law and indeed human rights law.

Race remains "unfinished business" and will continue to be so in an era when the contradiction between formal equality and structural inequality is normalized; and when two incompatible and competing "stories" — one colorblind, the other color-conscious — shape the unstable equilibrium that characterizes racial formation in the United States today. Because the meaning of race is still unsettled, its competing "stories" take shape in the form of claims-making by litigants in pursuit of racial equality and social justice. Uncertainty and contrariety are continually reproduced in the decisions that shape the race law canon: sometimes reaffirming old notions, sometimes seeking to establish new understandings of both race and rights. This unfinished business is the broader story that *Race Law Stories* presents and opens up for critical scrutiny.