

“The Hidden History of Civil Rights,”

By David J. Garrow, *Wall Street Journal*, 28-29 Oct. 2023, p. C7-C8.

Before the Movement: The Hidden History of Black Civil Rights

By Dylan C. Penningroth

Liveright, 496 pages, \$35

There was a time when “civil rights” didn’t mean what it does today. “In the century after emancipation,” Dylan Penningroth tells us in his cogently subversive book, “Before the Movement,” “civil rights went from being the fundamental rights of free people to being the rights of minorities not to be discriminated against.” Mr. Penningroth, a professor of law and history at the University of California, Berkeley, goes on to write: “In 1866, ‘civil rights’ had meant rights of contract and property,” whereas by 1954, “civil rights meant ending racial discrimination on the job, at school, in voting.”

This deeply altered meaning of what we know, or think we know, as a simple, self-evident term has major implications for African-American history in the century prior to the modern civil-rights era. “The notion of Black history as a freedom struggle,” the author asserts, “has shrunk our vision of Black life down to the few areas of Black life where federal law and social movements made a difference. . . . Overshadowed are many other parts of life that Black people might have cared about just as much but that do not fit into a story of freedom—things like marriage and divorce, old-age care, property-owning, running churches and businesses.”

Mr. Penningroth’s powerful thesis may seem strikingly counterintuitive, but his detailed exposition is convincing, drawing on the prior work of dozens of scholars who have explored smaller aspects of the vast canvas Mr. Penningroth seeks to paint. In the two decades he has been working on this project, he and dozens of his students sought out court cases from five states—Illinois, Mississippi, New Jersey, North Carolina and Virginia, plus the District of Columbia—in which one or both parties were African-American. “Very few people care about old court records,” Mr. Penningroth suggests, yet to understand “how ordinary Black people used law in their everyday lives,” the most revealing documents can be found “in the back rooms and basements of county courthouses.”

Over time, Mr. Penningroth’s team identified thousands of seemingly mundane cases involving black people that highlight how “state-level, private-law rules of property and contract and association” were “the paradigmatic ‘civil rights’” of the 19th century, even though they “weren’t the ones we think of today as ‘civil rights.’” While “scholars have typically focused on what law did to Black people,” in reality “African Americans hammered out their relationships with one another and with white people” by again and again taking the initiative to use law on their own behalf. To them, “civil rights simply meant rights that a court could protect,” even though “they rarely had occasion to call them ‘civil rights.’”

Nowhere is this “hidden history of black civil rights” more startling than when the author highlights “the legal lives of slaves” prior to emancipation, when “white southerners were used to seeing Black people own property and make contracts.” Mr. Penningroth blames the Northern, Republican proponents of the first postwar legislation for unknowingly obscuring this reality. “In redefining ‘civil rights’ as the rights that marked someone as not a slave,” the Civil Rights Act of

1866 “made it unthinkable that slaves could ever have owned property or made contracts. And yet slaves across the South had done just that.”

The Reconstruction decades were often bloody and deadly for black Southerners, yet at the same time white Southerners “took it for granted that ex-slaves had the right to own a house or hire a lawyer.” Since “whites were already used to seeing slaves have property,” Mr. Penningroth argues, it wasn’t a big leap “to the notion that ex-slaves could have property rights.” He stresses that “this consensus about ‘civil rights’ emerged among white southerners very quickly after the Civil War because everybody knew that before the war slaves had had property and made bargains.”

Mr. Penningroth expresses little surprise that African-Americans during the Reconstruction decades had the freedom to go to court. In Virginia and Mississippi, he found that black people filed 12% of civil suits in 1872 and 15% of them in 1882. Of the more than 1,000 cases he examined from those two years, “divorces made up the single most common reason Black people filed suit.” Indeed, he suggests that “former slaves quickly came to see divorce as one of the quintessential exercises of civil rights.”

This occurred in states where freedmen’s attempts to register to vote were often brutally repressed. Yet Mr. Penningroth emphasizes that, in the eyes of white Southerners, “voting and suing were different kinds of rights.” The legal initiatives of African-Americans also surged outside the South. “In growing numbers, across the country, Black people during Reconstruction vastly expanded their use of the courts.”

During the decades of racial segregation known as the Jim Crow era, “Black people went to the trial courts . . . even more than during Reconstruction.” Across all of Mr. Penningroth’s locales, African-Americans filed 11% of civil suits in 1892 and 17% by 1902; in Mississippi they went from 12% of plaintiffs in 1872 to 36% in 1902. As before, between 1902 and 1932 divorce remained the leading cause of action, making up 26% of civil cases.

Mr. Penningroth underscores how, “with few exceptions, Black people’s legal activity did not challenge white supremacy in any substantive way.” Only 8% of cases during Jim Crow “crossed the color line.” White lawyers could be fully complicit in suppressing black political efforts at the same time that they professionally represented black clients. “The justice system in the countryside and small towns was run by a courthouse ring” of such attorneys, Mr. Penningroth tells us, one that simultaneously “kept African Americans from voting, and helped them exercise their civil rights.”

This richly recounted history powerfully contradicts and undermines simplistic presumptions about the lived reality of racial segregation. So, too, does Mr. Penningroth’s strong emphasis on the explosive growth and dramatic decline of black land ownership in the years following emancipation. “Five years after the Civil War ended, 4.8 percent of the South’s Black families, or about 43,000, owned real estate.” By 1910 there were more than 500,000 black homeowners in America, including some 219,000 black farm owners who held title to more than 15 million acres, “practically all of it in the South.”

The rise of black property owners, Mr. Penningroth tells us, “is one of the most remarkable and least understood phenomena in American history,” but then so too is the subsequent decline: By 1969 those 15 million acres had shrunk to less than six million. Mr. Penningroth makes clear that the black migration from the rural South to the urban North had far more to do with that decrease than white skullduggery.

“Before the Movement” seeks to rescue African-Americans’ history from a narrative of victimology, and in this Mr. Penningroth richly succeeds. By using grassroots legal history to detail “the experiences that the freedom struggle narrative has obscured,” he begins to counteract how the simplifications of civil-rights history have made it harder to see Black people as people in full.”

Mr. Garrow’s books include “Bearing the Cross,” a Pulitzer Prize-winning biography of Martin Luther King Jr.