

---

---

## LAWYERS, LAW, AND THE NEW CIVIL RIGHTS HISTORY

REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER. By Kenneth W. Mack. Cambridge, Mass.: Harvard University Press. 2012. Pp. 330. \$35.00.

*Reviewed by Risa Goluboff\**

It is not always easy to identify a new field or a new paradigm for an old field. It can creep up on you — a book here or an article there. But there is no denying it: the legal history of civil rights is not what it used to be. Over the past several years, a number of books and a slew of articles and dissertations have coalesced around similar themes, methodological approaches, and arguments. A new civil rights history has arrived.

Professor Kenneth W. Mack's *Representing the Race: The Creation of the Civil Rights Lawyer* is the latest entry in this growing field. Its publication provides an occasion to identify both the contours of the new approach and its most significant lessons. In Part I, I describe *Representing the Race*, a poignant and nuanced collective biography of African American lawyers. In Part II, I survey the new civil rights history and its dominant characteristics. In Part III, I situate Mack's book in the context of the new field. I first identify the ways in which Mack draws on the methodological approach of the new civil rights history. I then explore how, even where Mack does not explicitly engage the new literature, his book nonetheless reinforces many of its lessons.

### I. REPRESENTING THE RACE

In *Representing the Race*, Mack paints a fascinating portrait of black lawyers struggling to find a place for themselves in the legal profession. Through a collective biography that spans the mid-nineteenth to the early twenty-first centuries, Mack argues that lawyers' own goals for their professional advancement, their own conceptions of identity, and especially their understanding of how lawyers should perform in the courtroom shaped their approaches to lawyering. As the title of the book suggests, these professional struggles took place in the context of what Mack calls the problem of representation. African

---

\* John Allan Love Professor of Law, Justice Thurgood Marshall Distinguished Professor of Law, and Professor of History, University of Virginia. The author thanks Tomiko Brown-Nagin, Ariela Dubler, Stewart Inman, Laura Weinrib, and especially Richard Schragger.

---

---

American lawyers worked hard and continuously since at least the moment that John Mercer Langston joined the Ohio bar in 1854 to figure out how they could practice law so as to reflect well on their race. For, as Mack points out, black lawyers did not merely represent clients. They also represented their entire race. The nineteenth-century idea of the “representative man . . . who encapsulated the highest aspirations of his racial or cultural group, in terms of education, professional advancement, and intellectual ability” (p. 4) was an argument for racial inclusion and equality. If an African American lawyer could accomplish what a white one could, then it proved — to whites, blacks, and the lawyers themselves — that the black race as a whole could achieve as well.

This idea of representation led black lawyers increasingly over the twentieth century to come “to court and demand[] to be treated like white men — even if things were different just outside the courthouse” (p. 268). Of course, white lawyers and judges did not always treat black lawyers with the respect the black lawyers thought they deserved. But many of Mack’s stories end with black lawyers achieving at least modest — and by the middle decades of the twentieth century, considerable — success in the largely white courtroom. Mack argues that the professional respect white lawyers showed black lawyers challenged Jim Crow in the North and South.

More than a problem, Mack identifies a paradox. Representation required African American lawyers to do two incompatible things simultaneously. On the one hand, in order to succeed in a courtroom dominated by whites, the black lawyer had to try to “convince his white lawyer colleagues and judges that he was, as nearly as possible, one of them” (p. 62). Sometimes, black lawyers of mixed-race ancestry used their racial ambiguity to convince white legal professionals that they were “in fact” white. At other times, they engaged in a performance of courtly gentility, insisting on professional courtesies that would never otherwise have been granted to African Americans. Successful performances subtly changed the racial status of black lawyers to whom such courtesies were granted. In other words, Mack shows, the “whiter” a black lawyer could seem or act — the more he could present himself as simply a lawyer (subtext: “white lawyer”) rather than as a “black lawyer” — the more likely he was to succeed in the law, and the better able to represent his race in the nineteenth-century sense.

On the other hand, and what makes the problem a paradox, the closer the black lawyer got to the white ideal, the further he got from black “authenticity” (p. 24). The black lawyer who was too white could not reflect glory on his race because he was not truly of the race. But if his race was fixed too securely as black, then he could not represent the race because he could not succeed in the eyes of the white bar. He was stuck between seeking racial authenticity in the

---

---

eyes of African Americans and professional legitimacy in the eyes of white lawyers.

*Representing the Race* is at heart a chronicle of this paradox, which began in the mid-nineteenth century, continued through the twentieth, and lingers in the twenty-first. After identifying Langston as the predecessor to the modern black lawyer and his paradox, the bulk of the book recounts histories of African American lawyers across the twentieth century. The center of gravity lies in the decades after World War I and before the mass-action phase of the civil rights movement. It was during those years that a small cadre of African American lawyers, mostly outside the South, began actually making a living practicing law. Though some of these lawyers would eventually come to be known as — and to view themselves as — “civil rights lawyers,” Mack points out that they did not generally start their careers with such an orientation. That appellation came much later. Instead, Mack reintroduces the reader to civil rights stars like William H. Hastie, Thurgood Marshall, Charles Hamilton Houston, Loren Miller, Pauli Murray, and the husband-and-wife team of Sadie and Raymond Pace Alexander as African American lawyers who sought success simply as lawyers.

Mack begins his twentieth-century story in earnest with Charles Hamilton Houston and Raymond Pace Alexander trying to succeed in the market for legal services in 1920s Washington, D.C., and Philadelphia, respectively. This was a challenge, given that virtually all whites and many African Americans — even the NAACP until the end of the decade — preferred to hire white lawyers. Mack painstakingly reconstructs how these black lawyers managed to make their livings in mundane civil and criminal matters. He shows how they created networks of white lawyers and judges, as well as of black lawyers, that helped them succeed. Mack emphasizes the courtroom experience, which operated on several levels at once: as crucial moments in the representation paradox, as critical opportunities for gaining new clients and advancing professionally, and as complex but important challenges to Jim Crow. He highlights the tremendous gulf between how black lawyers were treated outside the courtroom (disrespectfully and with few rights to speak of) and inside the courtroom (often, though not always, with professional courtesy and the right to spar on equal terms). Mack also points out that for both blacks and whites, the spectacle of a black man treated equally in a white courtroom was a major disruption of the racial status quo.

Mack homes in on a few of Alexander’s and Houston’s criminal trials — one in Philadelphia and one in Loudoun County, Virginia — as turning points in which the lawyers gained the kind of professional respect and courtesy that had frequently eluded black attorneys in the past. To a considerable extent, Mack argues, the lawyers’ performances rather than the defendants’ guilt or innocence became the fo-

---

---

cal points of these trials. Mack nicely illustrates this shift by analyzing successive drafts of a *Crisis* article about a Loudoun County murder trial in which Houston defended George Crawford. Initially, NAACP Executive Secretary Walter White criticized the trial and the prejudice it revealed in the southern justice system. As published, however, White's article instead offered a celebration of the ability of black lawyers like Houston to stand as equals with whites in the courtroom (p. 107). By the end of the 1920s, black lawyers had made some professional progress, and that progress was understood as extending, through the black lawyers' racial representation, to the race as a whole.

Unsurprisingly, the Depression proved something of a setback. It decimated the ability of African Americans to afford lawyers. It prompted radical white lawyers to compete with black lawyers for high-profile, and often black, clients who had been sensationally victimized by the American justice system.<sup>1</sup> It also prompted some black lawyers to turn away from the lure of (white) professional respectability. Mack offers the cautionary tale of black lawyer Benjamin J. Davis, Jr., who defended the black Communist Angelo Herndon against insurrection charges in Georgia. Davis did not respond to the racial prejudice he experienced at trial by trying to break into the respectability of the white bar. Rather, he decided to join the Communist Party himself (p. 170). For his radical turn, Davis eventually served a prison term for violating the Smith Act of 1940 and lost his law license.

Davis was not the only lawyer of his generation to resist the image of the respectable black lawyer that Houston and Alexander projected. The Depression provoked a generational crisis. On one side were those black lawyers who had come of age before it, who saw the law as offering up opportunities for advancement in the 1920s. On the other side were those who came after. Lawyering "offer[ed] only downward mobility that quickly spiraled into a crisis of professional identity" for young lawyers like Loren Miller and John P. Davis (no relation to Benjamin) (p. 185). They questioned how and on what terms they, and organizations like the NAACP, could represent the majority of African Americans. "The controversy over racial representation," Mack writes, became in the 1930s "a means for activists, intellectuals, and others to talk about a much larger set of issues concerning the future of African Americans" and of the NAACP in particular (p. 179).

---

<sup>1</sup> For example, Mack discusses the well-known conflicts over who should have represented the nine young African American men falsely convicted in 1931 in Scottsboro, Alabama, of the rape of two white women. For a fuller account, see generally JAMES GOODMAN, *STORIES OF SCOTTSBORO* (1995).

Not all of the black lawyers who came of professional age during the Depression experienced the same dilemma as the Davises and Miller did. Thurgood Marshall graduated from Howard Law School in 1933, a star pupil of Houston, who was then dean. Marshall was a master of the dual performance necessary for elegantly navigating the paradox of representation. Mack describes how Marshall became “[t]he authentic representative of African Americans in the courts” by walking a fine line between what whites wanted from his representation — proof to blacks that the legal system treated them fairly — and what blacks wanted — a black lawyer who was so accepted by whites that he could attack racial bias in the legal system (p. 112).

By the 1940s, black lawyers like Marshall increasingly began to succeed in their decades-long quest to make a living as lawyers. The triumphs of black lawyers came at a “dizzying” pace (p. 236), as they attained previously unattainable positions in government, private practice, and a variety of organizations and commissions (pp. 234–47). But such “professional integration was possible only because of the increasing distance between the lawyers and the communities they still claimed to represent” (p. 236). Indeed, Mack shows how, not long after black lawyering became a key part of the civil rights movement, it became both more contested and more problematic for that movement. A new generation of lawyers, like Philadelphia’s Cecil B. Moore and Curtis Carson, took a far more antagonistic stance toward both white and older black legal professionals. This younger generation explicitly rejected the example of the Alexanders and others, who Carson charged did “not represent the Negro people of Philadelphia” (p. 250).<sup>2</sup> Similarly, Mack recounts the well-known rivalry between Marshall and Robert Carter as the NAACP split into a legal organization and a movement-centered organization. While Carter reflected the more “impatient” and “race conscious” mood of the younger generation (p. 259), Marshall’s relationship with the grassroots became ever more attenuated, as he focused on fund-raising among whites (pp. 259–61). The end of the book moves quickly across time, following Marshall from the NAACP to the Supreme Court and then briefly discussing how the paradox continues to bedevil President Barack Obama and Justices Clarence Thomas and Sonia Sotomayor (pp. 262–63, 269).

Many of the lawyers Mack follows are men, and he underscores that being a successful lawyer required not only a racial performance but also a gendered one. The prototype of the lawyer was not only white, he was a man. Mack highlights the role gender played in this

---

<sup>2</sup> The author quotes *Transcript of Program Broadcast* (WCAU radio broadcast Feb. 8, 1963) (on file with the University of Pennsylvania Archives and Records Center) (internal quotation marks omitted).

performance by following the lives and careers of two African American women lawyers, Sadie Alexander — married to Raymond Pace Alexander — and Pauli Murray. Like her male counterparts, the black woman lawyer, according to Mack, felt herself first and foremost to be a lawyer. But that identity rendered her, to the rest of the world, something of an oxymoron. Contemporaries were not sure what to make of her and others like her. Mack offers a telling vignette in which Sadie Alexander wore her hat as she stood up in court — as a lady would — only to have the judge order her to remove it — as a male lawyer would (p. 137). As a general matter, black women lawyers found the courtroom inhospitably masculine, and they were often relegated to bookkeeping. Though that is where Alexander began her career, she eventually expanded her office practice outward. She took on more complex cases, advised and negotiated on behalf of prestigious and powerful clients, and moved into the leadership of the black National Bar Association. Even as the courtroom successes of her husband eluded her, she was the one President Harry S. Truman tapped for his Committee on Civil Rights in 1946 (pp. 146–51).

Mack contrasts Alexander's experiences with those of Murray, some twelve years Alexander's junior and different from Alexander in many respects. Alexander, who was torn between her maternal and spousal responsibilities and her work as a lawyer, could never, according to Mack, identify why her experience as a lawyer differed from her husband's. Murray — childless, of mixed-race ancestry, and long preoccupied with her gender identity, racial identity, and sexuality — was in Mack's words a "nascent feminist" (p. 132). She found the answer to why she and Alexander experienced legal practice differently from those around them obvious: they were women. Naming this problem "Jane Crow," Murray was an early advocate for women's equality and against sex discrimination. Fifteen years after Alexander served on Truman's civil rights committee, Murray served on President John F. Kennedy's Commission on the Status of Women (p. 254).

Through stories like Murray's, Mack reconstructs the professional challenges black lawyers faced in an often hostile legal profession. He uses the papers of the lawyers themselves to describe how they structured their lives and careers — and how their quests for professional success were deeply infused with tension and ambivalence.

## II. THE NEW CIVIL RIGHTS HISTORY

With the publication of *Representing the Race*, Mack joins the growing bibliography of the new civil rights history.<sup>3</sup> Before discuss-

---

<sup>3</sup> For major works in this new field, see generally MARK BRILLIANT, *THE COLOR OF AMERICA HAS CHANGED* (2010); TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT* (2011);

ing Mack's specific engagement with the field, and the ways in which his work amplifies some of its key conclusions, further description of the recent scholarship itself is in order. Though a few scholars have noted developments in legal historical approaches to civil rights history,<sup>4</sup> there has not yet been a full-fledged survey of the field.

The "new," of course, is always written against the "old." Two "old" literatures are particularly salient here. The first consists of legal histories of civil rights, which have customarily focused on the Supreme Court, the momentous case of *Brown v. Board of Education*,<sup>5</sup> or the NAACP's path to the Court in *Brown*. Some of these histories have been celebratory, others critical. Richard Kluger's *Simple Justice*<sup>6</sup> and Professor Mark Tushnet's *The NAACP's Legal Strategy Against Segregated Education, 1925–1950*<sup>7</sup> fall into the former catego-

---

RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); GEORGE I. LOVELL, *THIS IS NOT CIVIL RIGHTS* (2012); NANCY MACLEAN, *FREEDOM IS NOT ENOUGH* (2006); SERENA MAYERI, *REASONING FROM RACE* (2011); THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY* (2008); ANDERS WALKER, *THE GHOST OF JIM CROW* (2009); David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 *STAN. L. REV.* 1071 (2010); Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948–1964*, 26 *LAW & HIST. REV.* 327 (2008) [hereinafter Lee, *Hotspots in a Cold War*]; Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 *VA. L. REV.* 799 (2010) [hereinafter Lee, *Race, Sex, and Rulemaking*]; Herbert Timothy Lovelace, *Making the World in Atlanta's Image: SNCC, Morris Abram, and the Development of the UN Race Convention*, 31 *LAW & HIST. REV.* (forthcoming 2013) [hereinafter Lovelace, *Atlanta's Image*]; Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 *YALE J.L. & HUMAN.* 187 (2006); Christopher W. Schmidt, *Conceptions of Law in the Civil Rights Movement*, 1 *U.C. IRVINE L. REV.* 641 (2011) [hereinafter Schmidt, *Conceptions of Law*]; Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 *WM. & MARY BILL RTS. J.* 767 (2010); Herbert Timothy Lovelace, *International Legal History from Below: The Civil Rights Movement and the U.S. Origins of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1960–1965* (2012) (unpublished Ph.D. dissertation, University of Virginia) (on file with the Harvard Law School Library) [hereinafter Lovelace, *International Legal History from Below*].

<sup>4</sup> In the main, these scholars have spent more time canvassing prior scholarship than new scholarship and have usually limited their discussion of the new to one particular work. See generally Kenneth W. Mack, *Bringing the Law Back into the History of the Civil Rights Movement*, 27 *LAW & HIST. REV.* 657 (2009) [hereinafter Mack, *Bringing the Law Back*]; Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 *YALE L.J.* 256 (2005) [hereinafter Mack, *Rethinking Civil Rights Lawyering*]; Ariela J. Gross, *From the Streets to the Courts: Doing Grassroots Legal History of the Civil Rights Era*, 90 *TEX. L. REV.* 1233 (2012) (reviewing BROWN-NAGIN, *supra* note 3); Kenneth W. Mack, *Law and Local Knowledge in the History of the Civil Rights Movement*, 125 *HARV. L. REV.* 1018 (2012) (reviewing BROWN-NAGIN, *supra* note 3) [hereinafter Mack, *Local Knowledge*]; Dylan Penningroth, *Black Inheritance: Rights and Genealogies After Slavery* (Nov. 10, 2012) (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>5</sup> 347 U.S. 483 (1954).

<sup>6</sup> RICHARD KLUGER, *SIMPLE JUSTICE* (1975).

<sup>7</sup> MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987). Tushnet's *Making Civil Rights Law* covers topics beyond education,

ry; Professor Gerald Rosenberg's *The Hollow Hope*<sup>8</sup> and Professor Michael Klarman's *From Jim Crow to Civil Rights*<sup>9</sup> are prime examples of the latter. Both groups, however, share a court-centered or major-case-centered, relatively retrospective, and linear approach to the topic.

The second "old" literature consists of a wide array of community studies of civil rights written by social historians in the last thirty years. This literature could not be more different from the first: scholarship in this vein virtually ignores the Supreme Court — indeed, it generally ignores law (or depicts it as usually siphoning off movement energy) — and focuses on the civil rights movement on the ground in particular communities. Prominent among these works are Professor William Chafe's *Civilities and Civil Rights*,<sup>10</sup> Professor Robert Norrell's *Reaping the Whirlwind*,<sup>11</sup> and Professor Charles Payne's *I've Got the Light of Freedom*.<sup>12</sup>

Enter the new civil rights history, which has deliberately and self-consciously challenged the first literature by drawing on the second. 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, behind, after, 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 where actors and arguments meet. It identifies intermediaries, liaisons, ambassadors. It explains how ideas, movements, and legal doctrines cross the boundaries of space, class, race, and time. It explores the relationship between the many lay and professional actors involved in changing legal conceptions and in the civil rights struggle more generally.

I should properly speak of "a" — and not "the" — new civil rights history. There are other new histories of African American civil rights as well, which combine the old social history with religious,<sup>13</sup> politi-

---

but it remains tightly focused on Thurgood Marshall and the NAACP. MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW* (1994).

<sup>8</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1993).

<sup>9</sup> MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004); see also GENNA RAE MCNEIL, *GROUNDWORK* (1983) (viewing Houston's efforts in the 1940s as "groundwork" for *Brown*); LOREN MILLER, *THE PETITIONERS* (1966); J. CLAY SMITH, JR., *EMANCIPATION* (1993).

<sup>10</sup> WILLIAM H. CHAFE, *CIVILITIES AND CIVIL RIGHTS* (1980).

<sup>11</sup> ROBERT J. NORRELL, *REAPING THE WHIRLWIND* (1985).

<sup>12</sup> CHARLES M. PAYNE, *I'VE GOT THE LIGHT OF FREEDOM* (1995).

<sup>13</sup> See generally, e.g., DAVID L. CHAPPELL, *A STONE OF HOPE* (2004); ANGELA D. DILLARD, *FAITH IN THE CITY* (2007); JAMES F. FINDLAY, JR., *CHURCH PEOPLE IN THE STRUGGLE* (1993); CHARLES MARSH, *THE BELOVED COMMUNITY* (2005); RHETORIC, RELIGION AND THE CIVIL RIGHTS MOVEMENT, 1954–1965 (Davis W. Houck & David E. Dixon



cal,<sup>14</sup> diplomatic,<sup>15</sup> and cultural history.<sup>16</sup> It might perhaps be more accurate, then, to call the literature I am describing “the new legal history of civil rights.” But that appellation falters not only because it is unwieldy and the name of a new field should be pithy, but also more substantially because it seems unduly narrow. This new field is not limited to legal history in any traditional sense. It is truly a marriage of legal and social history — it has its roots in both, and it makes contributions to both. To the old legal history, it decenters courts and introduces the social history of law. To the old social history, it reintroduces law as part of, not contrary to, civil rights claims-making and identifies its importance to many lay actors. To both, it reworks the relationships between what have long, but somewhat reductively, been called “above” and “below” or “law” and “society” by viewing law creation as a dynamic and multidimensional process that involves both conflict and collaboration.<sup>17</sup>

The resulting scholarship generally shares several key characteristics: decentering the Supreme Court, *Brown v. Board of Education*, and the NAACP’s campaign for school desegregation and including many more actors involved in and events associated with the process of legal change; taking a prospective rather than retrospective approach to the past; emphasizing lawyers as particularly important intermediaries between the legal claims of lay actors and legal doctrine as constructed by courts; identifying the importance of class and economic issues to the ways in which various groups of lay and professional legal actors interacted with and understood the law; taking legal doctrine seriously but viewing it as a field of contestation rather than the authoritative output of judges; and finally, as a result of these other

---

eds., 2006); GARY S. SELBY, *MARTIN LUTHER KING AND THE RHETORIC OF FREEDOM* (2008).

<sup>14</sup> In particular, there is a new literature analyzing the rise of political conservatism in the context of civil rights battles. Many of these works engage with legal history as well, particularly WALKER, *supra* note 3. See also, e.g., KEVIN M. KRUSE, *WHITE FLIGHT* (2005); MATTHEW D. LASSITER, *THE SILENT MAJORITY* (2005); BECKY M. NICOLAIDES, *MY BLUE HEAVEN* (2002); Gross, *supra* note 4. Others have combined political with social history in discussing racial liberalism. See, e.g., SHANA BERNSTEIN, *BRIDGES OF REFORM* (2011).

<sup>15</sup> CAROL ANDERSON, *EYES OFF THE PRIZE* (2003); MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS* (2000).

<sup>16</sup> A new and growing literature on black power and nationalism has especially drawn on cultural studies and African American studies as well as social history. See, e.g., ALGERNON AUSTIN, *ACHIEVING BLACKNESS* (2006); *BLACK POWER IN THE BELLY OF THE BEAST* (Judson L. Jeffries ed., 2006); MATTHEW J. COUNTRYMAN, *UP SOUTH* (2005); PENIEL E. JOSEPH, *WAITING ‘TIL THE MIDNIGHT HOUR* (2006); KEVIN MUMFORD, *NEWARK* (2007); DONNA JEAN MURCH, *LIVING FOR THE CITY* (2010); JEFFREY O. G. OGBAR, *BLACK POWER* (2004); *THE BLACK POWER MOVEMENT* (Peniel E. Joseph ed., 2006).

<sup>17</sup> See generally Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984), for a critique of a distinction between the two realms.

shifts in focus, highlighting the contingency of the law-creation process.

As an initial matter, the new civil rights history departs from the old by displacing the Supreme Court, *Brown v. Board of Education*, and the NAACP's desegregation strategy. Decentering the usual actors means, of course, looking to new ones. Scholars writing the new civil rights history broaden the definition of legal actors from judges and lawyers to government officials, social movement organizations and participants, laypeople, and clients. The law does not change because courts make decisions. It changes because people think there is a problem that the law might solve. Those affected discuss it informally among themselves or with growing confidence and agitation in social movements and organizations. They call upon lawyers to help them. The lawyers discuss the problem with their clients and their colleagues, they read widely in law reviews, and they call on their old friends on law faculties. They write complaints and briefs; they appear in court. Only then do the judges come into the picture. And even then, judicial opinions are not the last word. They provide new and different resources from which all of these actors may, or may not, draw.

Part and parcel of this displacement of the traditional road-to-*Brown* story is a new starting point for the historical narrative. The old narrative looked backward from *Brown* to reconstruct a particular path to a particular outcome. In contrast to such a retrospective approach, the new civil rights history largely proceeds prospectively. It starts with a variety of actors at a variety of moments in what Professor Jacquelyn Dowd Hall has called "the long civil rights movement"<sup>18</sup> and asks what looked possible to those people in those moments. The new civil rights history thus explores what historical actors understood to be their present and what futures they could imagine making.

Scholars have moved outward from the *Brown* narrative in a plethora of ways. In my own work, I explore both the NAACP's efforts outside of the *Brown* context as well as the construction of civil rights within the Department of Justice in the 1940s. I take seriously the claims of African American workers, viewing their appeals to lawyers for help as the first step in the process of legal change.<sup>19</sup> Professor Tomiko Brown-Nagin starts with the civil rights movement in Atlanta, and she explores how Atlantans turned sometimes to the courts, sometimes to legislative bodies, sometimes to the streets, and sometimes to

---

<sup>18</sup> Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1239 (2005). For a critique of that framing, see Eric Arnesen, *Reconsidering the "Long Civil Rights Movement,"* HISTORICALLY SPEAKING, Apr. 2009, at 31, 31-34.

<sup>19</sup> See generally GOLUBOFF, *supra* note 3; see also generally LOVELL, *supra* note 3; Lee, *Hotspots in a Cold War*, *supra* note 3.

negotiation to achieve their civil rights goals.<sup>20</sup> Professor Thomas Sgrue shifts focus from Jim Crow in the South to Jim Crow in the North.<sup>21</sup> Professor Sophia Lee moves the emphasis from courts to administrative bodies like the National Labor Relations Board and the Federal Communications Commission to explore how lawyers presented their arguments in those fora and how administrators themselves conceived of discrimination and equality.<sup>22</sup> Professor Serena Mayeri explores the intersections between race-based civil rights and sex-based civil rights.<sup>23</sup> Professor Mark Brilliant moves beyond the black-white paradigm of civil rights, describing how multiple minority groups pursued reform in California.<sup>24</sup> And Professor Anders Walker focuses on the civil rights conceptions of white moderates rather than African Americans.<sup>25</sup>

Even as these and other new civil rights historians turn in many directions beyond the Supreme Court, one trend in particular is clear: lawyers are key. Of course, scholars of the old approach had discussed lawyers too. Most prominently, Tushnet placed the NAACP, and especially Marshall, at the center of his civil rights history.<sup>26</sup> But he discussed these lawyers as the agents of civil rights change without much analysis of the legal consciousness of the people they represented. Clients played only small roles, and information, ideas, and consciousness almost always flowed from the lawyers to the clients. Moreover, the lawyers who received the most attention in the past were those most directly related to the *Brown* narrative — those in the NAACP's national legal department and especially those directly involved with school desegregation litigation.

It is not *that* the new literature discusses lawyers, then, but *how* it does so that marks innovation. In the new civil rights history, lawyers — many and diverse lawyers — serve as intermediaries. The new field thus responds to a call Professor Hendrik Hartog made over twenty-five years ago to wed social and legal history by exploring the lived constitutional experiences of laypeople.<sup>27</sup> Recent civil rights his-

---

<sup>20</sup> See generally BROWN-NAGIN, *supra* note 3.

<sup>21</sup> See generally SUGRUE, *supra* note 3.

<sup>22</sup> See generally Lee, *Race, Sex, and Rulemaking*, *supra* note 3; Sophia Z. Lee, "Almost Revolutionary": The Constitution's Strange Career in the Workplace, 1935–1980 (2010) (unpublished Ph.D. dissertation, Yale University) (on file with the Harvard Law School Library); see also generally PAUL FRYMER, *BLACK AND BLUE* (2007).

<sup>23</sup> See generally MAYERI, *supra* note 3.

<sup>24</sup> See generally BRILLIANT, *supra* note 3.

<sup>25</sup> See generally WALKER, *supra* note 3; see also generally Sophia Z. Lee, *Whose Rights? Litigating the Right to Work, 1940–1980*, in *THE RIGHT AND LABOR IN AMERICA* 160 (Nelson Lichtenstein & Elizabeth Tandy Shermer eds., 2012) [hereinafter Lee, *Whose Rights?*].

<sup>26</sup> See *supra* note 7.

<sup>27</sup> See Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. AM. HIST. 1013, 1032–33 (1987).

torians have heeded that call, and they pick up specifically on a minor strain in Hartog's article that linked lay legal experience with formal legal processes. Constitutional history, Hartog wrote, "requires a perspective wide enough to incorporate the relations between official producers of constitutional law, and those who at particular times and in particular circumstances resisted or reinterpreted constitutional law."<sup>28</sup> Hartog suggested that "[l]awyers' categories, formal legalistic language, [are] important subjects of study, but as translations and as mediations of aspirations and claims, not as the ends of inquiry."<sup>29</sup>

This is where the new field has gone. It practices a history that emphasizes connections between laypeople and formal law — one that understands lawyers as mediators, facilitators, and gatekeepers. Lawyers have their own interests and constraints, but they also interact with myriad other actors in the process of creating legal change. That is not to say that the new literature treats lawyers as ciphers, merely offering courts whatever claims clients press. They choose, reject, shape, and transform those clients and their claims just as those clients and their claims transform and interrupt lawyers' ideas about law and legal doctrine.<sup>30</sup>

The new civil rights history is thus emphatically vertical. It is interested less in legal output at a single level of the legal system than in the movement of consciousness, arguments, and doctrine throughout the process of law creation. Professor Herbert Timothy Lovelace, for example, links the most basic grassroots efforts of civil rights activists — like the Student Nonviolent Coordinating Committee's work in Atlanta in the 1960s — all the way up to the creation of the United Nations's International Convention on the Elimination of All Forms of Racial Discrimination.<sup>31</sup>

Including multiple actors leads recent scholars to identify class and economic issues as critical to the creation of civil rights law. Often beginning from the point of view of everyday African Americans, the new civil rights history transforms scholars' understanding of Jim Crow itself. Jim Crow was not just what the Supreme Court described in *Brown* — a system of state-mandated segregation. It was also a partially public but partially private system of economic exploitation and inequality.<sup>32</sup> This broader definition of Jim Crow, a defini-

---

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1033.

<sup>30</sup> See generally, e.g., BRILLIANT, *supra* note 3; BROWN-NAGIN, *supra* note 3; GOLUBOFF, *supra* note 3; MACLEAN, *supra* note 3; MAYERI, *supra* note 3; SUGRUE, *supra* note 3.

<sup>31</sup> See generally Lovelace, *Atlanta's Image*, *supra* note 3; Lovelace, International Legal History from Below, *supra* note 3. For works exploring legal consciousness among nonlawyers, see generally, for example, CHANA KAI LEE, FOR FREEDOM'S SAKE (1999); BARBARA RANSBY, ELLA BAKER AND THE BLACK FREEDOM MOVEMENT (2002).

<sup>32</sup> See GOLUBOFF, *supra* note 3, at 7.

tion that encompasses economic, material, and private oppressions as much as formal, symbolic, and state-imposed ones, came originally from scholars who wedded labor and African American history. Historians like Professor Eric Arnesen, Professor Robert Korstad, and Professor Nelson Lichtenstein brought civil rights concerns into labor history.<sup>33</sup> Their expansion of the definition of Jim Crow served to undermine the idea of southern exceptionalism. If one understands Jim Crow as a state-mandated system of segregation, then the South and the North may look quite different. (Though as Sugrue and others have recently shown, the difference is perhaps not as great as we used to think.<sup>34</sup>) If one includes economic discrimination and exploitation as part of Jim Crow, then the North and the South are not so far apart.

New civil rights historians build on the work of these scholars not only in their broad understanding of Jim Crow but also in their views of how class concerns have shaped the processes of legal change. Class differences infuse lawyers' relationships with their clients, especially their poor clients. Class status influences how people see the world, what their goals are, what obstacles they think exist to achieving those goals, what they think the law should do, and what they expect from lawyers and judges. If one begins one's inquiry from the perspective of laypeople experiencing a problem they think the law can solve — rather than with a Supreme Court case that solves a stylized and abstracted problem invisibly crafted by lawyers — one is far more likely to see the class-specific nature of many civil rights harms. Indeed, new civil rights historians show how such class-specific claims resurfaced repeatedly over the twentieth century, and how lawyers, administrators, and judges alternately discarded, embraced, and formalized those claims at different moments and in different legal arenas.<sup>35</sup>

---

<sup>33</sup> See generally ERIC ARNESEN, *BROTHERHOODS OF COLOR* (2001); ROBERT ROGERS KORSTAD, *CIVIL RIGHTS UNIONISM* (2003); Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786 (1988). For other sources related to the intersection of the civil rights movement, labor history, and class concerns, see also generally MARTHA BIONDI, *TO STAND AND FIGHT* (2003); KIMBERLY L. PHILLIPS, *ALABAMA NORTH* (1999); ROBERT O. SELF, *AMERICAN BABYLON* (2003).

<sup>34</sup> See generally SUGRUE, *supra* note 3; see also generally BRETT GADSDEN, *BETWEEN NORTH AND SOUTH* (2012); RANDAL MAURICE JELKS, *AFRICAN AMERICANS IN THE FURNITURE CITY* (2006); PATRICK D. JONES, *THE SELMA OF THE NORTH* (2009); TRACY E. K'MEYER, *CIVIL RIGHTS IN THE GATEWAY TO THE SOUTH* (2009); GUIAN A. MCKEE, *THE PROBLEM OF JOBS* (2008); WENDELL PRITCHETT, *BROWNSVILLE, BROOKLYN* (2002); JEANNE F. THEOHARIS & KOMOZI WOODARD, *FREEDOM NORTH* (2003); Matthew D. Lassiter, *De Jure/De Facto Segregation: The Long Shadow of a National Myth*, in *THE MYTH OF SOUTHERN EXCEPTIONALISM* 25 (Matthew D. Lassiter & Joseph Crespino eds., 2009).

<sup>35</sup> See generally BROWN-NAGIN, *supra* note 3; GOLUBOFF, *supra* note 3; MACLEAN, *supra* note 3; RUEEL SCHILLER, *FORGING RIVALS* (forthcoming 2014); SUGRUE, *supra* note 3;

Even as new civil rights histories move beyond the Supreme Court and the headline cases, they nonetheless remain deeply interested in the formal mechanisms of the law and the work product of legal professionals. Professors Serena Mayeri and Christopher Schmidt, for example, emphasize detailed doctrinal analyses in works that simultaneously move beyond the traditional civil rights narrative.<sup>36</sup> More generally, the new literature explores lay rights consciousness, social movement constitutional practices, and formal doctrine in all the myriad arenas in which these forms of law are made, asserted, interpreted, embraced, and excluded. In other words, new civil rights scholars deviate from the old legal scholars by conceiving of law as plural. And they differ from the old social historians by conceiving of legal doctrine as deeply important, both to the actors themselves and to history.

As this description suggests, decentering the Supreme Court does not require losing engagement with legal doctrine. Instead, analyzing doctrine means defining the field of contestation as well as identifying the winning side.<sup>37</sup> The new field analyzes lawyers' efforts at disciplining lay claims and judges' embrace, rejection, and further transformation of such claims as they battle for legitimacy. Moreover, scholars consider these battles not only within formal legal processes but also within political culture and rights consciousness more generally. The new field delineates the multiple interpreters of law, how their interpretations differ, why some interpretations are more appealing to lawyers, why they win over judges, and what consequences follow. In analyzing legal doctrine, then, the new field is as interested in the arguments and interpretations that fell off the proverbial table as in those that made it on.

This interest in losing arguments, paths not taken, alternative histories — call them what you will — leads directly to the new civil rights history's embrace of contingency. Especially in the old legal histories of civil rights, scholars assumed a lot: they assumed that *Brown*,

---

Engstrom, *supra* note 3; Lee, *Hotspots in a Cold War*, *supra* note 3; Lee, *Race, Sex, and Rulemaking*, *supra* note 3; Lee, *Whose Rights?*, *supra* note 25; Reuel Schiller, *Law, Liberalism, and the New History of the Civil Rights Movement*, 61 HASTINGS L.J. 1257 (2010); Reuel Schiller, *Singing the "Right-to-Work Blues": The Politics of Race in the Campaign for "Voluntary Unionism" in Post-War California*, in *THE RIGHT AND LABOR IN AMERICA*, *supra* note 25, at 139; Reuel E. Schiller, *The Emporium Capwell Case: Race, Labor Law, and the Crisis of Post-War Liberalism*, 25 BERKELEY J. EMP. & LAB. L. 129 (2004). For nonlegal histories that also highlight class and economic issues, see generally, for example, ERIK S. GELLMAN, *DEATH BLOW TO JIM CROW* (2012); THOMAS F. JACKSON, *FROM CIVIL RIGHTS TO HUMAN RIGHTS* (2006); EBEN MILLER, *BORN ALONG THE COLOR LINE* (2012); and WENDELL E. PRITCHETT, *ROBERT CLIFTON WEAVER AND THE AMERICAN CITY* (2008). A related literature by political scientists has also engaged these themes. See generally, e.g., ANTHONY S. CHEN, *THE FIFTH FREEDOM* (2009); FRYMER, *supra* note 22.

<sup>36</sup> See MAYERI, *supra* note 3; Schmidt, *Conceptions of Law*, *supra* note 3, at 643.

<sup>37</sup> See, e.g., Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755 (2011).

as it eventually looked, was coming; that the Court was considering it; and that the only question — if there was a question — was which way the Court would decide. The new civil rights history sees far more openness. Scholars raise a plethora of field-expanding questions about how lawyers conceived of civil rights: Would civil rights lawyers pursue change in the courts or political arenas or administrative agencies?<sup>38</sup> Would they pursue education first or employment or voting?<sup>39</sup> Would they use the Fourteenth Amendment's Equal Protection Clause or its Due Process Clause or the Thirteenth Amendment?<sup>40</sup> Would different racial groups pursue different goals through different legal and political strategies?<sup>41</sup> Would simultaneous efforts seeking other kinds of equality — like the push for sex equality — affect race-based civil rights, or vice versa?<sup>42</sup> Would clients and lawyers seek desegregation or equal schools? And which would benefit whom more?<sup>43</sup> The new civil rights history is interested in possibilities as well as eventualities, in multiplicity rather than linearity, in understanding not only what was but also what might have been.

To a considerable extent, then, the novelty of the new civil rights history inheres in its methodological moves. The field takes an expansive approach to the cast of historical actors, the arenas in which they acted, the types of sources that can provide information about them, and the questions one might ask about the past. These methodological expansions are not limited to civil rights history alone. They are part and parcel of, as well as models for, an equally expansive emerging literature in constitutional history generally. Hartog's call for the further integration of social and constitutional history was hardly limited to civil rights history, and the scholarship produced in its shadow has not been so limited. The heralding of the new field of civil rights history, then, is important both in its own right and because it signals the coming of a new constitutional history.<sup>44</sup>

But to think of the new field as making only methodological moves would be unduly narrow. In fact, these methodological choices are deeply intertwined with new substantive and normative conclusions.

---

<sup>38</sup> Engstrom, *supra* note 3, at 1074–75; Lee, *Hotspots in a Cold War*, *supra* note 3, at 330–31; Lee, *Race, Sex, and Rulemaking*, *supra* note 3, at 799.

<sup>39</sup> See generally BRILLIANT, *supra* note 3; BROWN-NAGIN, *supra* note 3; GOLUBOFF, *supra* note 3.

<sup>40</sup> See generally GOLUBOFF, *supra* note 3.

<sup>41</sup> See generally BRILLIANT, *supra* note 3; see also generally BERNSTEIN, *supra* note 14; MARC SIMON RODRIGUEZ, *THE TEJANO DIASPORA* (2011); EMILIO ZAMORA, *CLAIMING RIGHTS AND RIGHTING WRONGS IN TEXAS* (2009).

<sup>42</sup> See generally MAYERI, *supra* note 3.

<sup>43</sup> See generally BROWN-NAGIN, *supra* note 3; SUGRUE, *supra* note 3.

<sup>44</sup> See generally Risa L. Goluboff, *The New Constitutional History: Toward a Manifesto* (Mar. 3, 2013) (unpublished manuscript) (on file with the Harvard Law School Library).

---

---

In changing the methodological approach, the new civil rights history increases historical and legal understanding. It upends much of what scholars once thought about the history of civil rights law and opens up space for alternative conceptions. If the struggle for civil rights historically included politics and law, national offices and local branches, private lawyers and government officials, lay consciousness and professional discipline, then it was not singular in the past and it need not be singular now. The new civil rights history thus explodes myths about how civil rights law must be structured, where it must be negotiated, and who must define it. By showing the complex construction of law in the past, the new field increases our understanding of law creation today as well.

Expanding the field methodologically thus radically changes both the history that emerges and the lessons of that history for the future. The narrowness of the old legal history of civil rights often reinforces the perception that the civil rights framework we got — for good or ill — was the only framework that we could have had. Whatever inequalities have persisted since seem, in this light, either caused by external forces or unintended consequences of inevitable legal doctrines. If civil rights law does not reach private action, or does not recognize material inequality, that is because it cannot. Such a cramped understanding of historical possibilities is in part a function of the longstanding historical emphasis on elites. That emphasis can make law look like an on-off switch: courts either agree with civil rights litigants or they do not. It can systematically distort how historical actors understood what was possible and what was at stake. Such histories can make it difficult both to know what happened and to evaluate its consequences.

All histories are partial, of course. But some omissions — particularly the repeated omissions of the civil rights and constitutional consciousness of laypeople and the ways in which legal professionals transform lay claims into legal doctrine — systematically obscure the law's possibilities. They naturalize the development of legal doctrine. Revealing the plethora of people involved in legal change and the choices various actors made in that process reveals the consequences of those choices for the structure of the law today.

### III. FROM CIVIL RIGHTS LAWYERS TO CIVIL RIGHTS LAW

As must be clear by now, several of the defining characteristics of the new civil rights history are also defining characteristics of *Representing the Race*. It is not especially remarkable that a new book of civil rights history bears a fair resemblance to other recent works in the field. For instance, it is explicitly Mack's project to downplay the Supreme Court, to make lawyers his central figures, and to take a prospective approach to civil rights history. What is more



noteworthy, however, is that even where Mack's project does not explicitly draw on the new field — as scholars often do, Mack engages with some aspects of the field more than others — it nonetheless reinforces many of its primary lessons.

As an initial matter, *Representing the Race* continues the trend of radically decentering the Supreme Court and the traditional *Brown* narrative. Mack keeps the Supreme Court at such a distance that when he describes Loren Miller's high-court argument in *Shelley v. Kraemer*<sup>45</sup> as the "crowning achievement" of Miller's career, he does not mention the case by name in the text and he spends just a single paragraph on it (p. 204). When Mack does, briefly, discuss *Brown*, he skips most of the usual story to zero in on the surprisingly collegial relationship between the NAACP's Marshall and the segregation-defending white southern lawyer John W. Davis (pp. 234–35). In sync with the new civil rights history, Mack resists the magnetism of the Court.

Mack's shift of focus to lawyers — and to a broader swath of lawyers than just those who brought *Brown* to the Court — also places his work in the heartland of the new field. Many, though not all, of Mack's lawyers had ties to the NAACP. But with Marshall as the major exception, Mack's lawyers mostly cooperated with the Association from their own private practices in Philadelphia or Chicago or Los Angeles, not from within the main office in New York. By ranging widely across individual lawyers, Mack highlights the variation within civil rights lawyering that has become a hallmark of the new scholarship.<sup>46</sup>

Finally, Mack follows the new civil rights history's methodology by taking a deliberately prospective approach to his subjects. He begins the book by debunking a backward-looking story Marshall had told about his journey from rejection by a segregated law school to victory in *Brown* (pp. 1–3). "Memory shaded into history, and then into a nation's public recollection of its racial past," Mack laments (p. 3). Mack's goal is precisely the opposite: It is to reconstruct the professional struggles of black lawyers as they experienced them. It is to understand his subjects as "lawyers" — as they understood themselves — rather than to cast them as "civil rights lawyers" from the outset (pp. 3–4).

In these crucial and defining ways, Mack makes the same moves that other scholars in the new civil rights history have recently made. He replaces a focus on the Supreme Court and the *Brown* lawyers with a broad inquiry into black lawyering in the twentieth century,

---

<sup>45</sup> 334 U.S. 1 (1948).

<sup>46</sup> See generally, e.g., BRILLIANT, *supra* note 3; BROWN-NAGIN, *supra* note 3; GOLUBOFF, *supra* note 3.

---

---

and he replaces a retrospective vantage point with the perspectives of those lawyers themselves.

In other ways, however, Mack does not follow the lead of the new field. *Representing the Race* is explicitly and self-consciously biographical. The fact that it is a collective biography broadens the lens from the singular, but lawyers' lives remain at the center. Perhaps as a result, and in contrast to much of the new field, Mack's main arguments do not concern lawyer-client relationships, the role of class in those relationships, the construction of the law, or the contingencies that mark legal change. Yet even where Mack does not explicitly engage the new field, much of what he has to say reinforces its central themes.

Most fundamentally, Mack's project differs from much of the new civil rights history in how he writes about lawyers. Where the new history places lawyers in conversation with everyday people, social movement organizations, and social movements, Mack places them in conversation with other lawyers and judges. In a way, this emphasis harkens back to older methodological approaches. Though Mack might intend his references to identity to follow recent cultural trends in legal history outside the field of civil rights, his approach is more closely aligned with conventional legal biography. Mack sometimes explores lawyers' relationships with lay African Americans (more on that in a moment), but the book's overall effect is to reprise a kind of horizontal history. Like Supreme Court historians and community historians, the book fixes its gaze on one set of actors in the process of civil rights change. Indeed, the lawyers here have even freer rein than those in Kluger's or Tushnet's works. One of Mack's central points is that these lawyers equated their own professional benefit with that of "the race" as a whole. And though Mack renders that equation problematic, he also makes it his focus. For prior scholars, the lawyers are agents only lightly encumbered by their principals; for Mack, the lawyers *are* the principals.

For most of the book, the paradox of representation attunes lawyers not to particular African Americans but rather to other legal professionals or the black race writ large or both. Even when Mack does put lawyers in conversation with specific lay actors, the conversation usually flows only in one direction. Take the description of Marshall's grassroots organizing. The goal of that organizing, as Tushnet described years ago, was to gain support for the NAACP's legal agenda.<sup>47</sup> Mack builds on that description, showing how, as a young lawyer, Marshall had close ties to his black constituency, "patiently nurturing local chapters, taking their measure, and deciding which

---

<sup>47</sup> TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 7, at 30.

places were most likely to support a legal challenge to segregation” (p. 258). For Mack, like for Tushnet, the purpose of Marshall’s client contact was not to identify what problems African Americans in a particular place faced and find ways to challenge them in court, but rather to find support for his organization’s own agenda. I say this not as a criticism of Marshall or the NAACP — they were entitled to their own views about the legal cases they would bring — but rather as the basis for an observation about representation. It is inherent in the nature of lawyering that lawyers’ specialized knowledge creates gaps between what clients want (in terms of both ends and means) and what lawyers think the law can or should do. And it is not clear, as Professor Derrick Bell noted more than thirty-five years ago, that the lawyers’ choices always serve either their clients or the cause of greater equality particularly well.<sup>48</sup>

In contrast to many of the new civil rights scholars — and despite Mack’s discussion of the lawyer-race tension that the representation paradox sometimes created — Mack does not take it as his project to analyze this lawyer-client tension too extensively. That said, when he does delve into the relationship between lawyers and clients, the results are both illuminating and telling. Mack’s stories reinforce how lawyers do their work in conversation with lay actors and with the lawmaking process itself. When discussing Miller’s unusual trajectory from Communist critic to legalist civil rights lawyer, Mack shows how Miller’s transformation came out of the practice of law itself. Legal practice brought Miller into contact with clients, with civil rights claims, and with civil rights law. Though Mack emphasizes a high-profile courtroom trial as pivotal (pp. 200–01), his description of Miller’s journey suggests that it was also those contacts with clients — with real people complaining of real harms for which Miller wanted to find legal redress — that fundamentally changed Miller’s orientation toward lawyering (p. 197). Such multidirectional influence — from laypeople to lawyers as well as vice versa — is a major theme of the new civil rights history.

Other stories reinforce less halcyon lessons about relationships between individual African Americans — most crucially clients — and lawyers. Take the discussion of Houston’s handling of Crawford’s murder trial (pp. 83–110). Though Houston celebrated the life sentence a black lawyer achieved for a black defendant in a southern white courtroom, contemporaries thought Houston had placed his own status above his client’s well-being. Mack concludes that being “treated like a white man” in Loudoun County meant “adopting

---

<sup>48</sup> See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

the consensus views of the Loudoun lawyers on the outcome of the case” — guilt for Houston’s client — and “suppressing the racially divisive issues that once seemed to define the meaning of the trial” — exclusion of black jurors and other forms of overt race discrimination (p. 108). Mack thus follows the new civil rights history by bringing Crawford into the picture, discussing how Crawford’s (and a few other clients’) interests may have diverged from those of the lawyers, and narrating the contemporary consequences of Houston’s racial performance. He diverges from the new field, however, by not making this aspect of the problem of representation — of actual representation in the lawyer-client relationship — particularly central to his project. When Mack writes in an analytic register, representation is a general problem of lawyers and “the race,” or (as during the sections on the Depression) lawyers and segments of “the race” (pp. 179–80). He portrays without deeply analyzing the principal-agent problem inherent in representation. Even so, stories like this one reinforce that it was not only that particular lawyers might or might not represent the race metaphorically; they might or might not represent the client literally.

A similar pattern can be seen in the book’s relationship to class concerns. On the one hand, Mack generally prefers the lens of professionalism to the language of class and class conflict. Economic issues, specifically the question of what socioeconomic segment of the race black lawyers represented, do surface in the book — most notably in discussions of the Depression era — but their appearances are only occasional, sporadic. And even when Mack recounts debates among lawyers and leaders about the class implications of lawyering, he himself does not speak in the language of class. As a result, the book often submerges the kinds of issues that the new civil rights history tends to highlight. Mack generally does not discuss the extent to which professionalism — and especially the felt need to approximate whiteness — was a function of class status, either real or performed.

On the other hand, one can read the entire book as a treatment of the fragile class position of black lawyers. Mack details their economic strivings and the racial performances in which they engaged in the service of those strivings. Mack’s stories accordingly reinforce the sense one gets from the new literature: that class concerns — of lawyers, clients, and social movement organizations — were enduring and ever present in the history of civil rights, and that they deeply influenced the path and shape of civil rights law. Before *Brown*, black workers and some lawyers were concerned with material equality.<sup>49</sup> In part because of the very different class positions of lawyers and work-

---

<sup>49</sup> See generally, e.g., GOLUBOFF, *supra* note 3; MCNEIL, *supra* note 9. Mack discusses these concerns in an earlier work. See generally Mack, *Rethinking Civil Rights Lawyering*, *supra* note 4.

ers, lawyers did not ultimately pursue those claims; the resulting civil rights doctrine that the Court embraced in *Brown* largely erased them.<sup>50</sup> In the post-*Brown* era, economic arguments resurfaced and made greater headway in administrative arenas.<sup>51</sup> In the 1960s and 1970s, movement participants, clients, and some lawyers also reworked and reasserted such claims with varying degrees of success.<sup>52</sup>

An abiding theme of this new work has been the often large and consequential gap between lawyers and clients. Scholars locate that gap in class differences, as well as life experience, legal training, geography, institutional location, and more. Scholars point out that it was not simply that lawyers represented black clients in courtrooms. It was also that lawyers served as potential and often real gatekeepers to those courtrooms. They decided which facts would get hearings, which clients would get NAACP support, which cases would be appealed, and which arguments would be made.

Mack does not explicitly analyze class in these terms. But his detailed treatment of the economic and professional concerns of black lawyers suggests that the legal consequences of the class position of black lawyers was even more pronounced than previously recognized. Professional concerns — generated by the paradox of representation — might have competed with or replaced concerns for client or movement goals. That was the charge contemporaries leveled against Houston in the Crawford case. If black lawyers systematically submerged client concerns and challenges to Jim Crow in the name of professional advancement, the consequences would be dramatic. Though the paradox of representation could have encouraged black lawyers to take on the interests of less elite African Americans in order to maintain their claim to authenticity or representativeness, much of *Representing the Race* suggests otherwise. It suggests instead that the paradox pushed black lawyers to articulate claims in ways that seemed more legitimate to white legal professionals but less effective to African Americans. One effect of Mack's articulation of the paradox, then, is to add another dimension to the gap between lawyers and clients. Even if, as Mack suggests, black lawyers made strategic choices believing that their own advancement would redound to the benefit of clients and the race as a whole, Mack's stories reinforce the new civil rights history's claims that such choices channeled, transformed, and perhaps limited civil rights doctrine and the shape of civil rights law.

---

<sup>50</sup> See, e.g., GOLUBOFF, *supra* note 3, at 238–70. For another economically focused account of the pre-*Brown* years, see generally Engstrom, *supra* note 3.

<sup>51</sup> See Lee, *Hotspots in a Cold War*, *supra* note 3, at 328–30.

<sup>52</sup> See generally, e.g., BRILLIANT, *supra* note 3; BROWN-NAGIN, *supra* note 3; CHEN, *supra* note 35; FRYMER, *supra* note 22; MACLEAN, *supra* note 3; MAYERI, *supra* note 3; SUGRUE, *supra* note 3; Lee, *Race, Sex, and Rulemaking*, *supra* note 3; Lee, *Whose Rights?*, *supra* note 25.

One can see how *Representing the Race* would bolster such conclusions, but Mack says little about the possible effects of lawyers' choices on the history of civil rights law. Indeed, one of the most significant differences between *Representing the Race* and the new civil rights history is that the book is not particularly engaged with conceptions of civil rights *law*. It is engaged with civil rights *lawyers*. Mack barely mentions Houston's, Marshall's, or Carter's growing and changing ideas about legal strategy and legal doctrine — or the real changes in doctrine they produced during this period. Mack's focus on the lawyers' lives, their professional aspirations, and their courtroom performances all but removes the lawyer from contestations over legal doctrine. Indeed, the book barely discusses doctrine at all. Law in Mack's book largely takes the form of lawyers' professional strategies and self-presentations during trials and hearings. Broadening the definition of "law" in this way comports with the generally pluralistic approach of the new civil rights history to ideas about law. But limiting law to the lawyers' professional concerns and courtroom performances misses much of the richness of the conception of law in the new field. Notably, the book barely suggests that trials and appeals might not only make or break lawyers' careers but also serve as arenas in which actors fight over legal arguments and shape how future arguments will be received.

In other words, Mack never brings his story full circle to show whether and how the paradox of representation shaped, or failed to shape, contestations over civil rights law. This is not to say that there is no contingency here. The lawyers' stories frequently highlight the fortuity that affected the career trajectories of black lawyers — that a certain sympathetic judge would show up in a future case, or a friendly white lawyer would refer a new client (p. 76). But the book's contingency operates at a high level of specificity — it is about the making and breaking of the reputations and careers of the lawyers. It is not Mack's project to ask whether or how this paradox of representation opens up more profound contingencies for civil rights generally.

Mack does occasionally venture into the various ways lawyers thought about law, but his forays are both marginal and partial. Somewhat ironically, the book most explicitly links biography to legal doctrine in its discussion of Murray (pp. 207–33). Mack thus connects lawyers to law not in the context of racial civil rights — the book's main preoccupation — but in the context of sex discrimination (p. 208). In addition, Mack does not quite connect this law creation to the representation paradox itself. To the extent that courtroom performance played a role in Murray's development, it was as a defendant before she attended law school rather than as a lawyer herself (pp. 222–25). Murray's doctrinal concerns were rooted far more in her general self-presentation, her personal anxieties, and her experiences of employment discrimination than in a paradox about her lawyering in

the courtroom or elsewhere (pp. 232–33). Though her story suggests productive links between the personal and the doctrinal, it does not suggest how the representation paradox specifically played out in legal understandings and strategies.

The Murray discussion is also notable because it shows that even when Mack does engage with conceptions of law, his treatment is somewhat cursory. Mack gives short shrift to a recent explosion of illuminating writing on Murray's linkage of race and sex discrimination by Professors Serena Mayeri and Nancy MacLean.<sup>53</sup> More specifically, in discussing Murray's arguments against segregation, Mack suggests that Murray was ahead of her time by fifty years in turning to the Thirteenth Amendment (pp. 230–32). However, as I have described elsewhere, when Murray was writing in 1944, the Thirteenth Amendment was very much in play among civil rights lawyers in the Department of Justice, it was the basis for some of the claims in the NAACP's racially restrictive covenant cases a few years later, and it was frequently invoked by African Americans as a basis for their rights.<sup>54</sup>

\* \* \*

Mack's emphasis on lawyers rather than law does not mean that his work lacks salience for our understanding of civil rights law. Scholars have emphasized how different actors in the legal process presented, argued, and imagined alternatives. In light of such arguments that law was malleable, dynamic, and contested, one might wonder whether black lawyers' courtroom performances, and their relationships with each other and the white bar more generally, opened up new possibilities and paths or closed them. Or rather, which paths they made more likely and which less.

To the extent that Mack's stories suggest answers to these questions, they readily reinforce the new civil rights history's conclusions about the deeply consequential and constantly renegotiated distance between lawyers and their clients. The new civil rights history views such questions as critical, asking not only how lawyers' self-representation affected how they represented clients, but also what cases they took, what legal arguments they understood to be available and promising, and what arguments they ultimately made. In answering such questions, the difficulty of separating out the lawyers' own interests from their perceptions of the interests of "the race" has become an enduring theme. When Mack describes the self-regarding na-

---

<sup>53</sup> See generally MACLEAN, *supra* note 3; MAYERI, *supra* note 3; see also generally GLENDA ELIZABETH GILMORE, *DEFYING DIXIE* (2008).

<sup>54</sup> See GOLUBOFF, *supra* note 3, at 141–73.

ture of pursuing professional success as a lawyer, he magnifies and deepens that theme. What the collective biography suggests is that these lawyers — and likely any lawyers — were far more self-interested than previous scholars have shown.

Mack shies away from such conclusions. He offers a deeply sympathetic portrait of his subjects. He largely describes the dilemmas of black lawyers as they understood them, without assessing their effect on the trajectory of legal consciousness and legal change. Mack takes pains to highlight the systematic and abiding nature of the paradox of representation. It is not his project to highlight the systematic and abiding power of lawyers. But that is also a consequence of his work. Though it was not necessarily his intent, Mack has augmented our understanding of how civil rights lawyers not only practiced law but also made it.