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Conceptions of Agency in Social Movement Scholarship: Mack on African American Civil Rights Lawyers [comments]

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Conceptions of Agency in Social Movement Scholarship: Mack on African American Civil Rights Lawyers

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MACK, KENNETH W. 2012. *Representing the Race: The Creation of the Civil Rights Lawyer*. Cambridge, MA: Harvard University Press. Pp. 330. \$35.00 cloth.

*This essay examines the theory of individual agency that propels the central thesis in Kenneth Mack's *Representing the Race: The Creation of the Civil Rights Lawyer* (2012)—namely, that an important yet understudied means by which African American civil rights lawyers changed conceptions of race through their work was through their very performance of the professional role of lawyer. Mack shows that this performance was inevitably fraught with tension and contradiction because African American lawyers were called upon to act both as exemplary representatives of their race and as performers of a professional role that traditionally had been reserved for whites only. Mack focuses especially on the tensions of this role in courtrooms, where African American lawyers were necessarily called upon to act as the equals of white judges, opposing counsel, and witnesses. Mack's thesis, focused on the contradictions and tensions embodied in the performance of a racially loaded identity, reflects the influence of postmodern identity performance theory as articulated by Judith Butler and others. Mack and others belong to a new generation of civil rights history scholars who are asking new questions about contested identities related to race, gender, sexuality, and class. This essay offers an evaluation of this new direction for civil rights scholarship, focusing especially on its implicit normative orientation and what it contributes to the decade-old debate over how to conceive of agency in social movement scholarship.*

INTRODUCTION

In his book *Representing the Race: The Creation of the Civil Rights Lawyer*, leading legal civil rights history scholar Kenneth Mack offers a new focus for the study of how African American civil rights lawyers changed US society. Mack proposes that, across many generations, civil rights lawyers who possessed an African American identity performed in a role—most often in courtrooms but sometimes in other public forums as well—in which they were called upon to act as exemplary African Americans and at the same time perform in a role traditionally reserved for whites only. In each of the chapters of his book, Mack develops this thesis by presenting compelling narratives of

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the “lives in the law” of a diverse set of prominent African American civil rights lawyers. His subjects’ professional lives span a period starting with the late nineteenth century and ending with the civil rights era of the 1960s, thus giving the book a broad reach and ample historical basis to support the thesis just described.

Mack sees his approach as standing in contrast to past scholarship on civil rights history that focuses on resurrecting the collective agency of an oppressed people; as he explains, he is declining “the invitation to recover the agency of an oppressed people living under slavery and segregation—a project that has nourished several generations of race-relations historians” (Mack 2012, 3).¹ But Mack, too, is seeking to “recover the agency” of persons living under conditions of oppression. He often highlights the heroic agency of the individuals he studies, as when, to take just a few of many possible examples, he describes how Philadelphia lawyer Raymond Pace Alexander had, in his first two years of law practice, already “rack[ed] up a string of improbable court room victories” (12) or how in the 1930s NAACP litigator Charles Hamilton Houston and other lawyers “had the courage to come to court not knowing whether that simple act would inspire violence” (266) and realized that in doing so they were placing their own lives perhaps “in greater danger” than their clients’ (268). Mack’s point, which I want to suggest is both an important historiographical turning point and a provocative challenge that needs much future attention from civil rights history scholars, is that the *individual* agency of these civil rights lawyers, not only their role as contributors to a collective movement, needs more foregrounding in civil rights history.

I argue in this essay that Mack’s approach resonates with identity performance theory. He is, of course, not the only prominent writer to focus on professional identity and civil rights lawyering; one immediately thinks of Tomiko Brown-Nagin’s prize-winning work contrasting the lawyering approaches of Atlanta’s African American civil rights bar over changing historical periods (Brown-Nagin 2011). But Brown-Nagin remains more focused in her book on the connections between individual lawyers’ professional performances and their work within social movement organizations. In *Representing the Race*, Mack is more intent on examining his subjects’ everyday professional practice lives. In his earlier work, as I discuss below, Mack has traced the relationships between lawyers’ ideological commitments and their particular forms of social movement activism; thus he by no means overlooks his subjects’ involvement in social change movements. But in *Representing the Race* he shifts his focus to view in detail the individually experienced, everyday professional lives of the lawyers he considers. With this analytic shift, Mack brings to the fore the debates about how to conceive of agency in social movements scholarship. Mack both describes the past and implies an appropriate frame for assessing civil rights activism going forward (Handler 1992).

1. Unless otherwise noted, page numbers within parenthetical citations refer to *Representing the Race*. Mack adds more detail to his critique of social historians’ enthusiasm about recovering the agency of “racially subordinated peoples” in subsequent pages and cites Walter Johnson as an important influence on him on this point (6, 274 n11). Johnson warns: “I think that we must admit we are practicing therapy rather than politics; we are using our work to make ourselves feel better and more righteous rather than to make the world better or more righteous” (Johnson 2003, 113, 119). As I discuss below, I believe Mack shares some of Johnson’s skepticism about the do-good impulses underlying politically progressive civil rights scholarship and that he accordingly seeks to make some adjustments through the theoretical stance he takes.

In this essay I first discuss identity performance theory and offer my interpretation of Mack's thesis in *Representing the Race* through this lens. I then briefly review the decades-old debate over how to conceive of agency in social movement scholarship and suggest that Mack's approach in *Representing the Race* helps resolve this debate, showing that understandings of agency in social movement theory can incorporate both traditional and postmodern insights into how social change actors manifest agency to bring about change through their work. I then trace the trajectory of Mack's body of scholarship leading to this book, noting his longstanding interest in studying identity performance in relation to civil rights lawyering, and highlight just a few of many possible examples from his book to illustrate this focus in *Representing the Race*. Finally, in the essay's last section, I raise, in very preliminary fashion, questions about what Mack's theoretical turn means for legal civil rights historiography going forward. I conclude that both lines of scholarly inquiry emphasizing collective agency and lines embodying Mack's focus on individual agency are important going forward and that scholars with these respective commitments should continue to engage in conversation with each other as work in the field proceeds.

IDENTITY PERFORMANCE THEORY AND THE THESIS OF *REPRESENTING THE RACE*

In contemporary legal academia, racial identity performance theory has informed the work of many contemporary theorists. Devon Carbado and Mitu Gulati have developed new understandings of race discrimination in the workplace and elsewhere (Carbado and Gulati 2000, 2013). Many other scholars use it for wide-ranging types of inquiry as well; Ian Haney López and Audrey McFarlane are two examples but many others could be cited (Haney López 2006; McFarlane 2009; see also Lau 2010). In other academic disciplines, left-leaning thinkers have spun complex and influential political work from the starting point of identity theory, while others have raised cautions about this approach, sometimes by way of general acceptance with some qualifications and sometimes by way of stronger rejection (see, e.g., Handler 1992; Brown 1995; Nussbaum 1999; Ford 2002). It thus would be hard for any contemporary scholar to ignore identity theory in writing about race. Mack has over time developed his own perspectives and contributions in this area.

No one could dispute that questions of race and identity have long been central to Mack's work. Mack has written in great detail about African American interwar civil rights lawyers' self-conceived mission of advancing the race, posing this interpretation against that of prior scholars who had portrayed these lawyers as primarily pursuing a so-called legal liberalist agenda focused on gaining formal equality rights in courts (Mack 2005).² After Obama's election, identity politics became somewhat more

2. Mack defines this term as follows:

[Legal liberalism's] core elements have become familiar: courts as the primary engines of social transformation; formal conceptual categories such as rights and formal remedies such as school desegregation decrees, as the principal mechanisms for accomplishing that change; and a focus on reforming public institutions (or, in some versions, public and private institutions without much distinction) as a means of transforming the larger society. (Mack 2005, 258)

complicated: Were we really suddenly in a postracial society as some law professors optimistically suggested (Liptak 2009)? Veteran racial justice advocates well knew that no such thing was true, but Obama's election did lead to a shift in the politics of race, and arguably in scholarship about race, in complicated ways. Mack's work has started to include more emphasis on the impossibility of authentically "being" of a particular race; this, indeed, is one of the most fascinating themes of *Representing the Race*. Mack shows that the lawyer-activists he writes about were not able to reside easily in the socially constructed identity classifications thrust upon them.

One of the most extreme examples, from my favorite chapter, involves Mack's portrayal of the feminist racial justice advocate and theoretician Pauli Murray. Because of her family background, Murray felt biracial in identity. She was also female in a highly sexist legal culture. This sexism, which pervaded white society, extended to the African American legal community. Thus Murray faced sex and race as two disprivileging aspects of identity. She also experienced the special compounding effects of the interaction between gender and race in the legal profession, where being both black and female made professional success especially improbable during her historical period. On top of this, Murray was transgendered. She thus felt that she straddled both sides of *two* identity lines, involving both race and gender. As a transgendered person, Murray faced forms of discrimination and oppression against those with queer identities that were scarcely even recognized during her lifetime (207–33). Mack does a wonderful job of sympathetically portraying the nuances of Murray's complex relationship with all these identity issues. He comes back to this theme at the close of his book, ending with a reference to President Obama's biracial identity. Mack notes the issues related to representativeness and identity that continue in race politics in the United States today (269).

In short, Mack's work reflects a longstanding, explicit interest in questions of identity, even though the ways in which he has been interested in this topic have arguably changed somewhat over time. In *Representing the Race* Mack both offers historical description and implicitly suggests forward-looking prescriptions for the most effective ways to bring about social change looking forward. Mack's description is focused heavily on the contradictions and irreconcilable pressures of identity performance in the deeply problematic context of US race relations and Mack's prescriptive implications, looking forward, are closely related to his descriptive account. In both description and implicit prescription, Mack highlights the operation of individual agency in navigating the complex, contradictory aspects of subordinated identity. I will suggest that this is an intervention with important implications for legal civil rights history scholarship going forward.

Risa Goluboff's review of *Representing the Race* in the *Harvard Law Review*, followed by a brief, highly illuminating reply from Mack, allows me to start my discussion precisely where this dialogue ends. In a nutshell, Goluboff lays out with great synthetic skill several main traditions of civil rights history scholarship in relation to which Mack's book must be located. The first is what she calls the "old" tradition, which has two strands: one a heavily court- and case-centered approach, exemplified by work such as Michael Klarman's (Klarman 2004), and the other the perspective of social historians, which tends to give little attention to law and instead "focuses on the civil rights movement on the ground in particular communities." Goluboff then describes a third

tradition, which she dubs the “new civil rights history.” This approach, she explains, “has deliberately and self-consciously challenged the first literature by drawing on the second.” It is, in other words, a synthesis of the two “old” approaches, using “the sources and analytics of both legal and social history.” This new civil rights history “attempts to capture what happens before, behind, after, in front of, and with little relationship to the Supreme Court,” rendering it “less linear” and “more multiple.” It also explores how ideas “cross the boundaries of space, class, race, and time” (Goluboff 2013, 2319).

Goluboff proceeds to analyze the characteristics of this new civil rights history in a summary that will surely be on the assigned reading list of many legal history seminars. At the end of this analysis, she suggests that Mack’s work fits into this “new” civil rights history genre, but with some differences, such as that Mack places his lawyers mostly “in conversation with other lawyers and judges.” Goluboff sees this as an emphasis that “hearkens back to older methodological approaches,” and differs from much of the new civil rights history, which tends more often to “place . . . lawyers in conversation with everyday people, social movement organizations, and social movements” (2329).

In his response to Goluboff, Mack agrees with her contrast between the two “old” schools of civil rights historians, but argues that what Goluboff calls the “new” school is today no longer so new. Instead, he argues, that approach involves criticisms that “most historians internalized” long ago and have now “moved beyond” (Mack 2013, 259). Mack sees himself as one such historian who is working in a genre that springs from newer theoretical work from the 1990s, which, he explains, expands civil rights history beyond boundaries of race, nation, and sexualities and critiques “older law and society frameworks.” Thus, his work seeks to draw from “more recent intellectual currents” and to respond to questions produced by “a globalizing world of shifting racial identities, contested sexualities, and new immigrant groups.” Mack defines the new questions central to his book as “how law (in this case the legal profession) and identity (in this case, the identity of a black lawyer) help construct one another” (260).

In short, there can be little question that Mack intends, in *Representing the Race*, to be dealing with identity in the context of law and legal professionalism and that in doing so he is drawing from theory emerging in the 1990s that addresses race, gender, sexuality, and other aspects of contested social identities. It thus makes sense to return to the classic identity theorists of the 1990s for insight into the theoretical underpinnings of Mack’s work. I use Judith Butler’s work for this purpose, since her exploration of identity performance theory in *Gender Trouble* (1990) helped kick off the 1990s explosion of theoretical thinking about identity performance in a number of disciplines, including law. To be sure, Butler’s theory arises primarily out of her work on gender and sexuality while much of Mack’s work is about race—though also with a strong consciousness about gender and sexuality. As Mack notes in his response to Goluboff, it is precisely this kind of identity theory work, which seeks to span and cross identity categories, that most interests him. Thus a brief review of Butler’s classic can help elucidate the general theoretical orientation Mack cites as influencing his work. Moreover, as I discuss later in this essay, thinking about Mack through the lens of Butler allows me to frame a more general comparison of traditional left-leaning versus postmodern approaches to questions of agency in social movements scholarship.

Butler lays out her theory of identity performance—and her attempt within that theory to “locate agency”—in *Gender Trouble: Feminism and the Subversion of Identity*

(1990, 25, 32–34, 141–47). She starts with the idea that there is no a priori self with a stable, essential identity prior to the many, often contradictory, social identities that define it. Similarly, Mack repeatedly states in *Representing the Race* that there is no such thing as an essentialized “African American” lawyer, or leader, or civil rights activist. Rather, the subject under analysis—who for the time being I will assume is male—is under pressure, due to his being socially constituted as African American, to act as an exemplary representative of his race. At the same time, he is under pressure, due to his role as a lawyer, historically “raced” white under conditions of racial subordination, to act in a manner generally off-limits to African Americans in a society pervaded by Jim Crow. Mack focuses especially on the tensions inherent in such a lawyer’s courtroom performances, where the role of lawyer necessarily required him to act as the social equal of whites, including judges, opposing lawyers, and the witnesses he questioned. Conduct that in any other venue would expose an African American man to great danger was mandatory in the courtroom in order to fulfill the lawyerly role.³

As I have already noted, among Mack’s many virtues as a writer is his power of empathetic identification. Again and again, he captures the dilemmas of the figures he studies as they experience the competing demands of performing in the role of representative African American, on the one hand, and of lawyer in a society in which this position has traditionally been reserved for whites only, on the other. Although he focuses on men’s courtroom role, for women the lawyering role typically involved behind-the-scenes, office-focused work. Mack shows how the two key African American women he studies, Sadie Alexander and Pauli Murray, have an even more complex burden, involving both race and gender. They must perform within the role of traditionally white male lawyer and as gendered female, sometimes with deleterious, even tragic, consequences. This was especially true for Murray, who experienced great isolation and, eventually, virtual exclusion from the world of civil rights activism in which she so clearly deserved recognition and a leadership role (256).

At this point, someone who has not read the book may take Mack’s narrative to be a fairly pessimistic account. African American lawyers faced a double burden and they strained under it. Striving for success in bringing about victories for their clients was far more difficult than it should have been. Opportunities for professional recognition that should have been theirs were not there to nearly the degree deserved. But this is far from the point of Mack’s narrative. Despite eschewing the hagiographic celebrations of agency that he hints mar some civil rights scholarship (3), Mack’s narrative is powerfully celebratory itself. He is enormously admiring of most of the figures whose lives he recounts, as well he should be for all the reasons he finds these particular lives worthy of his special study. Why? Because, he implies, these lawyers brought about change by virtue of their very performance of the contradictions of their roles.

But why should such individual, small-scale acts be viewed as a significant driver of change? This question puzzled me at first; I even wondered if Mack’s thesis held together without an explicitly articulated link between the level of individual action

3. This approach is similar to that of Carbado and Gulati (2013); Mack is describing in a historical context the burden of carrying a subordinated identity in a majority-controlled environment. Persons trapped within these contractions face burdensome demands that are often contradictory. This, as Carbado and Gulati remind in a contemporary context, is part of what constitutes the experience of discrimination.

and broader-scale social trends. Then I realized that the answer to this question lies in identity performance theory. To see this, we need to return to Butler's conclusion in *Gender Trouble*, where she seeks to solve the problem of "locating agency" in a postmodern perspective. In Butler's view, agency is not about free autonomous beings making choices that cause consequences; instead, agency is located in the process of performing identity (Butler 1990, 145). Applied to Mack's lawyers, these are persons who must operate in "certain rule bound discourses" that "govern the intelligible invocation of identity": they operate in a context where they must "perform race."

Where, then, is the possibility of agency that Butler promises her theory will show? Butler argues that agency resides in the spaces of contradiction, incoherence, and impossibility, which are everywhere when it comes to identity performances:

[I]t is only within the practices of repetitive signifying that a subversion of identity becomes possible. The injunction to be a given [identity] produces necessary failures, a variety of incoherent configurations that in their multiplicity exceed and defy the injunction by which they are generated. . . . The coexistence or convergence of such discursive injunctions produces the possibility of a complex reconfiguration and redeployment; it is not a transcendental subject who enables action in the midst of such a convergence. There is no self that is prior to the convergence or who maintains "integrity" prior to its entrance into this conflicted cultural field. There is only a taking up of the tools where they lie, where the very "taking up" is enabled by a tool lying there. (Butler 1990, 145)

Applying this theory to Mack's problem of understanding the historical role of prominent African American lawyers practicing in the Jim Crow era and its immediate aftermath leads to an articulation of a theory of agency something like this. These lawyers necessarily practiced within identity locations that were incoherent; they were required by discursive rules both to perform one side of an identity dualism or hierarchy—that is, black—but also, as Mack repeatedly and convincingly emphasizes, to act within the role of the favored identity in this hierarchy—that is, white. This incoherence, repeatedly acted out by many lawyers as Mack graphically depicts, created opportunities for subversion, offering possibilities for "complex reconfiguration and redeployment" (Butler 1990, 145). The lawyers Mack studies, through their professional work itself, exploited these possibilities in widely divergent but significant ways. Thus Mack's story is not about these lawyers overcoming racial subordination; instead, Mack is saying that these lawyers challenged traditional racial identity configurations using the very tools of racial identity performance that enabled them to perform at all. In other words, they used those tools, provided by a system of subordination, to rework the terms of that subordination.

This, I think, helps explain Mack's implicit theory of change as it emerges from the narrative emphasis of his book. It explains why individual professional practice arrangements and examples lie at the heart of Mack's most recent project. It also explains why he does not focus his analysis on the intermediate level between individual action and social change: Mack does not have to show that individual lawyers' practice lives changed broader social attitudes because his theory assumes it. Identity performances that played with cultural incoherence at sites of contradiction—such as whiteness/blackness in the professional lawyerly role—destabilized cultural understandings of race

in unpredictable ways that are difficult to pin down but can be assumed to have produced change.⁴ Mack does not trace how that change occurred because that is a different research project. He leaves that for others to do—as, indeed, others have previously done in works focusing on white views on race relations.⁵ Equally important, of course, are research questions focusing on changing perceptions within various African American communities, which might include the African American bar, lay persons, activists, and others. Where did change occur and how did those processes take place? All of these are also important empirical questions, but Mack need not take them on if his focus lies elsewhere. In future work, it may be helpful for Mack to clarify this, if only to avoid being misunderstood or criticized for failing to answer questions he never sought to pursue.

Instead, as Mack explains in his response to Goluboff, his central intent is to explore the creation of racial identity in relation to the lawyer role. But what are the normative implications of such a focus? Does it imply that individual agency—that is, lawyers just going about their everyday, individual work—is key to social change? Such a perspective would seem to raise some of the concerns Goluboff notes as to whether Mack's work reflects something of a return to the “old” civil rights scholarship, focused quite narrowly on lawyers and cases. On further reflection, however, I think Mack has a very different intent. To show this, we must once again return to Butler.

Butler makes her own normative orientation clear at the beginning of *Gender Trouble*, when she explains that the purpose of her text is “to make . . . trouble, not through the strategies that figure a utopian beyond, but through the mobilization, subversive confusion, and proliferation of precisely those constitutive categories that seek to keep [an identity] in its place by posturing as the foundational illusions of identity” (Butler 1990, 34). Mack does not profess the intent to make “trouble” in the way Butler does. But as the pragmatists have long taught (Dewey 1939), every descriptive theory does hold normative implications and others who have written on Mack's book have highlighted this as a salient aspect of his book (Alfieri and Onwuachi-Willig 2013).

Like Butler and postmodernists generally, Mack tells the reader at the beginning of his book that he eschews “strategies that figure a utopian beyond” (3). Instead, as I have shown, Mack focuses on how the contradictions in requirements that African American lawyers act both like the “representative Negro” and like a “lawyer-raced-white” produce space for change in social understandings of race. Tony Alfieri and Angela Onwuachi-Willig's review essay of *Representing the Race* in the *Yale Law Journal* spins out these contemporary lessons of Mack's book. They define the central questions they see the book as raising in their title: “Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance.” They also pair Mack's book with Carbado and Gulati's (2013), which applies identity performance theory to contemporary antidiscrimination analysis. Alfieri and Onwuachi-Willig point out that African American “civil rights lawyers' identity performances as attorneys, both inside and

4. A recent popular narrative that documents one prejudiced southern race relations reporter's change of viewpoint after watching Thurgood Marshall argue a case is Gilbert King's account of the “Groveland boys” case (King 2013).

5. One classic study with this focus is Williamson (1984).

outside the courtroom, have changed over time and may not serve the same social functions as they did in the past" (1522) and set out to explore how this "new civil rights lawyer" should manage his or her identity performance in the contemporary context (1532–33). The authors collect many fascinating accounts of lawyers attempting to do this today, both in and outside courtrooms, and offer a host of strategies ranging from individual appearance and performance in the courtroom, through litigation and publicity strategies to take on issues such as racial profiling, to what they call "racial reintegration" or community lawyering (my personal favorite), described as follows:

Building on Carbado and Gulati, the purpose of racial reintegration is not only "stereotype negation," but also "direct intervention" on behalf of racial groups to expand economic equality, inclusion, and opportunity. Guided by an "ethic of disobedience and resistance," reintegration pushes black and white civil rights lawyers *out* of the courtroom and away from the familiar comfort of law reform and test-case litigation, and into administrative, legislative, workplace, and civic forums. There, experimental collaborations with community partners (corporate, government, and faith-based) and improvisational tactics (film documentaries, food pantries, and health fairs) produce a protean mix of law, culture, and politics that may very well signal a new phase in civil rights advocacy and legal professionalism. (Alfieri and Onwuachi-Willig 2013, 1555, footnotes and citation omitted)

In other words, Alfieri and Onwuachi-Willig view Mack's book as raising normative questions as to how contemporary civil rights lawyers should "perform" professional identity going forward and their essay sparks provocative and creative answers to those questions. Before embracing their approach, however, I think it important to revisit the longstanding debate about the normative thrust of postmodern theories of agency in social movement scholarship. I turn to a brief review of that debate below in order to set up my analysis of the contribution Mack's work makes. I will argue that those contributions are positive and exciting, as the above-quoted passage shows. The work of scholars such as Mack, Alfieri, and Onwuachi-Willig suggests that creative new social change strategies may arise from the mindset of a generation focused on the politics of the personal. The relationship between small-scale, market-like interactions and broader mass forces can be the potential driver of social change.

EVALUATING THE NORMATIVE THRUST OF IDENTITY PERFORMANCE THEORY IN LEGAL CIVIL RIGHTS HISTORY SCHOLARSHIP

Postmodernism occupies an uncomfortable place in traditional left-leaning theoretical discourse. On the one hand, adherents of both postmodern and traditional left-wing perspectives share some important theoretical ancestors, such as Hegel and Marx; on the other, postmodernists reject materialism and can sound veritably right-wing in their skeptic tendencies about distinguishing good from bad. One area of such tension has surrounded the theories of agency I have been discussing above.

In law and society circles, Joel Handler's classic LSA presidential address (1992) well captures the clash between postmodern and traditional left-leaning concepts of agency in social movements scholarship. That essay raises charges that postmodernist theories produce a form of politics that can never achieve the goal of bringing about broad-scale social change toward conditions of greater justice, especially in the distribution of economic resources (701). Handler correctly observes that postmodern approaches describe actors as individuals "engaging in very small acts of defiance." Their perspective sees social change as coming about "through small-scale transformation" (724). He articulates his strong preference for the older classic stories told by scholars such as Eugene Genovese and Frances Fox Piven and Richard Cloward, which focused on "groups, communities, and movements," and were, correspondingly, mostly about "*collective* identity and *collective* strength" (714, emphasis in original). Handler's own work focused mainly on antipoverty struggles, so his essay primarily focuses on these scholars, but basically the same point can be made about the classic stories of civil rights lawyering history, as already discussed. Indeed, Handler includes in his list of "collective agency storytellers" quite a few civil rights scholars, including Nancy Fraser, Derrick Bell, and Eugene Genovese.

Handler (1992) argues that the postmodern approach to conceptualizing agency lacks important ingredients that should be in any agenda for social change. For one, Handler points out, postmodern approaches contain "no grandiose plan for a better society" (719). Moreover, postmodern authors are "extremely reluctant" to discuss "possibilities of collective action in any concrete manner, or even to suggest middle-level reforms, let alone reform at a more societal level" (724). Handler argues that without such a meta-narrative about how broad-scale social change could be made possible, there can and will be little work to produce such change. He cautions that a focus on the local—on "localized knowledge in mini-rationalities," as he puts it—will in fact turn out to be a concession that abdicates efforts at ambitious progressive social change, thus giving in to the "enemies of the poor and those who suffer discrimination" (728).

Handler was far from the only commentator to question the normative thrust of postmodern conceptions of agency in the context of social movement activism. Addressing Butler, perhaps the hardest hitting critique came from liberal theorist Martha Nussbaum. Some of Nussbaum's critique concerns Butler's writing and analytical style (and is sometimes unduly ad hominem, in my opinion), but other aspects of Nussbaum's critique raise themes similar to those Handler explores, though in a far harsher way. Like Handler, Nussbaum is concerned about the small scale of Butler's focus on individual, everyday acts, even offering the rather stunning comment that "Judith Butler's hip quietism" "collaborates with evil" (1999, n.p.).⁶

In yet another line of attack against Butler, Nussbaum complains that Butler "finds it exciting to contemplate the alleged immovability of power and to envisage the ritual

6. Earlier in the essay Nussbaum dismissed Butler's performance theory as being based in nothing broader than ideas of parody—of calling merely for "poking fun at things" (Nussbaum 1999, n.p.). However, Mack's book, applying identity performance theory to African American lawyers' *deadly serious*, life-endangering battling of criminal defense cases in the racist South in the 1930s, shows that identity performance can involve a lot more than "poking fun" (see also King 2013).

subversions of the slave” (Nussbaum 1999, n.p.). Nussbaum does not, however, offer any refutation of the arguments of postmodern theorists such as Butler and Foucault that power relations do tend to reenact themselves despite efforts at social change—and, indeed, often do so in the very course of such efforts. Instead, Nussbaum offers an alternative, rosier picture of human agency operating in the context of efforts to make social change. According to Nussbaum, the best approach forward would focus on promoting “human dignity” in its many facets. This uplifting human rights principle of aspiring to promote dignity rights would, according to Nussbaum, suffice to do the work required to avoid the sordid and relativistic quagmire offered by postmodern perspectives.

More than a decade after these critiques of the implications of postmodern identity theory for social change activism, it is more possible to assess the relative merits and demerits of the respective approaches that Butler, Handler, and Nussbaum developed in the 1990s. The reading of Mack I offer here posits that Mack’s work spans the divide between postmodernist and traditional leftist and liberal theories of agency, showing that there need not be any hard disagreement between these camps. Instead, Mack’s work shows that both big-picture analysis and individual everyday performance are relevant and important.

Mack’s perspective is sympathetic with Butler’s skepticism about the kind of do-gooder impulses that underlie Nussbaum’s claim that social reformers need merely focus on the principle of advancing human dignity in order to bring beneficial and significant social change to the world. Nussbaum’s critique of Butler ignores the problems—that is, the blind spots—of her own theoretical framework. Working for human dignity certainly is a laudable goal, but it fails to take account of the critiques postmodernists make about the potential naiveté and unintended consequences of do-gooder efforts lacking in self-critical reflection (Kennedy 2004). Such frameworks can fail, for example, to attend to how relationships of power and subordination tend to duplicate themselves in and through social movement efforts (Kennedy 2004) or how those relationships tend to play out in slightly altered but still powerful ways within such organizations (as, e.g., in sex discrimination in the Niagara Movement: see Carle 2013, 178–79, 197–98). Simply put, social change frameworks based in philosophical liberalism’s notions of individual human dignity do not necessarily have superior claims to efficacy based on the historical record; certainly, the history of social movements in the United States and elsewhere is far more complex than that.

Mack recognizes this. He has long argued that a “legal liberalist” account of what the civil rights movement sought to achieve—that is, one focused on achieving formal equality in legal rights as enforced primarily by courts—can be harmfully misguided, even worse than simply naive (Mack 2005). Mack’s claim is that other dimensions and dynamics must be brought to the foreground in historical analysis. These questions include such matters as: *Who* was doing the work and *what work*, specifically and at the level of everyday detail, were they doing? Mack’s new book offers provocative answers to those questions. In the section below, I suggest that Mack’s answer is that civil rights lawyers with African American identities were the ones doing the particular kind of social change work he is especially interested in examining, and that the specific kind of work they were doing involved identity performance. In other words, Mack is arguing—by *showing* through a compelling historical narrative, rather than merely

telling or asserting—that the debate about competing theoretical conceptions of agency underlying social change movement analysis does not pose an either/or alternative. It is not that social change actors achieve their goals simply because of their commitment to a grand ideological plan and/or principle—for example, redistributing wealth, as Handler would have it, or promoting human dignity, as Nussbaum would advocate. That is *part* of the story, as I think Mack would fully agree. But another part of it involves what happens when actors perform identity in the context of seeking to achieve their goals through actions that necessarily start at the individual level, through small-scale acts of resistance or subversion in the very course of everyday, individual action.

To give an example that makes the point above more concrete: it was one thing when elite white lawyers chose and argued cases for the NAACP in its very early history; it was quite another, far more powerful, phenomenon when African American lawyers took over choosing and arguing cases in the 1930s and after (Meier and Rudwick 1976). Mack's richer account thus synthesizes collective action theories—stories about what a social movement did—with attention to the level of individual action. This, I suggest, is one of Mack's central contributions in *Representing the Race*: an account of laudable, idealistic collective intentions and commitments to principles cannot produce a full analysis. An account of what made social movement activism effective in particular historical contexts must be enriched by examining the implications of individual action as performed in contexts in which identity was being continually socially constructed in ever-changing ways. This takes far more analysis than simply pointing to the good intentions themselves, such as a desire to promote human dignity, or equal formal legal rights, or some similar goal or collective intention. Additional layers of analysis are required to produce a full account of how and why social change efforts do (or do not) succeed.

To convince the reader of my interpretation of Mack's "deep thesis" in *Representing the Race*, I next trace the broad trajectory of Mack's work to show that it does indeed embody attention to both the collective and the individual aspects of agency in analyzing the history of the US civil rights movement.

MACK'S EVOLVING INTEREST IN AFRICAN AMERICAN LAWYERS' IDENTITY PERFORMANCE

The trajectory of Mack's scholarship, over the past decade and a half, shows his developing interest in the performance of racial identity, accompanied by an ever-increasing focus on agency at the level of individual action. Mack's first published article, from 1999, was a law and society piece on railway segregation in Tennessee (Mack 1999). Read retrospectively through the lens of *Representing the Race*, one is struck by how fully articulated Mack's central preoccupations already are. As Mack explains, he wants to explore "new sociolegal arrangements" in postbellum railway transportation, where "Southerners might encounter strangers aboard the trains without fixed rules of deference and courtesy." His goal is to examine in this still-fluid context "the interplay of law, social change, and identity formation," tracing how Tennesseans "struggled to map the race, gender, and class contours of the new social

space railroad cars presented" (1999, 380–82). He proceeds to undertake just such an analysis, concluding that "law intersected with identity and social structures" to offer both strategic avenues for agency and "a disciplinary function," as "black and white Tennesseans" battled over claims to social space (Mack 1999, 402–03).

Mack's second major article excavates the life of a pioneering female African American lawyer, Sadie Alexander, who was one of the leading lights of the first generation of black female practicing lawyers who were able to be successful economically and professionally. Mack emphasizes Alexander's day-to-day professional work, and sensitively explores the difficulties of the role conflicts she faced, including meeting her husband's traditional expectations about their home life while she was maintaining a very different professional identity at work.

These difficulties were compounded by the fact that her work location was her husband's law office, an arrangement that provided her with professional opportunities that were not available to most African American female law school graduates at the time. Facing the double burden of two discriminatory axes of subordination—that is, race and sex—this generation of African American women lawyers frequently failed to find legal practice work at all. Mack notes that the Alexanders were involved in political work along with their professional pursuits, but he shows less interest in these aspects of Sadie Alexander's life (which included her role as national secretary of the National Urban League). Instead, what Mack emphasizes, to quote from his conclusion, was that despite the fact that black female lawyers were "doubly disabled," feeling "the press of discrimination and exclusion even more harshly than their black male or white women peers," there were also "gaps within the bar's discriminatory structure, spaces where outsiders could find some room for play, maneuver, and sometimes an ironic power." Foreshadowing themes in *Representing the Race*, Mack argues: "Discriminatory professional practices may have been pervasive, but such practices did not define everything about the day-to-day life of a lawyer" (Mack 2002, 1473).

Mack's next article was his comprehensive study in the *Yale Law Journal* entitled "Rethinking Civil Rights Lawyering" (Mack 2005). There he makes the important intervention of correcting some legal scholars' tendency to look back at civil rights lawyering in the interwar period through the lens of *Brown*. That lens produces a story of the ascendancy of legal liberalist conceptions of "civil rights" as having been the goal of race activist lawyers' work all along, with the courts viewed as the primary locus of social change. Mack argues, quite correctly in my view, as I will discuss further below, that interwar civil rights lawyers were not interested in a legal liberal view of courts as the engines of racial justice reform. Instead, Mack persuasively shows, these lawyers had other objectives, which included commitments to intrarace "uplift," as they called this project, along with related voluntarist strands of activism. Marxist-influenced social justice visions also motivated the more left-leaning activists of this era (Mack 2005, 256).

I agree with Mack that the key civil rights lawyers he examines were not legal liberals and espoused a heavy dose of voluntarism (i.e., strategies that sought to convince private actors to undertake voluntary action rather than legally mandating changed conduct). This mindset included, in my opinion, a healthy shot of skepticism about the consequences of attempting to invoke state power to bring about greater racial justice outside the sphere of formal equality (Carle 2013, 291–92). I also think it

is very important to emphasize that some of the most important of these figures, including both Houston and Raymond Pace Alexander, espoused left-leaning politics that emphasized economic justice and endorsed redistributive goals. Because Mack's voice is so powerful, this article played an important corrective role within legal academia, along with Risa Goluboff's important book, released around the same time, which focused on how NAACP lawyers used the courts to litigate economic justice and employment claims in the 1930s and 1940s (Goluboff 2007).

Mack and Goluboff show that civil rights lawyers in the interwar period did not possess a "legal liberal" agenda.⁷ (And, indeed, it was really only legal liberal *scholars* who ever held such beliefs. Then, because they took charge of telling the story within legal academia, they told it through their own lenses.) Mack strives to emphasize that these lawyers did not believe that courthouse-based strategies were the only avenue for civil rights work and he can thus be interpreted as tending to downplay these lawyers' interest in pursuing litigation-based campaigns. Mack is certainly correct in emphasizing that interwar civil rights lawyers had a far broader and richer vision of civil rights activism than one that relied on courts to do justice. At the same time, in my view, these lawyers did see test litigation as an important part of their work. Influenced by the ideas of sociological jurisprudence, they thought that carefully planned litigation could provide one means of "socially engineering" change by reforming law. Thus, there is an important two-pronged point to make about Houston: first, Houston's economic radicalism led him to hold the economic and employment aspects of racial justice as his foremost social change priority and, second, he saw federal court litigation as an important focus for those lawyering efforts and indisputably championed litigation after he assumed the position of special counsel to the NAACP in 1935 (McNeil 1984, 139, 152–55). In other words, as I have argued elsewhere at length, in this period and in an earlier period as well, African American civil rights lawyers were no legal liberals, to be sure, but at the same time they did see the courts as one important venue for engaging in the racial justice struggle (Carle 2013).⁸ From their historical vantage point, change through courts was far from a certainty and held negative potential as well as possibilities for productive change. They thus held no naive faith in courts as purveyors of justice, but saw them as one of many problematic locations through which to try to bring pressure to shake loose established structures of racial oppression.

7. For Mack's definition of this term, see note 2.

8. In her classic biography of Charles Hamilton Houston, Genna Rae McNeil highlighted the term "social engineer" in relation to Houston's litigation work; her work pioneered pathways for analyzing civil rights lawyer activism that others later followed (McNeil 1984). I agree with McNeil, and thus must disagree with Mack, when he says that as initially formulated Houston's concept of social engineering "did not encompass attempts to transform American society through litigation" (Mack 2006, 299; see also 271, 281, 284). Mack is right to argue that Houston's conception of social engineering encompassed *far more* than litigation, but Houston did care about preparing his students potentially to become civil rights litigators from quite an early stage in his thinking (Carle 2001, 295–96). One of Houston's many litigation accomplishments was his highly improbable success in persuading the US Supreme Court to read a constitutional requirement of racial nondiscrimination into the National Labor Relations Act, despite that Act's openly racially discriminatory legislative history. He did so in *Steele v. Louisville & Nashville R.R. Co.* (1944), which announced the doctrine of labor unions' duty of fair representation (Mack 2006, 394 n35). That precedent lay fallow for years, until, as Sophia Lee shows in her important work on the NAACP's continuing commitment to labor and economic justice issues in the 1950s and after, it took up the project of pushing the National Labor Relations Board to give teeth to these antidiscrimination principles (Lee 2008).

Mack focuses most of his attention in his *Yale Law Journal* article on what he labels African American lawyers' intrarace advancement or "race uplift" project (Mack 2005, 256). Foreshadowing themes that emerge again in *Representing the Race*, he delves into how acutely aware these lawyers were of their role in representing and promoting the race through their very performance of the everyday work that consumed their professional lives. Thus Houston showed his brilliance as a courtroom litigator again and again, in cases like the George Crawford murder defense trial, and Alexander used courtroom performances for similar ends (Mack 2005, 296, 294–95). These are important observations that provide a jumping-off point for other scholars' work that contrasts approaches to civil rights lawyering across generations. One such important contribution, as already noted, is Tomiko Brown-Nagin's *Courage to Dissent* (2011), which contrasts the lawyering strategies of earlier civil rights lawyers in Atlanta in the 1940s, who sought to gain what they could in a system deeply flawed by racial oppression, with the more confrontational styles of some members of a later generation of radical lawyers. These latter lawyers sought to make the courtroom a venue for challenging the system through messages that attacked the entire US system of justice, using their courtroom performances to transmit a very different symbolic message than that which radical lawyers of a previous generation had sought to convey. Reading Brown-Nagin next to Mack produces an interesting set of historical questions about changing conceptions of radical civil rights lawyering, which Mack does not go into in *Representing the Race* simply because the time period at issue there does not present them. However, these questions surely must lead to many interesting discussions and future research trajectories.

Brown-Nagin's work pushes the analysis of styles and consequences of civil rights lawyering forward in time, as does the work of other legal civil rights historians such as Serena Mayeri (2011). My research looks at a much earlier period (1880–1915) and from this location I completely agree with Mack on the central thesis of his article (once I put aside my possible quibble about early civil rights lawyers' stance toward courts). More specifically, I agree with Mack's key points that the professional project of the early civil rights bar was (1) closely aligned with concepts of economic citizenship and (2) connected to ideas that the long-term future of the civil rights movement lay in cross-racial, class-based economic alliances with whites (Mack 2006, 265). Both are points that tend to be disregarded by sanitizing legal liberal scholars who worry about tainting memories of the civil rights activism with a left-wing focus on economic justice (but see Gilmore 1996). I also agree with most of Mack's very detailed look at how racial uplift and intragroup advancement strategies motivated the interwar generation of African American civil rights lawyers, as long as these points are combined with the appreciation Mack simultaneously holds about the broader, society-wide economic justice-seeking perspectives these lawyers held at the same time.

Mack especially emphasizes this broader economic justice-seeking aspect of some interwar civil rights lawyers' economic radicalism in his shorter companion article published in *The Journal of American History* (Mack 2006). In both this and his *Yale Law Journal* article, Mack is focused on the ideologies and concomitant collective action strategies that motivated civil rights lawyers of the interwar generation. These two articles mark the epitome of Mack's focus on collective action strategies, showing that he is well aware of them and that he is writing in his more recent work against the

backdrop of these earlier examinations. But even in these 2005–2006 articles, it is clear that Mack is particularly fascinated by the implications of individual identity performance. That Mack is headed in this direction in his future work is especially clear in the conclusion to his *Journal of American History* article, where he argues that understanding “civil rights lawyers begins in the place where their professional identities were formed—in the everyday litigation performances where they made their public reputations” (2006, 62). Clearly, this is the focus he is promising for his upcoming projects and in his later work he does not disappoint.

In the period after the publication of the two articles just discussed, Mack takes a break from the very long, in-depth scholarship of “Rethinking Civil Rights Lawyering.” His writing comments on Obama’s election to the presidency (2009), favorably reviews other scholars’ books (2012), and offers a short exploration of the everyday professional performance of civil rights lawyer Justin Carter of Harrisburg, Pennsylvania (2008). In this article, too, Mack hones in on the individual performance aspect of elite African American lawyers’ professional work. Carter was a founding member of the Niagara Movement, which Du Bois founded in 1905 with hopes of mounting a broad-scale attack on racial injustice on many fronts (including test-case litigation). Carter was also involved in the early NAACP (Carle 2013, 186, 205, 265). Mack knows all this, of course, but this is not what he chooses to focus on in his article. Mack’s concentration on Carter’s professional life again leads him to conclude with themes that will emerge in *Representing the Race*: “Legal work was a mode of being that allowed one to cross racial boundaries in a world where, in so many aspects of American life, law helped cement and harden racial categories” (Mack 2008, 14).

In sum, through a series of impeccably crafted scholarly articles, Mack acquires material for, and develops themes that come together in, *Representing the Race*. In his focus on individual professional identity performance, Mack excavates an aspect of civil rights lawyering that had not heretofore been the central focus of most civil rights historians’ work, which tended to focus on collective action strategies through the lens of social movement theory. Mack’s work is thus fresh and novel. But what is its significance in shaping the trajectory of legal civil rights history scholarship? To begin to answer that question, I turn to a short description of the tenor of the narrative in *Representing the Race* because it is, after all—as we law professors are always trying to tell our students—the story, rather than the theory, that persuades people to change their minds, just as Mack has persuaded me to change mine.

THE NARRATIVE THRUST OF REPRESENTING THE RACE

Representing the Race is a narrative tour de force. It starts with the professional life of John Mercer Langston, who died in 1897, and ends with Loren Miller, the well-known author of the (arguably legal liberalist) account of civil rights litigation in *The Petitioners*, who died in 1967 (Miller 1966).⁹ There is so much rich detail in the

9. What is legal liberalist about Miller’s work is its focus on US Supreme Court civil rights litigation. What is very different in Miller’s account as compared to that of contemporary legal liberalists’ is his narrative encompassing the very broad scope of such litigation throughout the first half of the twentieth

lives recounted between these two bookends that it becomes difficult to select examples for discussion. I have chosen Raymond Pace Alexander as a “representative” illustration of how Mack develops his thesis, with the caveat that one of Mack’s key themes is the problematic nature of the concept of representativeness in the first place.

Raymond Alexander, husband of Sadie Alexander, whom I have already discussed, was an African American “Philadelphia lawyer” (in both possible senses of that term) who built a hugely successful practice and correspondingly high profile and reputation in that city during the interwar years. A law school friend of Houston’s at Harvard, Alexander entered professional practice with this credential in his favor but with race prejudice presenting a substantial obstacle to his future professional success. The weight of racism made the professional heights to which he soared all the more impressive. He “struggled with the common perception that a black lawyer could not be an effective representative of his race in a profession dominated by whites,” but used his cases to defeat that perception (46), and he “showed his colleagues how to succeed in a world where reputation made race and courts made reputations” (57).

Throughout his career, Alexander would “oscillate back and forth between contrasting ideas of racial representation.” Sometimes, he would reject the notion of being held to be the “representative” African American lawyer, but at other times he saw himself standing for the hopes and aspirations of others of his race. Mack asks which account was true and concludes: “Both, of course, captured parts of a key tension that pervaded the life of a black lawyer in the early twentieth century. It was a paradox of representation that Alexander could never escape” (59). Thus in the interwar period lawyers such as Alexander and Houston “practiced in a world where blacks and whites seemed to want them to be both like and unlike the rest of their race,” a conflict that “would remain unresolved” even in a later decade (60).

Mack vividly captures Alexander’s lived experience in this identity location full of conflict and contradiction. Space precludes me from including these descriptions in all of their richness; a few examples will have to do, though the reader should be aware that Mack presents many more to back up his conclusions. Here is one passage I particularly enjoyed, describing an exchange between Alexander and a white police detective in a Philadelphia murder case:

Cross-examining the witness, Alexander verbally browbeat the detective, eliciting a staccato drumbeat of “No, sir,” “Oh, no sir,” “I made a mistake, I think, sir,” and “They didn’t find anything there, Mr. Alexander.” The exchange might seem unremarkable, save for the fact that a few hundred feet away Alexander would struggle to be served a sandwich in downtown Philadelphia, while the detective could claim a customer entitlement to use most public spaces as a matter of course. (63)

Thus Mack argues:

century and before, to include voting rights and disfranchisement, antilynching, antipeonage, public accommodations discrimination, and many other areas. In Miller’s account, *Brown* takes up one subchapter of a very rich and broad story.

Courts were important places for the reimagining of racial identity, for inside the courtroom black lawyers inhabited a public space where words and actions often conformed to a social script. In court, they experienced a world in which forms of address, patterns of deference, and professional acts crossed racial lines, within some limits at least. If public social interaction helped make race, then by appearing in court a black lawyer performed a racial identity that was solely associated with whites in almost every other public place. (64)

Moreover, Mack explains, this “racial script of the courtroom” that “did not fit” within fixed social ideas was “improvised on the spot, and emerged from repeated encounters” (68). Sometimes, these performances went well, but sometimes less so. Thus in the Willie Brown trial, where Alexander was trying to raise charges that police brutality had resulted in a false confession from his client, he encountered a trial courtroom marked by an openly hostile judge. He also confronted an all-white jury, from which all African Americans had been struck, and media that repeatedly identified him as a “Negro lawyer” while never mentioning the race or ethnicity of whites involved in the case. He lost at the trial-court level, as could easily have been predicted. But in the different atmosphere of the appellate court, he was able to turn matters around. In that appeal, Mack writes, “one can see a new public space begin to open for the black lawyer, and for the reworking of racial boundaries in a world where segregation remained a fact of life” (74). Mack proceeds to describe the details of the Pennsylvania Supreme Court’s proceeding. Newspapers reported the atmosphere as one of “utmost calm,” in which “Counsel were extremely courteous to each other.” Alexander’s opposing counsel’s terms of address to him “changed markedly,” and both lawyers received hearty congratulations from the members of the bar who came to watch the argument. Alexander received high compliments on his performance from one of the justices, who would write the opinion overturning the defendant’s conviction and go on to become a close friend, later sponsoring Alexander’s application seeking to break the American Bar Association’s color bar (75, 77). In the appellate court setting, Alexander blended “seamlessly into a brotherhood of lawyers whose most defining feature was their own connection with one another” and “began to build bonds with lawyers and judges that would make him a repeat player in the legal interactions that built community among the local bar.” Thus, “[h]overing about the case . . . was a process by which Alexander began to renegotiate the bounds of the profession” (75).

Mack goes on to describe later cases in which Alexander continued this process of being able to “demand, and receive, the scripted public courtesy that marked him as a member of a profession cemented together by repeated encounters” with a professional group over time (81–82). Mack similarly presents a vivid and convincing analysis of Houston’s sometimes even more harrowing experiences in criminal defense trials in southern courtrooms. Like Alexander, Houston’s performances were “both radical and respectable” (90) as he “stepped firmly in a role that would be denied him anywhere else in the county,” in acting “almost like a white man in court” (103).

Mack discusses many other lawyers, too. His earliest figure is the very formal John Mercer Langston (1829–1897). In Langston’s time period, the Ohio Supreme Court literally had to engage in the subterfuge of visually examining this early pioneer and certifying him to be “white” in order to permit him bar admission in 1854 (15). As

Mack persuasively shows, Langston felt himself torn his entire life “between conflicting expectations that he speak to whites and be the authentic representative of blacks” (26).¹⁰

As the other bookend example closing out the long Jim Crow era on which Mack focuses, he selects an similarly difficult-to-pin-down figure, Loren Miller, whose “strange” professional journey starts with him being a law-trained, socialist journalist with only critical things to say about how Houston “‘harped on court action’” that “would produce nothing more than ‘legalistic performances’” (194).¹¹ But Miller must practice law to make a living. Mack vividly captures the everyday texture of this life: the “constant hustling to keep up the volume of small-fee work” coupled with Miller’s relationships with clients who came to him “after they had been turned away from bars, lunch counters, and restaurants because of their race.” In the end, ironically enough, Miller becomes a key litigator in important restrictive covenant cases, which attacked the legality of enforcing contracts for the sale of property in which home purchasers committed themselves to not selling to racial “others” in the future. Although Miller “had long believed that law mattered little in remedying race and class inequality” (201), he ended up appearing in the US Supreme Court alongside none other than Houston, the very lawyer who had prompted Miller’s “blistering attack on the NAACP ten years before” (204).

Here Mack again delights in capturing the contradictions and ironies of the actual lives people end up living, just as he does in his sensitive, detailed renderings of the professional role conflicts of his chief female subjects, Sadie Alexander and Pauli Murray, as already discussed. Mack depicts the lived texture of individual subjects’ professional experiences with a level of richness on par with that of a talented novelist. By so doing Mack proves what he sets out to show: the lived professional experiences of these lives are themselves of great historical importance.

Mack ends with Obama, whom he places in the narrative as an example of an African American lawyer required both to represent a race and at the same time to avoid having an unduly “black agenda.” As Mack tantalizingly suggests without further discussion, as if gesturing to future work, these questions as to Obama’s authenticity, “asked of an African American who seems unlike those around him,” continue to encapsulate “something seemingly unavoidable in the American politics of race” (269).

In short, Mack’s narrative convinces the reader of his argument: his subjects’ everyday professional lives matter *in themselves* as much as they matter because these persons took part in collective action organizations. But what are the normative implications of this approach? Are professional accomplishments accompanied by subversive reworkings of cultural symbols of subordination and privilege effective ways of making change that contemporary lawyers interested in social change should emulate? Is

10. I, too, write about Langston, the founding dean of Howard Law School, depicting him as the Charles Hamilton Houston of his day, who transmitted to his students both an abolitionist civil rights jurisprudence and a charge to take up the racial justice struggle (Carle 2013, 33–37). I doubt Mack would characterize him quite this way, just as we may disagree somewhat about Houston, as already discussed, but the combination of our two perspectives indisputably makes for a much richer understanding of this important figure than would either one standing alone.

11. Note that even this contemporary of Houston’s thought that he focused a great deal on courts as potential levers for change.

participation in collective action strategies somewhat beside the point? These are questions to which Mack's book points.

ASSESSING THE NORMATIVE THRUST OF MACK'S WORK

Until writing this essay required me to think hard about *Representing the Race*, I tended to share Handler's concerns (but not Nussbaum's more extreme ones) about the consequences of focusing on identity theory as a centerpiece of social change theory. I worried about the lack of a big-picture theory of what the ultimate goals for social justice should be. To me, those goals should involve aspiring to greater fairness in resources for all and transcending socially constructed divisions between insiders and outsiders. Otherwise, without some guidelines for what utopia might look like—which certainly sounds like an old-fashioned notion now that I articulate it here—might not one set of people with power and privilege simply be replaced by another set, leading to social groups continuing to war against each other in unjust, dystopian ways? Thinking through Mack's work has changed my perspective, however. For one thing, there simply *are* no appealing “big” theories for social change in the United States today. For example, arguably one of the most compelling contemporary theories that purports to explain when social change can occur is Derrick Bell's interest group convergence theory, which posits that social change occurs only when it is in the interests of powerful elites that it do so (Bell 2003, 1633; 2005, 1056, 1059). That is certainly a discouraging, pessimistic “big” theory of social change if there ever was one. It may, to be sure, reflect an accurate, albeit cynical, theory of how social change forces tend to work (though I have some doubts, for reasons I will discuss below), but it is hardly a rallying cry for committed activists.

On the other hand, looking empirically if somewhat impressionistically at where sites of promising activism *are* occurring nowadays suggests that it is precisely in local experimentation and small-scale transformation that social change is taking place. Alfieri and Onwuachi-Willig capture this approach in their passage quoted earlier in this essay, calling for action guided by an “ethic of disobedience and resistance” that moves away from “the familiar comfort[s],” and instead seeks “experimental collaborations” and “improvisational tactics,” and produces “a protean mix of law, culture and politics that may very well signal a new phase in civil rights advocacy and legal professionalism” (Alfieri and Onwuachi-Willig 2013, 1555, footnotes and citation omitted).

In short, there is no big movement; perhaps in this historical era there will not be one. But there are lots of local or small-scale social change efforts underway—partly because this is what contemporary theories of social change support, just as Handler predicted.¹² These efforts are in rich communication with one another and able to gain high visibility even without a national infrastructure due to the development of new, nimble forms of social media and communication devices. And these efforts receive media attention by virtue of being engaged in local performative activity, with the

12. In reply to those skeptical about whether variations in kinds of theory produce different approaches to social change, one need only invoke the historical example of Karl Marx.

Occupy Wall Street movement and flurry of climate change activist groups being the most obvious examples.

Even in instances in which social change activists have made broad gains, such as in marriage equality, different groups of activists have gone about their work in vastly different, often competing, directions, as shown by the many tactics and ideologies at work during the California Proposition 8 battle (Taylor and Bernstein 2013). In contrast, the NAACP strove to shut out competing strategies, often quite purposively seeking to do so (Carle 2002, 113, 119). To be sure, there were plenty of conflicts among civil rights activists, as Brown-Nagin analyzes in depicting the relationship in the 1960s between Thurgood Marshall, representing the NAACP, on the one hand, and the Student Nonviolent Coordinating Committee (SNCC) and the Congress for Racial Equality (CORE), on the other. SNCC and CORE wanted to take a direct-action approach in which activists would get themselves arrested and lawyers would have to appear as their defenders rather than concentrating on Houston-type exemplary lawyering performances in carefully planned test cases (Brown-Nagin 2011, 138–39). But the NAACP and its litigation spinoff, the NAACP Legal Defense Fund, Inc. (sometimes known as the “Inc. Fund”) still followed the court-based strategy and continued to do so in the *Brown* follow-on case, *Griggs v. Duke Power Company*, which sought to pursue economic advancement through employment antidiscrimination law (Greenberg 1994, 443).¹³

Thus there were plenty of tensions among competing organizations in the civil rights movement, but the diversity of goals and strategies of contemporary social change organizations, even those working on the same general issues, is even more pronounced. The marriage equality campaign, for example, can be characterized as a host of local legal strategies going in many directions. These activists often do not share, or even strive for, the kind of a “big picture” underlying vision of social and economic justice that scholars have seen as animating many activists within the NAACP (Gilmore 1996; Goluboff 2007; Lee 2008). To point this out is not to say that one approach is better than another, but simply that social change campaigns today may be even more locally diverse and cacophonous than even the divided, mid-twentieth-century civil rights movement Brown-Nagin captures so well.

At the same time, there is today a renewed focus on the power of individual decision making to make change. Reviving the consumer boycott strategies of turn-of-the-twentieth-century consumer groups like the National Consumers League,¹⁴ activist groups ask individuals to leave their pollution-making cars home for a day, to buy fair trade products, and to wear ethically manufactured clothes. Supportive individuals—at least those with sufficient social power to make such choices—want to work for employers who offer benefits to same-sex couples and to boycott businesses that donate funds to right-wing causes. In other words, we live in an era in which individual identity performance often is the social change mechanism of choice. It is far too soon to conclude that the combination of all these efforts, in a kind of invisible-hand, market-driven way, will not lead to some forms of change that prove effective and long lasting. It only makes sense that the leading voices of this generation of legal civil rights

13. Greenberg, who was Inc. Fund director at the time, described the organization’s view of the impact of the *Griggs* campaign as “almost on a par with the campaign that won *Brown*” (Greenberg 1994, 443).

14. For a discussion of these strategies, see Sklar (1995) and Carle (1999).

lawyering historians and theorists, such as Mack, Alfieri, and Onwuachi-Willig, should reflect the preoccupations of this generation.

To say all this is not to discount the dangers Handler raised more than two decades ago. But in the absence of a big theory, pragmatism (in both its philosophical and lay meanings) must do. Pragmatists like to weigh pros and cons, however, so I will turn to a brief discussion of what to my mind is a salient downside to relying on identity performance to bring about social change: the theory tends to work best when applied to individuals with enough social power or prestige to make change through their individual identity performances. This is why Mack, as he forthrightly acknowledges, focuses on what some might describe as the African American legal “elite” (9)¹⁵—in other words, on the higher profile, relatively more advantaged lawyers who were able to make a public impression through their work. But as Mack fully acknowledges, there were many other lawyers out there too, toiling at a grassroots level with very little recognition (9). At least some of the work of civil rights lawyers in this latter category has by now been excavated too (see, e.g., Smith 1993; Nelson 2002; Kilpatrick 2007), but even in these cases lawyers are often identified because of their affiliation with organizations that had historical importance. Thus, for example, we learn about African American St. Paul, Minnesota civil rights lawyer Frederick McGhee through the work of a lay historian, Paul Nelson, and I became interested in him because of his pivotal role as the chief lawyer for three organizations that were key to collective action strategies at the turn of the twentieth century: the National Afro American League, the National Afro American Council, and the Niagara Movement (Nelson 2002; Carle 2013).

Indeed, Mack’s focus on legal elites appears implicitly to reflect some aspects of Bell’s interest convergence thesis—that is, an assumption that it generally is elites who have power to make change. My work leads me to a somewhat different view. For example, my study of the engines that generated early-twentieth-century national organization building for the cause of racial justice shows that elites often do have a part to play; for example, a group of racially privileged, socially elite actors provided crucial seed money at the NAACP’s start (Carle 2013, 250). But this group was not particularly helpful in contributing ideas or vision; most of that intellectual capital came from impecunious, long-time African American activists. In other words, sometimes so-called elites lack insights that those closer to the experience of injustice can contribute¹⁶ and it seems to me that scholarship going forward needs to look at both “elites” and “nonelites”, and also at the interactions between such groups and what they gain from each other. This is no criticism of Mack because I completely agree with him that different scholarly projects can (and must, to be sufficiently focused) take on different parts of this very large terrain. But there does seem to be a connection between scholarship that focuses on collective strategies and scholarship directed toward nonelite, grassroots types of activists. Put otherwise, nonelite research subjects tend to become a topic of inquiry precisely because of their relation to collective effort.

15. It is important to acknowledge, of course, that notions of who constitutes an elite are relative. Thus the lawyers Mack studies in *Representing the Race* are the elite of the African American bar, but many of them struggled financially in a society marked by massive racial discrimination, as I discuss further below.

16. I do not mean to sound like an essentialist here; I realize that an individual’s social identity does not determine her ideas or the worth of them (Brewer 1990).

Mack's focus on individual members of the African American bar bothers Goluboff somewhat as well; she, like me, seems to experience twinges of discomfort with the implicit political valence of a historical account that focuses on the heroic agency of the most successful lawyers of the period, individually considered (Goluboff 2013, 2322). What I have convinced myself of through writing this essay, however, is that this discomfort may be largely based on changing generational preferences. Goluboff's "new" civil rights history may indeed now be another kind of "old" civil rights history—with Mack leading the way in asking even newer historical questions generated in a rapidly changing, increasingly globalized, world (Mack 2013, 260–61).

Another obvious response to concerns that Mack's account focuses too much on elites is to point out the relativity of notions of who is "elite," especially in the context about which he writes. The lawyers on whom Mack focuses were very far from the pinnacle of the true US legal elite. They worked in small or solo practices, received only modest compensation, often struggled financially, and faced professional disadvantage and barriers to advancement that white lawyers never endured. Thus, concepts of elitism are inherently slippery and subject to dangerous misuse—a point I have found myself often having to make, for example, in refuting assumptions that all notable African American professionals in the nadir period descended from a pre-Civil War "free black elite," which is simply not the case (Carle 2013, 168–69, 188).

In short, the critique that a historical figure possesses "elite" stature may easily become an unfairly misused dismissive move. On this score, I would adamantly defend Mack's choice of subjects. The study of elites is obviously an important topic, since elites by definition possess disproportionate power and thus are disproportionately influential in processes of social change. This is why Mack focuses on elite figures as the agents of social change through their identity performance. In sum, my point in highlighting Mack's attention to the "elite" of the African American bar is no criticism of Mack's work, just an observation that his treatment is, as it must be, only a very partial study of the careers and significance of African American lawyers in the time period his book spans, to which many others should and undoubtedly will add.

In the end, what seems most important is that scholarship continues to proceed along many lines, examining the roles of elites and nonelites alike (with definitions of who falls in which category being relative and comparative, depending on a project's central questions). Scholars working along these different lines of inquiry should continue to be in productive dialog with each other, avoiding Balkanization and appreciating opportunities for cross-fertilization of perspectives.

CONCLUSION

Representing the Race offers a new emphasis for civil rights legal historians—a focus on lawyers' performance of identity in everyday professional roles. Mack studies constructions of race in US civil rights lawyering, but similar fruitful paths can be explored along other dimensions of identity—not only gender, which seems to have lent itself to similar inquiries more readily (Carle 1999; Batlan 2010), but also a host of other axes of identity, including economic class (Bourdieu 1984; Brown-Nagin 2011). Mack's powerful narrative launches him deep into a decades-old debate about the role of

postmodern theories in social movements analysis. What the reader discovers in accompanying Mack on this adventure is that there is no need for one theoretical approach to crash into another. Instead, the mix of theoretical currents offers a wonder of new insights to discover—deep below the surface of things, where scholars should try to direct their work.

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