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The Personal is Political: On Twentieth Century Activist Lawyers in the United States

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THE PERSONAL IS POLITICAL: ON TWENTIETH CENTURY ACTIVIST LAWYERS IN THE UNITED STATES

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KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012). Pp. 352. Hardcover $35.00.

LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY (2012). Pp. 352. Hardcover $34.95.

Kenneth W. Mack and Leigh Ann Wheeler each have written impressive books about key lawyers and legal activists who led efforts to expand constitutional interpretations of civil rights and civil liberties over the last century. Both books view the struggles for legal change through the lens of personal ambitions, challenges, and identity conflicts that directly shaped the activists' campaigns to expand basic citizen rights. The books differ in important ways, though. Mack offers a "multiple" or "collective" biography regarding the "intersecting lives" of African American civil rights lawyers and the paradoxical challenges that they faced in winning respect and power in the historically all-white legal profession.[1] By contrast, Wheeler focuses on the unconventional sexual inclinations, interests, and identities of leaders—many but not all of whom were attorneys—in the American Civil Liberties Union ("ACLU") who fought to expand rights protecting speech about sex, consumption of sex-related materials, and various sexual practices over the twentieth century.[2] The books differ not only in the substantive rights issues that they address, but they also diverge in the ways that the authors construct the relationship of personal aspiration to a politics of rights as well as in their narrative historical method, thus producing somewhat divergent intellectual contributions. This review will first summarize and comment on Mack's book, and then build on the discussion of Mack to distinguish key features and implications of Wheeler's study.

I

Professor Mack introduces his book by underlining how his account fundamentally

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1. KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 3 (2012).

2. LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 4 (2012).

departs from and even challenges conventional historical studies of civil rights attorneys. "The usual story of black civil rights lawyers in American history is that these lawyers represented the interests of a unified minority group that wanted to be integrated into the core fabric of the nation," he writes.[3] Mack's original contribution is to explore seriously the contradictions and paradoxes of the "studied racial ambiguity" that black lawyers wrestled with in pursuing their representational aspirations.[4] In short, the struggle for influence required that the authentic representative of African Americans seem as much like his white colleagues as possible and as unlike the rest of his race as possible.[5] The source of this paradox is that the American legal profession was exclusively white and almost entirely male prior to the late nineteenth century.[6] Winning respect was the key to advancing the Negro cause of civil rights by black lawyers, and winning respect required adopting the disciplined manners of speech, argument, and self-presentation as well as, to some degree, the values or worldviews of the whites who dominated the legal profession, including lawyers and judges at all levels, from local trial courts to appellate courts. If African American lawyers could match the performance of white lawyers in court, it was hoped, then their example would substantiate claims that blacks as a racial group could perform as respected citizens and skilled workers as well. However, the closer that black activist attorneys came to winning respect and professional stature, the greater the distance grew between them and the ideas, interests, needs, and commitments of those ordinary black folks they claimed to represent. In short, the success of African American lawyers came at the potential cost of lost black "authenticity."[7]

Mack's story begins, in Chapter One, with the experiences of John Mercer Langston, an important national figure whose memory has been dwarfed by the two most famous nineteenth century black Americans, Frederick Douglass and Booker T. Washington.[8] Langston, who joined the Ohio Bar in 1854, did have something in common with his two more famous peers, however: "he was the product of a biracial parentage."[9] This fact strikes me as important, for many of the most influential African American lawyers in the early twentieth century were light skinned; however Mack does not make much of the point, despite his overall focus on the cultural and professional "whitening" of black lawyers.[10] In any case, Langston learned that "to be an authentic representative of your race—in the eyes of blacks and whites alike—was often to be seen, as much as possible, as a white man."[11] As such, he "occupied an often-uncomfortable space between white desires and black hopes."[12] And as a result, Langston left behind his earlier interests in black nationalism and instead embraced the ideal of "progress" through legalized integration.[13]

3. MACK, *supra* note 1, at 4.
4. *Id.* at 30.
5. *Id*. at 5.
6. *Id.*
7. *Id*. at 24.
8. *Id.* at 13-14.
9. *Id.*at 14.
10. *See id.* at 5-6.
11. *Id*. at 130.
12. *Id*. at 13.
13. *Id.* at 17.

Mack's account of the little known Langston artfully prepares the way for more prominent figures in the twentieth century, including Raymond Pace Alexander, the most successful lawyer in the two decades prior to World War II, and then Charles Hamilton Houston and Thurgood Marshall. A key to the success of each, Mack demonstrates convincingly, was the ability to perform like a white man in court.[14] But this nurtured a deep confusion and conflict in the black attorneys' conception of representation.[15] For example, Alexander at times stated publicly that he should not be viewed as a "Negro" attorney, while "[a]t other times, he told both blacks and whites that he could stand in for the life experiences and desires of the thousands of poor, rural African Americans who were streaming into Philadelphia."[16] Most black attorneys seemed to straddle these two versions of their public role. The increasing prominence of black attorneys in high-level civil rights cases created confusion among whites as well.[17] Mack quotes one white man's response to seeing Charles Houston in court: "He ain't black and he ain't white. I can stand a thoroughbred n—, but I can't stand these mongrels."[18] The author develops powerful narrative portrayals of these and other black attorneys to show the various ways in which they struggled through their ambiguous or contradictory situation to carve out respect and success essential to "progress" for the race.[19]

The book is structured effectively to explore the complex, changing dynamics of the core theme while offering added evidence of its continued historical salience in the lives of leading black civil rights lawyers. Overall, the historical account follows a general linear chronological order, from the late 1900s through the early 1950s. But the different chapters also tend to focus on specific individuals who represent subtly different manifestations of these themes. Chapters Two and Three focus on Raymond Pace Alexander in the first quarter of the century.[20] Chapter Four shifts attention to Charles Hamilton Houston, while the young Thurgood Marshall, the epitome of the lawyer who joined the white legal fraternity, takes center stage in Chapter Five.[21] Chapter Six adds attention to the important dimension of gender that further complicated the struggle by female black attorneys, like Ruth Whaley and Sadie Alexander, for respect and influence among the "white fraternity of lawyers."[22] The narrative shifts to a darker tone in Chapters Seven and Eight as "things fall apart" and the ambiguities of representation become the stuff of crisis and conflict for black civil rights attorneys.[23] Chapter Nine picks up on earlier discussions about the "trials" of Pauli Murray, a woman of mixed race who struggled for justice from a restless, boundary-crossing posture that was neither black nor white, female or male, homosexual nor heterosexual, and who went on to help construct the legal

14. *Id.* at 54-60.
15. *Id.*
16. *Id.* at 59.
17. *Id.* at 61-63, 81-82, 85.
18. *Id.* at 89. This quote again could be read as a response to the light skin of the racially mixed Houston, but Mack focuses instead on tension between racial stereotypes and effective professional behavior.
19. *See id.* at 61-74.
20. *Id.* at 42-44, 61-62.
21. *Id.* at 83-84, 111-12.
22. *Id.* at 131-32.
23. *See id.* at 154-206.

category of sex discrimination and embrace the causes of human rights.[24]

The narrative is not simply organized as a linear chronology, however. For one thing, a number of the leading figures cross the decades and show up in multiple chapters, providing continuity of personas as well as of themes. Equally important, several high profile trials add continuity as they evolved over the decades from event to formative life experiences and then to prominent, sometimes haunting symbols. For example, the case of George Crawford, a black man accused of murdering a wealthy white socialite and her maid in Virginia, provides an apt foundation for Mack's exploration of Charles Houston's climb to fame and the growing belief by black attorneys that "[t]he surest way to represent black people . . . was to be treated like a white man."[25] The case returns again in Chapter Seven to underline the crisis of representation faced by the migration era generation of black lawyers as younger black lawyers conditioned by depression era economic hardships began to question the aspirations of their mentors.[26]

In some ways, the thematic arc of the entire book is highlighted in Chapter Eight, "The Strange Journey of Loren Miller."[27] The little-known Miller as a young man in the 1930s became a vocal critic of Charles Houston's "legalism."[28] Miller's "main complaint was the charge that black attorneys represented nothing more than the voice of a self-interested middle class, and certainly not the voice of the race as a whole."[29] In short, Miller exposed and dramatized the brewing crisis of representation. He thus left his work in Los Angeles as a lawyer—which he found as politically compromised as it was financially unrewarding for a black activist—to take up writing and speaking in New York on the causes of black nationalism and socialism as well as the limits of legal reform efforts.[30] By the late 1930s, however, he found himself broke and returned to Los Angeles to resume his work as an attorney, beginning with everyday disputes of minority citizens and then escalating to criminal cases and successful challenges to restrictive covenants as violations of the Fourteenth Amendment.[31] Miller renounced the USSR, became a Democrat, and reconnected with the NAACP, Charles Houston, and other reformers whom years earlier he had attacked in blistering terms.[32] This was a "stunning reversal," Mack notes; Miller's return to lawyering for civil rights changed his politics, affirmed the value of incremental legal reform, provided a good income, and "connected him to both middle-class blacks and to liberal white politicians and judges who would help sort out their claims."[33]

Miller's return to the legal fraternity reconnected him to major figures in the legal assault on segregation in the 1940s and 1950s. But Mack recognizes that the crisis of representation resurfaced again in the post-*Brown* years as frustrations with the limits and diversions of litigation divided activists, as exemplified by the well-publicized clash

24. *Id.* at 207-08.
25. *Id.* at 108.
26. *Id.* at 173-80.
27. *Id.* at 181-82.
28. *Id.*
29. *Id.* at 181.
30. *Id.* at 181-82.
31. *Id.* at 195.
32. *See id.* at 198.
33. *Id.* at 204.

between Robert Carter and establishment icon Thurgood Marshall that divided the NAACP.[34] Mack traces the rise of Critical Race Theory to these historical clashes over the issue of representation. The author powerfully and sensitively ends the book by connecting the challenges of representation faced by earlier generations of black civil rights lawyers to the contemporary challenges of America's first black—or, as Mack recognizes, mixed race—president, Barack Obama, himself a community organizer and constitutional law teacher, whose own ambiguities about his racial status and trials of representation have been widely recognized.[35] Mack looks to the President not for answers, but rather as a representative of the "one enduring theme that has reasserted itself—the question of authenticity, asked of an African American who seems unlike those around him."[36]

Assessing the Achievement. *Representing the Race* is a masterful, compelling, and important book. Mack writes in vivid, memorable prose, and he artfully narrates stories that illuminate and illustrate his themes in complex yet clear terms. It is a good read. The book is the product of much research, and the author displays a clear vision guiding his choices about how to craft the historical data into a strong narrative account. The author writes in his own voice, which is at once articulate and accessible; he consistently avoids intrusive academic referencing, intellectual positioning, and esoteric jargon. At the same time, the book was a bit frustrating for a reader like me, as I filled the margins of many pages with ideas that could be developed by engagement with other directly relevant scholarship. And it poses a challenge to me as a reviewer, whose duty in part is to locate the author's contribution in broader traditions of scholarly inquiry.

Mack's focus on lawyers, the legal profession, and legal norms explores terrain that is ignored by many fine historical studies of civil rights era struggles "on the ground," in civil society, relatively independent of formal law. But Mack's book also differs from a great deal of the leading scholarship that focuses on the role of law and lawyers in the civil rights struggles. Much of this study about the civil rights era has focused on high-level appellate litigation before federal courts and especially the Supreme Court, with greatest attention to *Brown v. Board of Education*.[37] In these accounts, federal judges or justices and the lawyers who presented arguments before them are the primary actors. Much of the older work was rather celebratory,[38] while a second wave was more critical about the limited impacts and diversionary thrust of Supreme Court litigation.[39] Mack's study, by contrast, is little concerned with such questions about either the legal strategies or the impact of appellate litigation, and he steers attention away from the Supreme Court. Instead, Mack focuses on the formative experiences and practices of black civil rights attorneys confronting white lawyers and judges mostly in ordinary civil and

34. *Id.* at 206.

35. *Id.* at 265-69.

36. *Id*. at 269.

37. *See generally* Brown v. Bd. of Educ., 349 U.S. 294 (1954).

38. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); MARK TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1959 (1987).

39. MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT: FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2007); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 1993).

criminal courts.[40] As such, he spotlights the domains of the legal profession and ordinary legal practice that occupy an institutional space between civil society and the high law of federal court appellate test case litigation.[41]

In this regard, the most likely audiences for engagement with Mack are sociolegal scholars who begin from an understanding of law that blurs and collapses distinctions between state and society, and between official law on the books and ordinary legal practice. Sociolegal scholars in this tradition typically decenter high courts, make rights claiming and struggles by multiple different actors the primary subjects of inquiry, and underline the historical contextual factors that shaped the terms of struggle and delimited available options for action. Some studies of collective "legal mobilization" focus on complex, multi-sited historical struggles, including the civil rights movement,[42] while others focus on individuals largely independent of collective group struggle.[43] A common topic for these studies is the developing, historically contingent, "legal consciousness" of various rights activists, including both lawyers and non-lawyer activists.[44] Finally, a small but prominent sociolegal industry of analysts focusing generally on "cause lawyers," and closely aligned with law and social movement specialists, has explored the professional incentives and pressures on activist lawyers, the problematic relationship of lawyers to specific clients as well as broader causes, and the tensions among lawyers and other activists for egalitarian social change.[45]

Mack's court-decentered focus on lawyers, the legal profession, and ordinary lawyering practice parallels and at least potentially engages most directly these latter modes of inquiry.[46] The relevance for studies of "cause lawyering" is most direct and palpable. Mack clearly dwells on a tension at the heart of those studies: between lawyers' self-interest in status and financial gain, and their commitment to both clients, and more importantly, larger causes of social justice and change.[47] Indeed, Mack cites allegations by non-lawyers and younger dissident lawyers that migration era black lawyers placed personal advancement ahead of racial justice.[48] Mack quotes one NAACP activist: "[i]t is an unfortunate fact that the colored lawyers . . . usually take advantage of philanthropic interest . . . to make money for themselves."[49] The black bar was often alleged to be "try-

40. MACK, *supra* note 1, at 5-6.

41. I doubt that many social historians or traditional constitutional law scholars would be likely to assign Mack's book in their courses, although teachers should find his book enlightening.

42. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974); Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 716 (1992).

43. RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007); GEORGE I. LOVELL, THIS IS NOT CIVIL RIGHTS: DISCOVERING RIGHTS TALK IN 1939 AMERICA (2012).

44. *See* Michael McCann, *On Legal Rights Consciousness: A Challenging Analytical Tradition*, *in* THE NEW CIVIL RIGHTS RESEARCH ix-xxx (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006).

45. CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998); STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004).

46. *See* MACK, *supra* note 1, at 3-7.

47. *Id.* at 38-39.

48. *Id.* at 68.

49. *Id.*

ing to gobble all the fees and the credit" in important cases.[50] For this reason, at least in part, Raymond Pace Alexander took no fee for defending Willie Brown against charges of assaulting and murdering a white woman in the 1930s. By refusing any fee, lawyers like Alexander "sent a signal to the public that they were motivated by racial loyalty rather than self-interest."[51] Such tensions between "doing well" and "doing good" by activist lawyers are an enduring theme of scholarship on cause lawyers.[52]

Mack adds important new insights into these enduring themes. For one thing, he convincingly argues that the pressures for conformity were greater for black lawyers than for other black professionals like doctors and dentists.[53] The reason is that success for the latter was more defined by individual skill, whereas legal success depended on reputation, which was grounded in winning the respect of the white fraternity.[54] But, Mack's most important contribution is to add the dimension of institutionalized racial power to the tensions that compound professional pressures on activist lawyers.[55] By recognizing that the bar was historically white and male, Mack acknowledges that professional participation was inherently constraining.[56] The experienced demand on black attorneys to show that they could perform and compete with white lawyers ended up whitening them, making them into particular types of legal actors by shaping their aspirations, their visions of their roles, and their strategies to promote changes in racial relations.[57] Mack's account of the persistent paradox of representation adds new layers of insight about the racialized institutional pressures that civil rights lawyers experienced. This strikes me as a highly generalizable insight about the dilemmas faced in varying degrees by many different types of "outsider" legal rights activists, whether lawyers for the causes of racial minorities, women, LGBT communities, religious minorities, the poor, or immigrants, to name a few.

However, Mack does not follow through by developing his most provocative and arguably important claim about the significance of these racialized professional pressures on black civil rights attorneys. He repeats often the theme that "professional integration was possible only because of the increasing distance between the lawyers and the communities they still claimed to represent."[58] The claim itself is notable, because it gestures toward central concerns of sociolegal scholarship on cause lawyers and the often problematic roles of lawyers in rights-based movements.[59] But Mack's analysis is limited in both his conceptualization of the dilemma and his empirical historical method.

Consider his theorization first. Mack frames his story around the primary concept of paradoxes and tensions in racial "representation," and secondarily in claims about the loss of racial "authenticity."[60] But neither concept is explained or explored adequately. In

50. *Id.* at 69.
51. *Id.* at 71.
52. *Id.* at 71-72.
53. *Id.* at 53.
54. *Id.*
55. *Id.* at 52-54.
56. *Id.*
57. *Id.* at 268-69.
58. *Id.* at 236.
` 59. SCHEINGOLD, *supra* note 42.
60. *Id.* at 273-74.

an early footnote,[61] Mack acknowledges that Americans were "confused" about the concept of representation, and he cites the classic scholarship of Hanna Pitkin[62] that explored the multiple, often contradictory meanings of the term. But Mack leaves the conceptual puzzles that he recognizes at the start unaddressed. As a result, the purported crisis of representation at the heart of the book strikes this reviewer as somewhat elusive in character and implication. Mack further relies on the concept of "authenticity" to suggest what black lawyers compromised or lost by integrating into the white legal fraternity. But this concept is also elusive and highly problematic.[63]

The work of Nancy Fraser on the politics of "recognition" demanded by excluded minorities is relevant in this regard.[64] In many ways, Mack's account is precisely about what Fraser and others call the politics of recognition, However, Fraser importantly calls attention to the dilemmas of such politics.[65] Foremost is the tendency to reify identity in ways that privilege an "authentic, self-affirming, and self-generated collective identity" as an imaginary standard or ideal.[66] Such group authenticity is an illusion, Fraser argues, in that it conceptually denies recognition to the diversity of experiences, aspirations, values, and commitments within the excluded or exploited collective.[67] Moreover, the standard of authenticity is potentially dangerous, in that it can be invoked to devalue differences and minority positions *within* the dominant group, imposing a singular vision that mutes less powerful factions.[68] The norm of authenticity thus both obscures power differentials within the exploited groups, and diverts attention from the actual political processes and relationships by which group goals and strategies are contested and, at least potentially, negotiated. Finally, the obsession with identity recognition often competes with and trumps attention to the challenges of economic and political redistribution, which often are critical to altering the terms of exploitation and unequal status.

This problematic conceptualization of the representation dilemma is compounded by Mack's particular historical method. In short, Mack's use of biographical accounts to illuminate the paradoxical entry of outsider black attorneys into the insider white male fraternity systematically sidesteps what is essential to interrogating the politics of representation. Such interrogation, Pitkin and Fraser agree, would require examining the political relationships, interactions, overt conflicts, and negotiations among black lawyers, other civil rights activists, and perhaps even non-activists, especially those who were not lawyers or willing to compromise principles for professional prestige.[69] The strength of Mack's focused study of interactions between black and dominant white members of the legal profession mutes attention to the more complex interpersonal, organizational, and institutional dimensions at the heart of the representation puzzle. In this regard, his study stops short of following through on the provocative questions he raises about relations of

61. *Id.*

62. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1972).

63. MACK, *supra* note 1, at 268.

64. Nancy Fraser, *Rethinking Recognition*, 3 NEW LEFT REV. 107, (May-June 2000), http://newleftreview.org/II/3/nancy-fraser-rethinking-recognition.

65. *Id.*

66. *Id.* at 112.

67. *Id.* at 112-13.

68. *Id.*

69. PITKIN, *supra* note 61; Fraser, *supra* note 63.

activist lawyers with various sectors of the black community.

Finally, the study not only sidesteps attention to relations among multiple actors that is essential to exploring the representation puzzle, but, in doing so, it offers little direct insight into the important questions about the effect of professionalized, whitened lawyers on the substantive agendas—the framing of rights, the prioritization of values, the privileging of conceptions of interest—that won or lost out during the complex mid-century civil rights campaign, much less over the long term trajectory of civil rights across several centuries. In short, Mack gives little attention to the implications for ideological struggle. It is relevant in this regard that the primary division among radical and moderate attorneys featured in Chapter Seven revolves around the handling of a criminal case rather than the larger goals of desegregation that came to dominate the NAACP campaign by the late 1940s.[70] This is telling, because we know that other visions of black empowerment and civil rights were available and strongly advocated at the time. Historically-grounded empirical sociolegal scholars have demonstrated that a far wider array of visions about civil rights were espoused by both ordinary African American individuals and affiliated group activists prior to the 1950s.[71] In particular, Risa Goluboff has demonstrated how a complex mix of forces drove a wedge between class-conscious worker-based activists and race-based civil rights activists in the late New Deal and early Cold War eras, effectively marginalizing the once central economic rights claims and substantive economic issues in the civil rights agenda.[72] One can glimpse these lost promises of civil rights in Mack's book, but his personalized focus exclusively on professional lawyers and ordinary courtroom practice impedes engagement with such important insights and questions. Had he documented more thoroughly the growing "distance" of black lawyers from actual organizational affiliations, debates over strategy, and aspirational visions that thrived among blacks and other civil rights supporters rather than by the standards of an imagined black "authenticity," his contribution might have been greater.[73]

Perhaps I am unfairly pointing out that Mack has not written the book I wanted to read. But I have tried to make the case that his book highlights questions and advances claims that he leaves implicit and unaddressed, both conceptually and empirically. Moreover, attention to the historically complex relationship of class to racial and gender identity construction is at the heart of much sociolegal study of rights-based advocacy and cause lawyering, and is underlined by sociolegal historians of the civil rights era like Goluboff and theorists of recognition politics.[74] Nevertheless, Professor Mack's achievement is still quite original and unique. Sociolegal scholars who study cause law-

70. MACK, *supra* note 1, at 173-79.

71. GOLUBOFF, *supra* note 43; *see also* CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955 (2003); Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966*, 34 LAW & SOC'Y REV. 367 (2000).

72. GOLUBOFF, *supra* note 43; *see also* PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY (2008).

73. Mack might respond that his aim was only to document the experience of the loss of authenticity by black lawyers, the terms of which they did not clearly articulate. But this still strikes me as evading the interpretive role of making sense of experience amidst the context of their practices. MACK, *supra* note 1, at 273-74; *see also* PITKIN, *supra* note 60.

74. GOLUBOFF, *supra* note 43; MACK, *supra* note 1.

yers, rights-based social advocacy, and civil rights activism in particular will learn much from this splendid book. Law professors may be challenged to find a place for this book in the conventional curriculum, but all teachers of law should read and learn from Mack's powerful narrative about how the racialized and gendered power of the legal profession works in practice. *Representing the Race* is by any account an important scholarly contribution.

II

Professor Wheeler's book title, *How Sex Became a Civil Liberty*,[75] succinctly captures her subject as well as Kenneth Mack's title clearly captures his. Like Mack, Wheeler decenters high courts and the intricacies of appellate litigation and rulings, choosing instead to offer an "empathetic" account of the activists in and around the ACLU who contributed to the development of civil liberties protecting sexually-oriented talk, reading and viewing material, and practice in America over the twentieth century.[76] Wheeler's primary commitment is to construct a highly personal insider narrative about the motivations and experiences of the many male and eventually female ACLU leaders who worked through their own personal sexual passions, conflicts, and contradictions to advance serious commitments to promotion of sex-related rights and liberties.[77] In her own words: "[e]xamining the personal values, interconnecting relationships, intimate behavior, and often profoundly gendered experiences that lay behind the choices of the ACLU leaders made reveals much about the compromises they negotiated and the policies they ultimately developed."[78]

The book chronicles the ACLU's role in two quite different periods of sexual revolution, one that commences in the early twentieth century and the other in the 1960s and 1970s.[79] The narrative starts in Chapter One with the ACLU's work in the 1920s advancing the cause of speech rights for birth control advocates, which in turn grew into support of sex educators, artists and playwrights, and nudists.[80] Wheeler develops the personal side of this story about policy generation intriguingly by underlining that most of the activists, both men and women, had been attracted to the sexual libertinism that flourished within Greenwich Village in the 1920s.[81] These budding activists included Roger Baldwin, who in early adolescence engaged in regular sexual relations with his family's maid, stimulating his sexual desire and widening his range of sexual experiences at a young age, including learning the lesson about the importance of birth control.[82] In New York, Baldwin met and eventually wed, apparently without ceremony, Madeleine Zabriskie Doty.[83] Baldwin continued to openly espouse and practice "free love," which included

75. *See* WHEELER, *supra* note 2.
76. *Id.* at 7-8.
77. *Id.* at 7.
78. *Id.* at 4.
79. *Id.*
80. *Id.* at 11-12, 29.
81. *Id.* at 29.
82. *Id.* at 18-19.
83. *Id.* at 29.

sex with multiple lovers, not surprisingly creating tensions in the relationship.[84] During that time, Baldwin also founded the ACLU and began to develop agendas for the organization.[85] His experimentation with nudism and open sexual relations nurtured a sense that he and his cohort were in the vanguard in a broad cultural movement for sexual liberation, which led to commitments to rights protecting distribution of reading material as well as speech related to sex.[86] Whatever their private motivations, Professor Wheeler convincingly argues, the young reformers displayed a sober, persistent commitment to libertarian principles and to the struggle to reign in the invasive, paternalistic government.[87]

The campaign to protect the rights of those who produce sexually-oriented reading and viewing matter evolved by the 1950s into a commitment to expand rights for the consumers of such material as well.[88] This commitment involved mobilizing the First Amendment as a general resource for protecting the rights of people as consumers.[89] The "right to read" principle, for example, became the lynchpin of the ACLU's anti-censorship campaign.[90] Wheeler astutely notes that this strategy of framing sexual expression and consumption as a constitutional right played well in the developing consumer culture and political economy despite challenges from moral conservatives.[91] Even as the ACLU agenda became larger and more serious, Wheeler notes, the leaders continued to display a pragmatic, ad hoc approach to involvement in legal cases.[92] It was also during this period in the 1950s when the ACLU began an alliance with Playboy publisher Hugh Hefner, and initiated challenges against the moralistic censorship agendas of the Catholic Church as well as large corporate communication monopolies.[93] The ACLU also professionalized its internal administration under the leadership of Patrick Murphy and began to experiment with submission of *amicus* briefs in high profile cases.[94]

A shift from defending speech and consumption of sexual materials to the defense of sexual practices defined the next phase of the expanding the ACLU agenda of "privacy" rights.[95] This transition represented an increased sophistication in legal strategy and ambition, as the reformers challenged laws prohibiting fornication, sodomy, birth control, abortion, and homosexuality.[96] Again, the ACLU enlarged its ambitions to "rewrite American Constitutional Law" even while proceeding cautiously on issues like abortion and homosexuality, deferring to the path-breaking leadership of the American Law Institute.[97] In any case, these campaigns increased the visibility of the ACLU and connected

84. *Id.* at 29-30.
85. *Id.* at 24.
86. *Id.* at 37.
87. *Id.*
88. *Id.* at chs. 2-3.
89. *Id.*
90. *Id.* at 66-68.
91. *Id.* at 91.
92. *Id.*
93. *Id.* at 61.
94. *Id.* at 68-69.
95. *Id.* at 93-94.
96. *Id.*
97. *Id.* at 115.

it to other social movements that evolved in the 1960s.[98] Especially important in this period was the increasing role of women—such as Dorothy Kenyon and Harriet Pilpel initially, and later Pauli Murray and Eleanor Holmes Norton—in the association and the related growing commitment to women's rights.[99]

From the start, however, the libertarian anti-government commitment of the ACLU at times clashed with feminism.[100] For example, while a leader in defending the privacy right to choice about abortion, the ACLU opposed a right to government funding for women who choose abortion.[101] The relationships to women's groups on issues of sexual and reproductive rights became more problematic and adversarial in the 1970s and 1980s, as contentious debates developed over rape, pornography, and sexual harassment.[102] Opposition to rape shield laws, defense of pornography as sexual expression, and reluctance to support sexual harassment laws at times placed the ACLU in direct opposition to second wave feminists and especially to radical feminists.[103] In the process, ACLU leaders and chapters often divided amongst themselves, sometimes producing various compromises on issues like sexual harassment.[104] These dramatic clashes make Chapter Seven the most dramatic section of the book, although that part of the story also was the most familiar for this reviewer. The author ably characterizes the conflicts of principle and policy in that era of the intensifying culture wars, and the author's commitment to even-handed treatment facilitates explanation of how ACLU activists developed their positions.

Assessing the Achievement. Wheeler's book, like Mack's, is splendid in many ways. It is thoroughly researched,[105] well written, and compelling. It covers a time period that is similar in length but later (1920s-1980s) than Mack's account (1890s-1950s). Like Mack, Wheeler is less interested in critically assessing the impact of rights advocacy than in documenting the personal motivations, challenges, and experiences of the advocates. But the texture of Wheeler's historical account is different. One big difference is that Wheeler's book highlights at length the ceaseless strategic moves, clashes, and compromises over rights policy advocacy far more than does Mack. Scholars and students who enjoy strategic political maneuvers in principled legal contestation will find much to like about Wheeler's account in this regard. Likewise, while Wheeler does not devote much attention to the specifics of high court rulings and case law development, her stories provide interesting background for important judicial rulings on rights that teachers of civil liberties courses are likely to find useful as anecdotal tidbits to spice up lectures. At the same time, though, Wheeler's documentation of far more people, issues, strategic engagements, and events makes her narrative less thoroughly biographical, personal, and intimate. I came away from reading Mack's book with strong, memorable portraits of key people struggling with similar sets of professional pressures over time, whereas the

98. *See generally id.*
99. *Id.* at 93-94, 116-17, 152.
100. *Id.* at 121.
101. *Id.* at 121.
102. *Id.* at 179-80.
103. *Id.*
104. *Id.*
105. Wheeler includes over seventy pages of endnotes and a twenty-page bibliography. The amount of original archival research is extremely impressive.

figures in Wheeler's account were more distant and defined by their ever changing policy quests than their personal experiences and struggles, despite Wheeler's avowed aims. In short, Wheeler's approach to narrating history differs a bit from Mack's historical method, thus producing books with different styles and resonance.

More important in this regard is the two author's conceptualization of the relationship between the personal and the political, or legal. In Mack's version, personal biographies are used as a device to explore collective identity construction among black civil rights lawyers as they adapted to the expectations and imperatives of the white dominated legal profession. Mack suggests that African American lawyers' private identities as members of mostly segregated black communities had to be repressed and reconstructed according to professional disciplinary expectations, which in turn created the distance from both their previous selves and those whom they aimed to represent.[106] By contrast, Wheeler is most interested in how the different personal desires, life experiences, and interactions of varied individuals became expressed in, or translated into, policy advocacy for new rights. "In many ways," she proclaims," "their [ACLU leader's] private lives became laboratories for experimenting with sexual civil liberties."[107] Lawyering as public activity was an outlet for expression that seemed to impose few systematic professional constraints on identity construction and modes of performance. For example, Wheeler expresses a legal realist perspective that the developing "ACLU's agenda was . . . shaped less by some logic inherent in the Constitution than by the particular values, desires, and experiences" that activists "brought to their work."[108] The cultural environment matters for Wheeler's activists, to be sure; Greenwich Village and the rise of consumer society contributed to personal desire and experience. But these extra-legal "cultural" forces facilitated more than impeded development of desires and translation into public advocacy. Constraints within the legal terrain surely existed, but mostly in the form of individuals and groups (e.g., Catholic Church, radical feminists) with opposing ideas and who thus had to be challenged. In sum, Wheeler's subjects tend to work out private identity conflicts in public legal contestation, whereas Mack's black attorneys experienced professional legal performance to be the source of conflict with and within their personal and public identities.

These two routes to connecting the personal and the political, the individual and the public, reflect as well as shape how the authors differently address power. For Mack, the primary currency of power is professional prestige; it is relational, asymmetric, and produced by institutionalized racial and gender hierarchies. The quest for power by black civil rights lawyers required their subjection to new modes of disciplinary power. For Wheeler, there is little analytical attention to institutional power in this or any other sense. Her world seems to be one of autonomous individuals who clash with other autonomous individuals over policy. She hints often that differential power exists, and that advocacy for new rights constructions must face and overcome opposition. But how we imagine the differential and asymmetric modes of power in legal contestation are not interrogated in any systematic way. While attentive to the many ways that race and gender

106. *See* MACK, *supra* note 1, at 3-7.
107. WHEELER, *supra* note 2, at 31.
108. *Id*. at 217.

mattered as policy considerations as well as changing roles and instrumental clashes, Wheeler thus has little to say about Mack's central concerns regarding how race and gender structured the professional world of lawyers. In particular, the fact that most ACLU leaders were white, and most were male in the early decades, is not recognized to account for why personal desire might have seemed to translate so directly into legal reform politics.

This leads me to offer a final set of comments about Wheeler, which repeats to some degree my challenge to Mack. One way to make the point is to note that Wheeler's historical story is actually very much about accommodation to, or co-optation by, institutionalized hierarchical power structures that came at some clear cost, even though she does not follow Mack in conceptualizing it in those terms. In short, Wheeler astutely recognizes that the expansion of sex-related civil liberties was interrelated with the emergence of commercially-driven consumer society. Her emphasis is on the strategic "brilliance" of ACLU activists in framing demands for new constitutional protections in terms of "consumer rights."[109] As she puts it in her concluding chapter:

> Positioning consumers as the First Amendment's primary clients was a revolutionary move that expanded the amendment's constituency to include everyone who might want to "read, see, and hear" . . . . It seemed to articulate what had always been the case by echoing the individualistic, consumer-oriented ethos of the postwar era . . . .[110]

This new framing of citizens as consumers changed "how people thought and felt about their rights."[111] This is an incisive observation that elevates the analytical value of the book. It is important not just to make sense of the ACLU's strategic impact over time, but also to understand how basic constitutional rights were reconstructed to fit the development of corporate capitalist forms of organization in which most people increasingly identified freedom with private indulgence while their control over the terms of work as employees for large organizations declined. And it makes sense of how the ACLU fit into the larger movement of lawyer-driven, legalistic reform politics which included civil libertarians, rights advocates for racial minorities and women, environmentalists, Nader-inspired corporate reformers, and good government advocates during the 1960s and 1970s. At the heart of this loosely defined liberal movement was an ethos of "new consumerism" that redefined citizens and their interests as enlightened consumers.[112]

While Wheeler is astute in recognizing the creativity of this reconstructed agenda of consumer rights, she does not address the palpable surrender of political possibilities at stake. Legions of critics have interrogated the downsides and pathologies of corporate dominated, commercially-driven consumer society. Not the least of these are prominent critics who assail the transformation of the distinctively public character of politics and the injection of what once was cabined as "private" modes of interaction into the public

109. *See id.* at 215-20.
110. *Id.* at 216.
111. *Id.*
112. *See* MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM (1986).

sphere—an historical development that is captured mostly uncritically in Wheeler's own version of politics driven by private desire.[113] My emphasis here, though, as in my engagement with Mack, concerns instead what was lost in historical visions of citizen rights during the twentieth century campaigns for expanded civil rights and civil liberties. Like Mack, Wheeler traces the original commitments of the ACLU to support for the rights of anti-war protestors, labor organizers and leaders, and socialist critics of capitalism.[114] Baldwin and others were allied with a variety of left-leaning, labor-based organizations; Baldwin bonded with Emma Goldman, among others. As the campaign for civil liberties developed into a movement for consumers, however, the focus on rights of citizens as workers with protections for workplace organization, speech, and democratic participation in corporate management were demoted to episodic and mostly marginal status. The advances for personal liberties in matters related to sex, as in the advance for individual civil rights against discrimination for racial minorities and women, paralleled directly the rapidly receding protections for the rights of citizens as workers in the post-World War II constitutional order. ACLU activists did not cause that transformation, of course, but their embrace of consumer rights represented a fundamental, historically significant accommodation that forfeited longstanding aspirations for rights according political power in pervasive production processes to ordinary people. For her part, Wheeler seems to hint at some ambivalence about the rise of consumer society and the sexualization of public life, but she is as analytically inattentive to the concomitant erosion of workplace rights as is Mack.

Perhaps this transformation from a producer-based rights vision to a consumer rights legal regime was so inevitable in advanced corporate capitalist society that it does not merit attention. But, as Robert Cover once argued, legal scholarship, like law itself, institutionalizes processes of systematic forgetting, a routinized mode of amnesia about lost possibilities for legal justice and rights.[115] Most historically oriented sociolegal scholars assume an obligation to interrogate what was abandoned or killed off in periods of legal change, including especially those developments identified as "progressive." Such a process of recovering historical options eviscerated by official law is more an analytical than a normative commitment. The normative questions that follow concern whether, how, and how much we respond as citizens to those losses of possibilities for basic rights.

III

None of the critical engagement above should obscure my high regard for the books written by Professors Mack and Wheeler. These volumes not only are impressive feats of empirical historical scholarship, but they succeed brilliantly in illustrating a fun-

113. *See* HANNAH ARENDT, THE HUMAN CONDITION (2d ed. 1958); CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS (1979); HANNA PITKIN, THE ATTACK OF THE BLOB: HANNAH ARENDT'S CONCEPT OF THE SOCIAL (1998).

114. *See* WHEELER, *supra* note 2, at 215-20.

115. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY 1, 5-10 (Jan. 1, 1983), http://digitalcommons.law.yale.edu/fss_papers/2705 (discussing legal scholarship and legal justice); *see also* Michael McCann & George Lovell, *Executing "Good" Civil Rights Law: A Political History of* Wards Cove v. Atonio (2012) (unpublished manuscript) (on file with the author).

damental maxim articulated best by Stuart Scheingold in his 1974 book, *The Politics of Rights*.[116] In short, basic rights are not "natural" and inalienable, nor are they automatically protected by our official legal order. Rather, as these new books demonstrate, rights must be constructed and reconstructed, won and re-won through persistent political action and struggle. In such struggles for expansion and enforcement of rights, committed lawyers are almost always critical to advancement even as the norms and priorities of the legal profession routinely work to contain rights visions in ways that limit challenge to existing hierarchical arrangements. I especially appreciate that Mack's book addresses these paradoxes of law and the legal profession in direct, convincing ways. By connecting these two recent books to other historical studies and theoretical projects, I have attempted to construct from the background elements of their narratives recognition of even deeper paradoxes inherent in progressive liberal rights advocacy.

116. *See* SCHEINGOLD, *supra* note 42.