
CIVIL RIGHTS HISTORY: THE OLD AND THE NEW

*Kenneth W. Mack**

In her review of *Representing the Race: The Creation of the Civil Rights Lawyer*, Professor Risa Goluboff correctly notes that my book partly diverges from the agenda she outlines for a “new civil rights history.”¹ As she acknowledges, my book pursues a somewhat different project than the one she would like to define for the field. As I will explain below, Goluboff’s project is actually a recapitulation of themes that became mainstream in legal history a generation ago. *Representing the Race*, by contrast, joins recent work in legal history, both within and outside civil rights history, in attempting charting a path away from that familiar terrain.

In defining the “new civil rights history” Goluboff recommends that civil rights historians meld a traditional approach to the legal history of the subject — “a court-centered or major-case-centered” focus — with that of traditional social history — the “movement on the ground in particular communities.”² That way, historians can show that civil rights law and lawyers were a mediating force — “intermediaries, liaisons, ambassadors” between the formal legal system and outsider communities — in order to demonstrate “complexity and contingency”³ of historical development and “paths not taken.”⁴ By the 1990s, the kind of socio-legal history proposed by Goluboff was already so familiar that a well-known scholar referred to “studies of ‘law as an arena of struggle’ between an official and subaltern cultures” as a “safe disciplinary harbor” for young historians.⁵

The “new civil rights history” is an odd name for Goluboff’s paradigm. As she concedes, the agenda for the enterprise she presents as “new” was set out in an article — actually an influential symposium in the *Journal of American History* — that was published twenty-five years ago.⁶ That symposium helped define the legal history of the 1980s and early 1990s.⁷ Her real task is to get civil rights historians to

* Professor of Law, Harvard Law School.

¹ Risa Goluboff, *Lawyers, Law and the New Civil Rights History*, 126 HARV. L. REV. 2312 *passim* (2013) (book review).

² *Id.* at 2319.

³ *Id.*

⁴ *Id.* at 2325.

⁵ Daniel R. Ernst, *Law and American Political Development, 1877–1938*, 26 REVIEWS AM. HIST. 205, 205 (1998).

⁶ Goluboff, *supra* note 1, at 2322 (citing Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All,”* 74 J. AM. HIST. 1013 (1987)).

⁷ See Ernst, *supra* note 5, at 205.

devote themselves to the project that animated the legal history of a quarter century ago. Goluboff, correctly enough, is criticizing those few remaining unreconstructed historians who continue to focus on appellate courts without attention to social context, as well as old style social historians who tend to ignore law and legal institutions. Within the field of legal history, however, most historians internalized that criticism long ago and many have moved beyond it.

These changes have occurred even, and especially, within the historiography of race and civil rights, which has often moved away from the conventional law-and-society concerns that animate Goluboff's review. Some scholars have expanded the understanding of the civil rights movement across racial lines and those of sexual identity.⁸ Others have critiqued the conventional focus on the voices of outsider communities and their interaction with formal law.⁹ Others have explicitly declined to take up Goluboff's invitation also set out in her earlier work to explore paths not taken in civil rights history.¹⁰ Still others have used the tools of cultural history to analyze slavery and civil rights in ways that stand in deep tension with traditional law-and-society approach,¹¹ while others have suggested that legal history as a whole is perhaps moving beyond that convention altogether.¹² Both within and outside of civil rights history, the concerns of a generation ago no longer define the central project of legal history.

Goluboff's location in the concerns of the older scholarship sometimes causes her to miss some of the subtleties of *Representing the Race*, beginning with her attempt to state the book's central thesis. She takes the thesis to be that black civil rights lawyers were "stuck between seeking racial authenticity in the eyes of African Americans and professional legitimacy in the eyes of white lawyers."¹³ The introduction of the book quite explicitly states otherwise: "the problem of the black lawyer as racial representative was not simply a case of the larger society demanding one thing and the minority group demanding another."¹⁴ The central problem of Raymond Pace Alexander, Charles Houston, Sadie Alexander and others was not that black clients and

⁸ See, e.g., MARK BRILLIANT, *THE COLOR OF AMERICA HAS CHANGED* (2010); MARGOT CANADAY, *THE STRAIGHT STATE* 255–63 (2009).

⁹ See, e.g., TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT* (2011).

¹⁰ See Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948–1964*, 26 *LAW & HIST. REV.* 327, 331 (2008).

¹¹ See Ariela Gross, Essay, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 *COLUM. L. REV.* 640 (2001) (collecting scholarship).

¹² Christopher Tomlins, *What is Left of the Law and Society Paradigm After Critique? Revisiting Gordon's "Critical Legal Histories,"* 37 *LAW & SOC. INQUIRY* 155 (2012).

¹³ Goluboff, *supra* note 1, at 2313–14.

¹⁴ KENNETH W. MACK, *REPRESENTING THE RACE* 5 (2012).

communities wanted authenticity and that white lawyers and judges wanted conformity. In fact, book argues that white lawyers wanted their black counterparts to be “authentically” black and at the same time to conform to the standards of the white profession, and that black communities and clients were similarly conflicted about what they expected from representatives of their race. That is central paradox of representation that is explored in the book. Although this point, made explicitly in the introduction, is sometimes made with more subtlety in the body of the book, it is not an argument that a discerning reader should miss. The problem of lawyers as a mediating force between the “authentic” claims of outsiders and the legal system is a much-explored topic, but analyzing it is not the project of this book.

Representing the Race is a work of social-cultural history, and it draws upon newer work that expands civil rights history across the boundaries between racial groups, nations, and sexualities, and critique many of the older law-and-society frameworks. It deals with a question that lies at the heart of much of the work that has emerged since the 1990s: how law (in this case the legal profession) and identity (in this case, the identity of a black lawyer) help construct one another. The book, like much of that history, pursues a project that is quite orthogonal to that of the old socio-legal history. For instance, Goluboff makes a particular version of class analysis the center of her “new civil rights history” – although the works she invokes as examples of that new history often do not – and seems to suggest that *Represejnting the Race* should have deployed it. But why should a social-cultural history of the ways that professionalism constructs civil rights lawyers’ identities (and vice versa) take up the question of, for instance, whether the lawyers deradicalized their clients’ claims?¹⁵ This problem of lawyers-versus-client politics is well-explored territory within legal scholarship,¹⁶ but it is not germane to the project of *Representing the Race*.¹⁷ Something similar is at work in her suggestion that the book might have devoted substantial attention to legal doctrine – which of course raises the question of why a social-cultural history of black lawyers’ everyday lives *should* devote substantial attention to appellate legal doctrine. Such questions remain unanswered in her review.

In fact, *Representing the Race* makes, quite deliberately, a critique of the the traditional law-and-society enterprise of analyzing what Goluboff calls the “gaps between what clients want . . . and what lawyers

¹⁵ See Goluboff, *supra* note 1, at 2330–31.

¹⁶ See, e.g., Derek A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

¹⁷ This point is made explicitly in the book’s introduction. See MACK, *supra* note 14, at 7.

think law can or should do.”¹⁸ The book, for instance, devotes a long discussion to the controversy that broke out after Charles Houston defended a black man named George Crawford in rural Virginia, and argues quite explicitly that the participants in that controversy all believed that they could resolve the dispute by determining whether Crawford’s desires meshed with Houston’s objectives for civil rights litigation. The controversy was precisely about the thing that Goluboff contends should be at the center of civil rights history – the match (or mis-match) between clients’ claims and lawyers’ desires. That discussion takes up a good portion of the pivotal chapter of the book. That chapter shows, at length, how difficult it is for a historian to discern whether Crawford and his lawyer wanted the same things of the legal system.¹⁹ The chapter actually presents a quite explicit cautionary argument for those scholars who believe that one can easily foreground the question of client desires and the legal system.

Goluboff’s real concerns are not directed at the substance of the book. Her actual concerns are with the newer approaches to history that the book exemplifies. The older socio-legal history in which she locates herself grew out of the positivist law-and-society scholarship, and the social history writing, of the 1970s and 1980s. It grew, as well, out of an era when civil rights reverses prompted many scholars to explore paths not taken in the movement, forgotten alternatives, and the role of law in deradicalizing the claims of clients and communities. The newer scholarship is driven in part, as it is in many fields, by more recent intellectual currents, and by questions prompted by the world we now inhabit — a globalizing world of shifting racial identities, contested sexualities, and new immigrant groups.

Goluboff and I have very different visions of the future of civil rights history, and of legal history more generally, and very different relationships with its past. She believes that the old verities of the law-and-society scholarship of the 1980s and 1990s can supply a roadmap for twenty-first century historiography. Indeed, her review is a quite useful mapping of those older concerns and how the newer scholarship in civil rights history partly – and only partly – incorporates them. My own view of the future of the field is captured by newer scholarship in the field that takes those old verities as a helpful starting point, but feels free enough to discard them when they are no longer useful.

¹⁸ Goluboff, *supra* note 1, at 2330.

¹⁹ MACK, *supra* note 14, at 173–80.