BOOK REVIEWS

ALL UNHAPPY FAMILIES: TALES OF OLD AGE, RATIONAL ACTORS, AND THE DISORDERED LIFE


Reviewed by Ariela R. Dubler*

Professor Hendrik Hartog revels in mess. Domestic messes of every variety fill the pages of Someday All This Will Be Yours: A History of Inheritance and Old Age. Hartog serves as a brilliant navigator of this complex and potentially befuddling cacophony of family scenes and conflicts. He guides us through families’ domestic and legal battles, bringing family members’ daily lives and experiences into the center of inheritance law and the legal history of the family.

Families living in New Jersey from roughly the mid-nineteenth century through the early decades of the twentieth century produced the historical mess into which Hartog has waded neck-deep. Fearlessly, Hartog assembles and picks through this stunning array of emotional, legal, and financial debris. Patiently, he reconstructs the origins of the wreckage: the travails of families struggling to negotiate the needs, desires, and anxieties surrounding the care of aging relatives in a time before state programs and paid caregivers eased some of the predictable burdens of old age. The original creators of this wreckage were unable to exert control over many aspects of their situations. Medical emergencies and limited resources often determined their destinies. Hartog, however, narrates their lives with great intentionality, thereby reconceptualizing the role of these families in the law and, indeed, the very meaning of law itself.

Someday All This Will Be Yours is about the ways that older people, terrified of being left alone in their final years of life, used promises of future wealth transfers to ensure that younger members of their households would care for them in their old age. It is about how those promises shaped family arrangements, domestic duties, and, particularly, the provision of end-of-life care. And it is about what happened when, unsurprisingly, some promises of future riches went unfulfilled and some disappointed promisees turned to the courts for

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redress. Ultimately, *Someday All This Will Be Yours* is about the blurry and mutually constitutive spheres of family life and family law, viewed through the prism of New Jersey families stumbling through the pitfalls of old age and complex familial relationships.

Hartog is a master storyteller, and the core of *Someday All This Will Be Yours* is stories: stories of deals made between hopeful (or, sometimes, desperate) relatives, stories of grueling illness and nursing care, and stories of despair at promises and expectations unfulfilled. These tales of anticipation and disappointment are relentlessly messy — unruly collections of people living together as households, physical spaces falling into disrepair, and elderly bodies confronting the impending end of life with all the accompanying bodily decay.

Without flinching, Hartog arrays these overlapping layers of dishevelment before us. Indeed, his explicit goal is to counter the false neatness of past accounts of such familial scenarios. He writes:

> There is a certain bloodlessness to the history of care as it has often been written about. Care itself is a neutral word that can hide the rages of the demented and of their caretakers, and the struggle to keep a house clean when one has to live with an incontinent old man or woman, the chaos of everyday life. (p. 12)

True to this commitment, the pages of *Someday All This Will Be Yours* brim with metaphorical and literal blood: not only hard-to-characterize configurations of people and conflicting legal doctrines, but also emotionally devastating encounters with mental breakdowns, the tortured administration of enemas, caretakers "smeared up" with fecal matter (p. 255), old people with "suppurating wounds" (p. 157), and one man with swollen testicles "as big as a small muskmelon" and "as black as ink" (p. 262).

It is all a big mess. And Hartog almost rejoices in its unkemptness. The blood allows us all to peer into the lives and legal struggles of families negotiating the perils of sickness and death. Moreover, the blood allows Hartog to dismantle the traditional boundaries between legal doctrine and lived experiences.

Of course, a historian like Hartog, with his eyes trained on the intimate puzzles of the past, might understandably savor such a complex landscape of domesticity gone awry. The law, however, at least as it has been conventionally constructed, is no friend of such unmitigated disorder. The law, understood as the doctrinal work product of judges and legislators, is famously intolerant of chaos, both inside and outside of families. As Alexis de Tocqueville observed, "What lawyers love above all things is an ordered life."¹ In the face of mess, lawyers often

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act as the most efficient of clean-up crews, with the law serving as the capacious rug under which junk of all kinds is conveniently swept. The disordered life is soon rearranged and tidied up. Complicated conflicts are shoved out of view. The appearance of order is restored, good as new.

Amidst these countervailing forces of familial disorder and legal tidiness lies the central drama of *Someday All This Will Be Yours*: how family members and legal actors made sense of the disconcerting conflicts and oozing bodily fluids that accompanied familial decisions around what we would now call eldercare. Drawing on a treasure trove of carefully mined sources, Hartog again and again pulls all the familial junk back out from under the law’s rug. He unapologetically brings families’ struggles back into plain view where he can ponder the significance of the disordered life, as well as the law’s valiant, but ultimately futile, attempts to impose a patina of order upon familial states of disorder.

In the end, though, *Someday All This Will Be Yours* forces us to reckon with the fact that order and disorder are themselves hard to separate. The rug cannot be separated from all that it is trying to hide. Despite the rigorous efforts of judges, the law too is a messy business.

It has long been Hartog’s scholarly project to get historians and lawyers alike to reject any neat definition of law in favor of one that recognizes law as complicated, multiple, and contingent — the result of people’s actions and understandings, not any particular text or judicial pronouncement. True to this vision, *Someday All This Will Be Yours* highlights the deep ways that family and law are actually more similar than dissimilar: indeterminate, conflicted social institutions whose strength and very meaning emerge from their complex roles in people’s unruly lived experiences.

Which is not to say that the people in Hartog’s stories — family members or legal professionals — ever threw up their hands and conceded that they could control neither home nor law. Quite the contrary. Through private bargaining and public litigating, lay people and professionals alike stubbornly sought to exert control over family and doctrine. Hartog’s stories are about the seemingly rational deals that family members struck with one another to benefit their respective needs for care or money. These are stories of attempts to impose order on familial disorder. And these are stories about the clear accounts that judges gave of what family members had done and the allegedly predictable consequences of their well-reasoned actions. Judicial narratives sought again to rearrange messy familial conflicts into ordered resolutions.

Ultimately, however, Hartog’s stories reveal just how hard it is to restore order convincingly to either the family or the law. While judges, desperate to dispose of the claims of feuding relatives, often
presumed a rationality to the decisions made by parents and children, scraps of evidence almost inevitably hint at the possibility of other motivations. Time and again, Hartog’s stories subtly suggest that, although family members might bargain for what they need, it is hard to transform all familial relationships into purely rational transactions based on costs and benefits.

Yet, the impulse toward order must be a deep one. And even as Hartog reveals law and family life as inextricably intertwined social spheres, forms of thematic order emerge in his own narrative. Moreover, even as Hartog forces us to recognize the disorderly heart of the law, he seems drawn to his own sense of order based on family members’ roles as rational actors engaged in calculated deals. Hartog’s own narrative, then, often seems to understand family arrangements as the reasoned outcomes of bargained-for goods, albeit with calculations made in suboptimal circumstances.

But this order too almost begs to be unmasked. In particular, these tales might force us to reckon with the role of far less rational emotions — particularly, love — in guiding the familial structures crafted by aging parents and their grown children. Indeed, Someday All This Will Be Yours subtly expresses a profound ambivalence about the role of love and altruism in familial negotiations. Hartog seems unable to banish love fully from the familial realm and, simultaneously, unable to grant it significant explanatory power.

So too the law. Just as Hartog occasionally concedes that a parent or child might have acted not out of rational self-interest but rather out of emotional connection, the law cannot entirely figure out what to do with love’s messy impact on the otherwise rational actors that make up the legal family. In Someday All This Will Be Yours, then, narrator and subjects alike seem deeply ambivalent about whether family members act out of their own self-interest or out of commitments that might be deeply out of sync with their own well-being.

These tensions are not simply an artifact of history. The ambivalence that weaves through Someday All This Will Be Yours lurks deep within contemporary family law, as well. In fact, through the lens of nineteenth- and early-twentieth-century New Jersey inheritance law, Hartog offers us a rich view, more generally, of the multifaceted, fraught relationship between the messy, mutually constitutive arenas of the family and the law. In this respect, Someday All This Will Be Yours offers not only a history of a narrow set of familial practices in one period of New Jersey legal history, but also the critical antecedents of the central themes and struggles of family law today as judges continue to confront the order and disorder, and the rationality and irrationality, that burn alongside each other at the core of the legal family.
I. HARTOG ON OLD AGE AND THE LAW

Family after family traipses through the pages of Someday All This Will Be Yours. The heart of every chapter of Hartog’s book consists of detailed, poignant narratives of specific families’ experiences and struggles, their agreements and disappointments. Hartog has crafted spectacularly rich tales of families’ actions and relationships from a range of court documents and trial transcripts. His sources overflow with the elements of family life that are precious and rare in historical documents and, particularly, in published legal sources.

Hartog tells the parts of people’s stories that are often hardest to learn and almost always missing in judges’ dispositive accounts of familial conflict: detail-rich descriptions of family negotiations, compromises, and tensions around the most intimate forms of the emotional and physical care that many old people require. In story after story, we learn of people’s deepest fears, their conflicted notions of responsibility, their physical frailties, their desire for freedom, and their potential for both extreme kindness and heartbreaking cruelty. Hartog brings the reader into the web of interactions and conflicts that, ultimately, led some member of each family to turn to the law to resolve his or her problems.

A. The Family Drama

Every embattled family in Someday All This Will Be Yours is different. And Hartog marvels that “[o]ne true wonder of these records — as social history — is in their inability to be reduced to a representative norm” (p. 13). Nonetheless, the book assembles these stories because they are linked in critical ways.

A basic cast of characters, for instance, binds the distinct family conflicts and travails that unfold in the chapters of Someday All This Will Be Yours. The common dramatis personae consist of an aging member of a family and some number of younger members of the household — usually, but not always, biological relatives of the aging person. Across tales, a basic narrative thread similarly links these characters. The fundamental recurring plot is as follows:

Act One: An aging family member realizes that old age will likely mean the need for a caregiver. Deep fear and “anxieties of solitude” set in (p. 120). What if there is no one to provide the necessary care when the time comes? What if old age means being left all alone and helpless? For many, reports Hartog, “[t]here was no imagined escape from abandonment” (p. 120).

Act Two: A possible solution presents itself: guarantee that someone will care for you by making some younger, able-bodied member of the household an offer that she or he cannot resist. And so the aging person makes the book’s eponymous promise: “Take care of me, and
someday all this will be yours.” In each story, some younger person, enticed by the vision of future wealth and prosperity, makes the deal.

Act Three: Things fall apart. Not surprisingly, especially since this is a history based on court documents, happy endings often prove elusive. Some time after the deal is made and the younger family member has endured a period of grueling physical care given at the expense of pursuing more fulfilling life options, the old person dies and leaves the promised property to someone else.

Act Four: Enter the judges. The aggrieved younger family member goes to court to get his or her due. He or she must find a legally remediable account of a deep familial injustice. A judge is then asked to decide whether some legal action might offer some remedy—in the form of property or compensation—for the angry younger caregiver.

By unfolding this drama again and again, Hartog paints a vivid portrait of family relations. It is, of course, a portrait from a very particular angle. One of Hartog’s spectacular, disquieting moves in *Someday All This Will Be Yours* is to shift the focus of our lens when we examine the family. As Hartog points out, most studies of the family have focused on either husbands and wives or parents and young children. By contrast, through Hartog’s sources, “our attention is drawn to two characters, shadowy figures within family law as it has ordinarily been conceived: the adult child and the elderly person” (p. 21).

These characters focus us on very particular and peculiar characteristics of the family. Most strikingly, when an adult child and an elderly parent sit at its core, the family becomes a setting devoid of formal obligations to tie family members to one another. Jarringly, parents had no legal obligation to provide for their children in their wills, and children had no obligation to care for their aging parents. Unlike the arena of husband-wife relations or parent-(young) child relations, then, the law made no demands on the core familial relationship structuring the dramas in Hartog’s book. Parents and their adult children had to work out their mutual responsibilities for themselves. Similarly, adult siblings—often the rivals in these dramas over family wealth—owed each other no legal duties.

Thus, Hartog’s “focus is on families within which competent parties negotiated and fought with each other over promises, inducements, commitments, and obligations and over differing understandings of needs and duties” (p. 28). Far from the image of the family as a “haven in a heartless world,” a respite from market forces and hostilities, Hartog’s families are bonded by the need to barter over their varied goods and services. In *Someday All This Will Be Yours*, “families are

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2 See generally CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD (1977).
studied as locales or arenas filled with men and women who held interdependent but conflicting life plans and identities" (p. 28).

The families that emerge in this terrain of negotiated exchange are extremely varied and porous. It is not a neat landscape of fixed identities. The line between family member and employee, for instance, often blurred. Many people inhabited a “peculiar middle space” in which they were “neither family nor employees — or both family and employees” (p. 249). And to complicate matters further, identities often shifted over time. As years passed, blood relations and non-blood relations came in and out of seemingly familial configurations. “By the time the younger people discovered that they were not getting what they believed they had already been given . . . [a]lignments within families had shifted, and new families had formed. People had died, remarried, and quarreled. Debts had been incurred, and inopportune comments expressed” (p. 141). Faced with these disorderly scenes, courts “struggled to fix identities that were multiple and contradictory” (pp. 249–50).

By contrast, Hartog works to unfix those identities in order to dwell on the ways that familial relationships were contingent and ambiguous. Likewise, while judges sought to categorize familial conflicts into predictable patterns, Hartog stresses that each family’s tale is different. To be sure, he concedes, “part of the allure of such cases is their apparently universal, folktale-like qualities” (p. 49). But while Hartog seeks to bring these cases together to understand something about people’s lived experiences across cases, no case in Hartog’s book is meant to be representative. All of the tales in the book “about daughters, sons, housekeepers, or adopted children became, through the matrix of petitions and complaints and the testimony of supportive witnesses, particularized and distinctive” (p. 13).

Moreover, Hartog recognizes that each family’s story could itself be told in many different ways. Marriage could sit at the center. Or parenthood. Or a sibling relationship. In many cases, “the underlying conflict was both between parent and child and between contending and competing siblings” (p. 52). Any overarching narrative, Hartog cautions, might “bleach out many of the characters that shaped the conflict in the case” (p. 52). And, above all, “it is important not to deny a messy reality” (p. 53). Everyone — family members, lawyers, judges, and Hartog himself — is constantly making narrative choices that produce particular accounts of family deals and injustices.

By reconstructing many detailed and varied accounts of the “some-day all this will be yours” tale, each unfolding in its own way with its own eccentricities, Hartog explores how families made decisions about important life choices, how the law understood the doctrinal significance of those choices, how those legal understandings shaped familial choices, and how families shaped the law.
These stories are filled with the elusive details of domestic labor, the types of work too often thought to be so private or uninteresting or embarrassing that they are omitted from many of the written documents — particularly, those of a legal variety — that are available to historians. By focusing on cases surrounding broken promises of inheritance, Hartog has brought to light trial documents that tell us how families did the laborious work that comes along with domesticity, from tending to farms, to cleaning the house, to preparing meals, to nursing a sick relative. His sources are jam-packed with the “revealing detritus” of family life (p. 142). He has even found transcripts that give the poignant details of the physical labor involved in giving the most intimate care to incontinent, incoherent, and demented old people.

As Hartog notes explicitly, these are stories of family members performing the forms of labor that today we often outsource to paid workers (pp. 270–73). The government also provides services for the elderly (p. 270). But Hartog’s transcripts reflect a time when such caregiving was almost always performed by relatives or at least by people who understood themselves to be family members.

B. Enter the Lawyers

Hartog is particularly attentive to the legal profession and the role that lawyers played in the lives of aggrieved family members as they struggled to frame their legal options and assess their entitlements. As more and more “someday all this will be yours” cases arose, lawyers proved only too happy to try to provide advice and counsel to family members seeking to claim what had been promised to them. Indeed, the second part of Hartog’s book shifts its attention to the imagined attorney’s office and the advice that lawyers were likely to give their clients when, with increased frequency beginning in the mid-nineteenth century, cases arose in which a young relative sought money or property for care provided to someone already dead. Over time, more and more people realized that “[t]he death of a parent was a good time to talk with a lawyer” (p. 172). And thus, Hartog’s stories reveal “the everyday, normal, known ways of recourse to law in the face of family conflict and uncertainty” (p. 13).

Through the book’s stories, then, Hartog explores not only the lives of families with an aging relative in their midst, but also the doctrinal questions that challenged lawyers and courts when disputes about broken promises and lost inheritances entered the realm of litigation.

While families have always experienced conflict, not every type of conflict has always been able to morph into a legal dispute. Cases about broken promises of future inheritance in exchange for present caretaking, Hartog observes, began appearing in court records for the first time only around 1850 (p. 49). Suddenly, courts were forced to
decide whether, in fact, a contract had existed between a deceased person and the surviving younger relative who had served as the deceased's caregiver. In other words, judges were forced to decide whether the young relative had acted out of legal obligation because an agreement had been reached or whether that relative had cared for his aging family member for some other reason—be it convenience, familial pressures, or cultural expectations.

Moreover, in many instances, judges were forced to decide whether the younger caretaker was a relative at all, whether that mattered and, if it mattered, what it meant for the outcome of the case. Frequently in Hartog's stories, upon an older person's death, a member of the deceased person's family claimed that the caregiver, who claimed to be a relative entitled to inheritance, was in fact an employee. Judges, then, had to decide both what constituted a familial relationship and also what types of contracts for care could exist between elderly people and a range of family and nonfamily relations.

These contract questions, of course, were embedded in an underlying set of legal rules. Testamentary freedom, for instance, was a basic principle of Anglo-American law (p. 67). The law would not compel parents to leave an inheritance to their children. Thus, a child, like a stranger, had no automatic legal recourse if a parent died and left all of his or her money to someone else (p. 67). But what if a promise had been made? Then judges had to decide whether the promise constituted a contract that restricted the general principle of testamentary freedom. And, if such a contract existed, whether that entitled the promisee to either the property he or she had been promised or alternatively some form of financial compensation for the caregiving services already performed.

With the guidance of their attorneys, aggrieved promisees crafted two different types of claims in their quests for the wealth that had been promised to them. In some cases, they sought the actual land they had been promised; in others, they sought financial compensation for their domestic services. Over time, these claims both responded to and shaped a set of evolving legal doctrines.

The former claim for the return of land led judges to ask whether a promise of future wealth had prompted "a life transformed" (p. 181). Faced with claims of hard labors performed and enticing promises broken, "[c]hancellors and vice chancellors wanted rich descriptions of lives spent doing things that could be explained only as resulting from such agreements" (p. 181). This was, of course, a tricky business. As Hartog observes, courts were wary of understanding all decisions made by children or young relatives within this paradigm. To do so would have undermined a basic normative premise of familial behavior. After all, "[c]hildren who did what their parents wanted...revealed nothing about the necessary existence of a prior agreement. Obedience was what children did at home without the
need for or the presence of a contract” (p. 181). Thus, to win a claim, someone had to demonstrate some type of extraordinary circumstance.

The latter argument for compensation, by contrast, presented courts with claims of quantum meruit. Such claims began from the premise that “[a]t least for free American adults who worked outside the home, work presumed a right to compensation” (p. 207). The question for judges, then, was whether that was true when work was performed within a family context or whether “[f]amily work meant noncompensable work that was done for reasons other than expectations of pay” (p. 208). Successful claims of compensation, therefore, generally demanded that a member of a household convince a court that she or he had provided the care in a role that, while familial in some ways, was not the role of a child.

C. The Messy Character of the Law

In Hartog’s hands, the law itself becomes a central, if complicated, character in his tales of familial care and betrayal. Hartog never paints a simple portrait of the law. And he never has. Hartog’s scholarly agenda has long been committed to revealing “legal meaning as multiple and contestable.”

“The meaning of law,” Hartog has always insisted, is not given by a particular group of law makers, not presumptively imposed on those affected by those who officially interpret. It is not, indeed, an “it,” but instead a multitude of possibilities, arguments, strategies, positions, located in various institutions and in the imaginations of a complex and diverse citizenry.

Even the Constitution must be treated as “contested interpretive terrain, as an arena of struggle between contending and changing normative orders.” Thus, Hartog has altered the field of legal history by teaching lawyers and historians alike that the law cannot be found in any one document or pronouncement, no matter how august or definitive. “If a legal historian has to define or assume a nature of law,” he has advised, “he or she might as well start with a definition of law as an arena of conflict within which alternative social visions contended, bargained, and survived.”

In Someday All This Will Be Yours, Hartog once again reveals that the law, like the families turning to it for relief, was neither uniform nor determinate. “There were always several right answers,” he ar-

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4 Id. at 764.
gues, “as judges and chancellors confronted rich and indeterminate
evidentiary records of family quarrels and enmeshed relationships,
which they necessarily shaped by picking and choosing their way
through thick fields of inconsistent legal doctrines” (p. 5). Thus, seem-
ingly similar cases could come out differently. And complex doctrinal
intersections — such as the relationship between the statute of frauds
and the doctrine of part performance (p. 178–79) — could generate
mixed results.

But, crucially, Hartog argues that this is not a story of doctrinal in-
coherence. This is legal pluralism. In Hartog’s account, legal plural-
ism is a critical part of understanding the role that the law played in
people’s everyday lives — and, equally importantly, the role that peo-
ple’s lives played in the law. Drawing on the terms of legal an-
thropology, Hartog understands the cases that underlie his stories as
“cases of trouble” (p. 11). As such, each of his stories
reveals norms of the legal culture (i.e., what ought to have happened) even
as it is by nature a case about claimed violations of norms and tests of the
power of norms, as well as a case about individuals who did not easily or
comfortably embody or conform to the identities the norms prescribed.
(p. 11)

To be sure, while families and legal doctrine alike were often a
mess, “[m]any voices in the law and in the popular culture struggled to
resist or to deny that chaos” (p. 149). And, true to Tocqueville’s basic
insight, judges sometimes struggled mightily to restore a vision of or-
der. Thus, the allure of the rug to hide all kinds of sins: “[T]he chaos
of having to manage the needs of the old, once enmeshed in a situation
where rational planning was at an end, was everywhere in the case
records, although often hidden in judicial opinions” (p. 150).

But imposing order was difficult. And despite its pluralistic nature,
or perhaps because of the many possibilities inherent in it, the law ex-
erted a powerful pull over individuals. “Parents, children, neighbors,
and other relatives all thought and spoke about what would happen in
the law” (p. 14). Across Hartog’s sources, people’s “conversations and
their negotiations revealed internalized and sometimes sophisticated
understandings of legal norms” (p. 14). As such, legal history and so-
cial history necessarily collide and inform one another in Hartog’s
book as he weaves a web of people’s most intimate familial experi-
ences, their arms-length discussions with lawyers, and the complex state
of their legal consciousness.

II. ORDER AMIDST CHAOS

So Hartog wants us to see that it is all a mess: families, law, and
families in the law. Hence the complexity of the landscape Hartog
constructs in Someday All This Will Be Yours. Each family is unique.
Each legal opinion is contingent. Each familial struggle and each trip
to the lawyer’s office are occasions not only for doctrinal prediction, but also for the law’s very redefinition. It is a rich portrait of the disordered life.

And yet, the impulse to create order has a strong pull, and as one reads Someday All This Will Be Yours, some forms of order begin to emerge. Embedded within Hartog’s detailed narratives are not just a common set of character types and plot moves, but also a set of overarching analytic themes. Like a clever painter, Hartog obliquely inserts patches of ruminations on particular themes amidst the sometimes camouflaging details of his intricate tales. Often one story leads into another with little by way of explicit analytic transition. The themes sit somewhat precariously at the interstices of the stories.

I will admit that I sometimes longed for Hartog to paint his themes with a slightly heavier hand. At points, I found myself wishing that he had been more willing to stray from the details of his sources to offer greater explicit argument and analysis with respect to the thematic links between his stories. He rarely is. Though I would have loved to hear more of his thoughts, it is hard not to admire his methodological commitment to letting his sources speak for themselves in all their particularity and complexity.

Indeed, the themes are surely there. In particular, three themes link many of the stories in Someday All This Will Be Yours: the tension between formal and functional approaches to defining the family, the role of gender in legal understandings of familial rights and duties, and the legal significance of differentiating between home and work. These intellectual categories, to be sure, did not provide clear answers to any particular case. They did, however, provide some predictability and order by shaping the questions that family members, lawyers, and courts asked and the ways they reasoned about families in the law.

Notably, these are also themes that shape contemporary family law. Bringing them to the fore of Someday All This Will Be Yours makes clear that, like the messy modern family itself, the central themes of twenty-first-century family law have deep antecedents in legal history. Hartog’s stories give one such history to the contemporary analytic categories that judges and lawmakers commonly draw on to think through the questions concerning the allocation of familial rights and obligations.

A. Formal and Functional Parent-Child Relationships

The easiest way to guarantee your legal status as a member of someone’s family is through the formal links clearly recognized by the law as routes to familial status: blood, marriage, and adoption. These three “on-off” switches mark legally protected transformative moments. Flip the switch — by giving birth to your biological child, by marrying your intimate partner, or by adopting a child — and you are
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a legal family with all the attendant rights and obligations. Neat and tidy, just as the law likes it.

But often relationships do not fit into the law’s prescriptive neat boxes. Not all parties to intimate or caregiving relationships can or do avail themselves of these transformative moments. Even absent formal bonds, however, lots of people develop relationships that, over time, make them seem like they are a family. They act like families. They look, in many ways, like families. Others recognize them as families. And then, in many different circumstances, they turn to the law for clarification or protection. For one reason or another, they ask a court to decide whether their relationships entitle them to the legal rights and responsibilities that accompany the designation of family. Judges and lawmakers, thus, are often faced with the task of deciding whether to recognize functional families (based on ways of acting over time) alongside formal families (based on blood, marriage, or adoption).

The stories in Someday All This Will Be Yours introduce a stunning array of functional families. Masterfully parsing his sources, Hartog dissects the myriad households that assembled themselves in nineteenth- and twentieth-century New Jersey and the complicated mixtures of formal and functional relationships that challenged lawyers and courts when disputes arose over inheritance entitlements. Many of these households formed not around marriage or birth, but rather around informal ties that developed over time.

One married woman, for example, for reasons that are unclear in Hartog’s sources, raised her neighbor’s baby. As that girl, Martha, grew up, Ruth Buzby sometimes referred to her as a daughter and other times referred to her as a servant (p. 58). Ruth also raised her own granddaughter as though she were her daughter. She also gave birth to children of her own. Her home brought all of these children together in one domestic unit (p. 58). When Ruth died, though, she left a significant portion of her estate to her granddaughter, Mary, “specifically excluded [her] grandson Nathan W. Buzby,” and yet included Martha (p. 61). Her biological children were, not surprisingly, outraged and charged that their mother’s will was invalid as it had been created under the “undue influence” of her quasi-adopted young relatives (pp. 62–63). After much litigation, the New Jersey appellate court declared the will valid. Ruth was competent to leave her money to whomever she chose, and the law protected her right to do so (p. 65).

Hartog’s tales are replete with complicated extended families like Ruth Buzby’s, linked by a web of biology and performance, and chock-full of conflict over individuals’ ambiguous duties to one another. As one reads Someday All This Will Be Yours, it becomes increasingly clear that such complexity and ambiguity was not as unusual as we might have imagined. Indeed, it would appear that in matters of
family structure “the routine became the exceptional” (p. 126). Adults raised children as their own who were not, biologically, their children (pp. 58, 94, 95). Or they had children in their households whose familial status was unclear — children they sometimes cared for like family members, and sometimes treated like employees (pp. 239–41). And, eventually, as old age took its toll, many children started to act more like parents (p. 165). Gradually, old people assumed the functional role of children.

As Hartog brilliantly demonstrates, it was rarely easy for courts to sort out the relationship between formal familial ties and functional familial patterns of behavior. So they developed a range of legal approaches in an attempt to neaten the landscape of the law. But the approaches were inconsistent and varied. Thus, in some doctrinal areas, biology became increasingly irrelevant. A court might simply ask, “Did you belong to the family, or did you not belong?” (p. 232). In other areas, by contrast, courts increasingly clung to biology as a more “seemingly objective” approach to questions of familial status (p. 226). Formal and functional, in other words, competed with one another again and again as courts looked to how people behaved — “to what had been said and done” (p. 82) — and also to their blood relationships in order to understand what it meant to be a parent and a child within a family.

B. Gender and Familial Expectations

Sometimes lawyers and judges talk about parents and children. Other times, they talk about mothers and fathers, or daughters and sons. Sometimes it seems to matter that some parents and some children are female and that others are male. Often, though, it is difficult for courts to explain clearly why and how gender matters. It just seems relevant.

Inchoate intuitions about gender can do powerful work in the law. As Hartog’s stories make clear, because functional standards have always competed with formal categories, judges struggled to understand the social meaning and legal import of behavior that took place within people’s households. Old people made promises and young people provided care. Old people said certain things and made certain demands, and young people tended to homes, washed decrepit bodies, and prepared countless meals.

Confronted with these scenarios, Hartog identifies the many ways that courts understood the significance of all parties’ actions through a gendered lens. That is, as they understood the significance of what family members (or alleged family members) did, they refracted people’s actions through a set of conventional understandings about men’s and women’s distinct roles at home, as well as their imagined potential lives away from home. Men and women were expected to
act in different ways within families. And, for judges, those assumptions about gender made parents’ and children’s actions look more or less intelligible, logical, and predictable.

Certain family gender roles were, of course, not mere social conventions. They were written into the law for much of the long nineteenth century that is the timeframe of Hartog’s book. Coverture, in the varied forms it assumed over this period, explicitly defined the rights and obligations of husbands and wives as distinct. This doctrinal scrim quietly shades the backdrop of many of the stories in Someday All This Will Be Yours. For instance, as Hartog observes with respect to James Davidson, who worked and cared for his father for some years after his mother died and his youngest sisters got married, “[i]t may well be that marrying, in effect finding a woman who could replace sister Ida and his mother as a caregiver, was a central aspect of what it meant for James to ‘keep’ his father” (p. 38).

As a matter of social norms and as a matter of law, wives and husbands played different roles. As a matter of practice, though not of law, so too did sons and daughters. Thus, judges often attached very different meaning to a daughter’s decision to remain in her parents’ home and care for them than they attached to a son’s decision to do so. Housework, after all, was something women did. Caregiving was women’s work, the role of a wife and/or daughter. For a daughter to perform such tasks was unremarkable — certainly not evidence of a life transformed by a contract. For a son to do so, by contrast, often seemed like a quite extraordinary decision explicable only by an unusual contractual arrangement. As Hartog observes, “[y]oung men would not, so the courts often presumed, have stayed or returned to work for parents or others without an agreement . . . . Young men were presumptively restive and mobile” (p. 97). Not so young women: “The work they typically did within families — intimate, personal, household care, cleaning, and cooking — often became, in judicial scrutiny, just what daughters did” (p. 98). Thus, Hartog points out, in many decisions

inside work was contrasted with outside work, care work contrasted with economically productive work, the ordinary work of a household contrasted with “exceptional” tasks that were explicable and undertaken only because of a contractual understanding, the prospect of marriage contrasted with the prospect of a career, and voluntary gifts contrasted with enforceable contracts. (p. 99)

As legal doctrines developed to adjudicate the growing number of “someday all this will be yours” cases, these gendered ways of thinking had concrete legal consequences. For example, “men who gave up jobs

or careers to care for older property owners at home were often understood as having passed the test of demonstrating a life transformed by reliance on a contract (p. 188). Some women were able to pass that test too (pp. 188–90). After all, the law was never fully determinate. But, for the most part, as Margaret Sayre, a housekeeper who agreed to stay and care for her elderly boss after he promised her a significant inheritance, learned when her boss died without providing for her: “All the work she did, including the intimate bodily care of her longtime employer, was coherent with gendered expectations of what women did as routine aspects of their lives” (pp. 187–88).

Similarly, as grown children began to bring lawsuits to reclaim wages for care they had provided to their deceased parents, sons found it much easier to recover. To make out a legal case for wages earned, a child had to prove that he or she was an emancipated adult working within his or her parent’s home (pp. 218–22). A child, after all, would not be paid for household tasks. Only an adult forgoing other employment could possibly be paid for in-home caregiving. Van Dyke Ten Broeck, for instance, succeeded in convincing a court that he would never have worked in his father’s home had he not believed he was doing so for wages (pp. 223–24). As Hartog explains, the court concluded that “Van Dyke had not remained because that is what a son naturally did . . . . He remained because he and his father had made a deal” (p. 224). By contrast, a court was unwilling to award wages to Sarah A. Schooley, a woman who had left home to learn a trade but returned when her mother fell ill (pp. 224–25). Such actions, according to the court, could not be construed to imply a “promise to pay for services rendered by a daughter to her father” (p. 225).

C. Work/Home

Judges have always had a hard time imagining certain forms of caregiving as paid labor, not only because these tasks were usually done by women who were expected to do them as mothers or daughters, but also because of where women usually did them— that is, in their family homes. The home was long imagined as the antithesis of the public sphere of the market and the workplace. Thus, when acting in their familial roles, people were presumptively acting not within an economic sphere, but rather within a sphere of reciprocal, unremunerated caregiving.

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8 The author quotes Gardner’s Administrator v. Schooley, 25 N.J. Eq. 150, at 154 (N.J. Ch. 1874). An internal quotation mark has been omitted.

9 See, e.g., NANCY F. COTT, THE BONDS OF WOMANHOOD 64–74 (1977); LASCH, supra note 2, at 4–8.
Hartog’s stories repeatedly circle around this set of assumptions about a home-market divide. Again and again in his stories, this ideological construct fuels the assumptions of family members and judges alike about whether caring for an elderly relative constitutes work for which anyone could have reasonably expected to be compensated. If a family member “did the things that a daughter would do,” she surely could not have expected to be paid (p. 95).¹⁰

As Hartog explains, most people did not want to believe that their homes were sites of paid labor: “They did not want to see themselves as employers. They particularly did not want to ‘employ’ their daughters and sons (including adopted daughters and sons) in tasks that intertwined with a household economy” (p. 101). Hence the difficulties faced by plaintiffs seeking, for example, wages for caregiving work performed for a deceased family member. For the most part, “[f]amily work meant noncompensable work that was done for reasons other than expectations of pay” (p. 208).

To pay family members for care done at home was to require people to acknowledge that the line between home and work was a blurry one. And that was a threatening admission, to say the least. Willfully, people “wanted to act as if those tasks — that work — belonged to an unmonetized or relatively unmonetized economy” (p. 101). And vast dangers lay in repudiating this view: “To look to contract law and to expect a court to adjudicate what one family member owed another for the work done in maintaining that family must have seemed, by its very nature, an odd and perilous task, one that risked destroying the very bonds that united a family” (p. 209).

Of course, ultimately, a key argument that Hartog develops throughout Someday All This Will Be Yours is the deep incoherence of the traditional work-home divide. As Hartog powerfully demonstrates through the book’s stories, the ideology of separate spheres actually performed an inversion of reality: “[W]ork was what happened at home in nineteenth- and early twentieth-century households” (p. 181). Moreover, “[n]early everyone relied on the power of contract law to organize private relations, including familial relationships. Everyone knew that it was only through law that property would be transferred and held” (p. 16).

Indeed, the stories at the heart of the book “reveal a regimen of work and attention almost unimaginable today, one that was carried out in chaotic but distinctively private households” (p. 158). A central message of Someday All This Will Be Yours is that the family has never actually constituted “a special domain in which the individual was

¹⁰ The author quotes “Dusenberry v. Ibach,” Records and Briefs, 1008 (2), Court of Errors and Appeals (New Jersey State Library, 1926), 2–3. An internal quotation mark has been omitted.
restrained and family members — that is, wives and husbands, as well as parents and small children — engaged with each other out of ‘love,’ that is, without an expectation of pay or of immediate compensation” (p. 26).

Notably, “love” requires quotation marks in this analysis.

III. LOVE AND THE RATIONAL ACTOR

Love is, indeed, something of a puzzle in the law. Some years ago, I observed the first day of a colleague’s Family Law class. My colleague began by asking the class of over one hundred law students the following basic question: why do people get married?

Hands shot up. Students offered a range of answers: to get health insurance, to please your parents, to fit into your community, because your church encourages it, for financial stability, to gain entry to the United States, to ensure hospital visitation privileges, because you want to have children, and — my own New York City real estate-centric favorite — to increase your chances of passing a co-op board interview.

My colleague, who I surmised had witnessed this exercise play out similarly before, wrote everyone’s suggestions in a long list on the blackboard. She then noted with a wry smile that one motive for marriage was notably absent from the list: Love. No one in the entire class had speculated that some people get married even without the pressure of an impending co-op board interview just because they are in love. Where, she asked the class, was love on this list of reasons to marry? And what were we all to make of its absence? Could it really be that no one in the class believed that people got married because they were in love? Or did that answer simply seem implausible in the context of a law school classroom?

It took me a number of years of teaching Family Law to realize that these law students, perhaps inadvertently, had stumbled onto a profound insight: the law does not know what to do with love. Love is perfect fodder for literature and politics. It is the rare novelist who is not drawn to the complexity and incomprehensibility of love, its ineffable grandeur and incomparable pain. And, on the flip side, it is the rare politician who does not speak as though the meaning of love (certainly the love between that politician and his or her spouse) is quite obvious and simple.

But the law cannot find a comfortable place for love. In particular, the law cannot quite figure out what to do with the role that love should play in people’s familial choices and commitments. Love is something the law can neither compel nor measure. Deep cultural convictions tell us that family members should and do love one another, but legal metrics and incentives to that effect are elusive. The law
can force one person to pay for the expenses of a former intimate partner. It can force property transfers of all kinds. It can force a parent to pay for a child’s physical needs. And it can force an adult to take a child to school. But, regardless of social pressures or biological ties, no judge can force one person to love another person. Love, like the family and the law, is messy.

In fact, although cultural ruminations on love and marriage abound, even constitutional law’s most canonical description of marriage is missing any mention of love. In *Griswold v. Connecticut*, the Supreme Court famously waxes rhapsodic, proclaiming: “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.” Powerful stuff. But nothing about love. My colleague’s Family Law students were, perhaps, on to something.

Love hovers over *Someday All This Will Be Yours* much as it hovered over the student-generated list of reasons to marry in my colleague’s class. Its minimal role in the book’s stories seems somehow to cry out for comment. For a reader steeped in the social conventions surrounding how we talk about families, it is jarring how minimally expectations of love figure in Hartog’s stories—in his accounts of family members’ actions, as well as courts’ interpretations of those actions. Parents and children in Hartog’s stories act out of rational self-interest, out of calculated need, not out of love.

To be sure, Hartog’s sources undoubtedly guided and limited the role of affective connections in the book’s tales. Families overflowing with feelings of love for one another rarely, if ever, encounter the law. Often, law enters precisely when love exits. The families in *Someday All This Will Be Yours* created a paper trail of acrimony, conflict, and bargaining, not one of love and altruism. And Hartog doggedly follows that trail, analyzing family members as they presented themselves within legal processes arising out of deals gone sour. Legal conflicts are not likely to produce much data on love.

Moreover, even beyond the general bias of legal sources, in Hartog’s particular collection of cases, legal incentives sometimes actually disincentivized any mention of love. In certain types of “someday all this will be yours” cases, if one dared articulate the pull of affection it could backfire in a court of law. Once in litigation, “for the young who worked for the old, love was a great legal danger” (p. 147). After all,

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11 381 U.S. 479 (1965).
12 Id. at 486.
[If a court was going to give them what they had earned, they had to appear as independent, individual, and canny bargainers. . . . They had to resist being revealed to be what they often really were — family members who had done what they had for deeply emotional, as well as material, reasons. They and their lawyers worked to mask the fact that they were children who were returning care and love to their parents, who had once cared for and loved them. (p. 147)

In this project, then, Hartog might be even less likely than the average scholar of legal sources to encounter family members waxing rhapsodic about their love for one another.

Yet, even up against all of these barriers, sometimes love creeps into Someday All This Will Be Yours. Once in a while, Hartog recognizes love as a strategic façade, the thing that family members would like people to think is motivating their actions, notwithstanding all evidence to the contrary. Sometimes

[Love was context, and love was a tool. Love may sometimes have been the goal of the negotiations. The older persons sought to reassure themselves that a child or someone else cared about them. They wanted to know that care was being given for reasons other than an anticipated exchange of property. (p. 147)

In still other moments, the possibility of caregiving motivated by a far less rational sense of obligation seems to creep into the narrative. At one point, for example, Hartog concedes with respect to analyzing the motives of caregivers: “One can, if one wishes, understand their acts as instances of family altruism that are perhaps explicable through a metahistorical evolutionary biology” (p. 142).

At particular moments, even the people in Hartog’s stories seem to realize that love could play a role in their family lives. Indeed, at certain narrative moments, love seems to haunt Hartog’s characters’ own experiences, however painful and anguished their family lives have become. Hartog notes, for instance, that one of the reasons that aging parents did not like to pay either their family members or household employees for care was so they “could live out the partial fantasy that everything that was going on was being done out of love” (p. 104). And, true to the fantasy, here and there throughout Someday All This Will Be Yours, love occasionally enters the picture. As Hartog notes, “[m]oral obligations and love joined with legal rights, duties, and expectations . . . to produce ways of managing generational transitions and the needs of old people and other dependents” (pp. 17–18).

But, for the most part, Hartog presents the book’s characters as rational actors, motivated by calculated self-interest, not feelings of love or affection. Even if this is the dominant refrain in the book’s sources, Hartog is surely deeply aware of the strategic biases shaping the self-presentations of his stories’ central characters. Yet, Hartog steadfastly reads his sources so as to credit the notion that family members imagined one another to be rational actors rather than emotionally inter-
twined partners guided by feelings of affection. Parents wanted their children close by, but were never sure how to make that happen. "Love and service," Hartog says, "provided often inadequate answers" (p. 125). Thus Hartog makes explicit his assumption that "[i]f we imagine the older people as rational economic calculators, we might presume that who got the property in the end was a secondary concern... [W]hat was most important was the care, and they would make whatever promises they needed to secure care and attention" (pp. 100–01).

It all seems to make sense. But families do not always make such sense, and love’s muted role in Someday All This Will Be Yours might prompt us to ponder the basic challenge of bringing family life within the boundaries of legal discourse. After all, the core questions of Hartog’s book are about familial decisionmaking around matters of eldercare and the incentives created by the law to behave in certain ways: Why do people care for their elderly relatives? Why do young men and women with ambitions and responsibilities of their own take on the often-unpleasant tasks involved in caring for an ailing old person? What prompts people to act in these ways that we all recognize as at once familial and, in many ways, deeply unappealing? And what role does the law play in all of these processes?

Of course, one available answer to many of these questions begins not with negotiations and incentives, but with emotional bonds. We could begin not with a rational actor model, but with a model built on compassion and affection. Maybe people care for their parents because they love them. Maybe that is what it means to be a member of a family. And maybe people do things for their loved ones that they would not do for other people — not because they have been promised anything in exchange and not because it makes good sense, but because they want to act in certain exceptional ways with certain exceptional people.

Even the law can, occasionally, imagine such an account of the family and caregiving. When it comes to answering the question of why parents care for their young children, for instance, the law seems relatively comfortable approaching the realm of love or, at least, emotional connection. The Supreme Court has thus famously opined “that natural bonds of affection lead parents to act in the best interests of their children.”13 Parents, in other words, naturally love their young children and thus do the right things for them. Or so the law is willing to presume. And this presumption of love carries with it vast legal significance. This presumption of affective connection has led the

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Court to guard jealously the right of parents to make decisions about their minor children’s care.

But Hartog’s stories are not about these natural bonds of affection. Hartog’s materials are all about what happens when the parent and child switch roles. In his stories, the children have become the caregivers and the parents are the ones in need of care. And in this context, the natural bonds of affection apparently cease to capture people’s own perceptions of reality, or the legal imagination, or Hartog’s own speculations.

As Hartog observes:

Parents had to love their children, and that meant they had to care for them. Children did not have to reciprocate. They were free of obligations. They were free to turn their parents out, to put them away, to refuse them, to ignore them, to move away, and it was because of that freedom that older people ended up in the poorhouse. (p. 19)

By Hartog’s account, then, aging people concerned about their future care never truly believed that the younger members of their households would care for them out of love — hence the need to incentivize that care through promises of future wealth. And even those promises needed to be carefully crafted so as to avoid what Hartog labels the “King Lear problem,” that is, “the problem of not giving up control and power and property too early” (p. 33). So aging parents had to measure and titrate their offers carefully — a little promise of future riches here, a little control of present circumstances there — to achieve the right formula. Likewise, young adults needed to evaluate carefully that precise mixture of short-term constraint and long-term freedom to decide whether caring for aging parents made good sense in their lives.

And the law followed suit in Hartog’s account, embracing this same rational actor view of family relations. Faced with disputes over property upon the death of an elderly relative, judges viewed the facts with an assumption that family members tended to act not out of impulsive emotionality, but rather out of calculated self-interest. Judges assumed that young people organized their lives in response to the rational incentives created by their aging relatives and that they protected their financial stakes when they could demonstrate that they had transformed their lives in response to a relative’s promises.

Throughout Someday All This Will Be Yours, Hartog’s tone suggests a deep and poignant ambivalence about the relationship between love and rationality in people’s caregiving plans, an ambivalence mirrored in the law. Like many of the judges he describes, Hartog himself seems committed to imagining old people “as rational calculators when plans for old age were put into place” (p. 144–45). Ultimately, this perspective reflects, perhaps, the book’s own commitment to order in the face of the disordered life.
Hartog closes his book with a modern mystery. “Perhaps the real mystery,” he writes, reflecting on our own times when so much of the caregiving in his historical materials is outsourced to paid professionals, “is why some younger people still stay home to provide care, why families continue to work and to share, why adult children and old people still remain entangled, remain ‘family’” (p. 284).

Across the long nineteenth and twentieth centuries and into our own day, the law has struggled to make sense of parents’ and children’s actions. Perhaps the answer is that the decisions made by mothers, fathers, daughters, and sons do not always make sense. Perhaps, here too, order cannot really be imposed. Or perhaps it is naïve to think that love plays any part in explaining those decisions. Perhaps, in the end, that is the puzzle at the heart of the messy legal family.
LAWYERS, LAW, AND THE NEW CIVIL RIGHTS HISTORY


Reviewed by Risa Goluboff

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

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

I. REPRESENTING THE RACE

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

* John Allan Love Professor of Law, Justice Thurgood Marshall Distinguished Professor of Law, and Professor of History, University of Virginia. The author thanks Tomiko Brown-Nagin, Ariela Dubler, Stewart Inman, Laura Weinrib, and especially Richard Schragger.
American lawyers worked hard and continuously since at least the moment that John Mercer Langston joined the Ohio bar in 1854 to figure out how they could practice law so as to reflect well on their race. For, as Mack points out, black lawyers did not merely represent clients. They also represented their entire race. The nineteenth-century idea of the “representative man . . . who encapsulated the highest aspirations of his racial or cultural group, in terms of education, professional advancement, and intellectual ability” (p. 4) was an argument for racial inclusion and equality. If an African American lawyer could accomplish what a white one could, then it proved — to whites, blacks, and the lawyers themselves — that the black race as a whole could achieve as well.

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

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

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

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

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

Mack homes in on a few of Alexander’s and Houston’s criminal trials — one in Philadelphia and one in Loudoun County, Virginia — as turning points in which the lawyers gained the kind of professional respect and courtesy that had frequently eluded black attorneys in the past. To a considerable extent, Mack argues, the lawyers’ performances rather than the defendants’ guilt or innocence became the fo-
Mack nicely illustrates this shift by analyzing successive drafts of a *Crisis* article about a Loudoun County murder trial in which Houston defended George Crawford. Initially, NAACP Executive Secretary Walter White criticized the trial and the prejudice it revealed in the southern justice system. As published, however, White’s article instead offered a celebration of the ability of black lawyers like Houston to stand as equals with whites in the courtroom (p. 107). By the end of the 1920s, black lawyers had made some professional progress, and that progress was understood as extending, through the black lawyers’ racial representation, to the race as a whole.

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

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

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1 For example, Mack discusses the well-known conflicts over who should have represented the nine young African American men falsely convicted in 1931 in Scottsboro, Alabama, of the rape of two white women. For a fuller account, see generally James Goodman, *Stories of Scottsboro* (1995).
Not all of the black lawyers who came of professional age during the Depression experienced the same dilemma as the Davises and Miller did. Thurgood Marshall graduated from Howard Law School in 1933, a star pupil of Houston, who was then dean. Marshall was a master of the dual performance necessary for elegantly navigating the paradox of representation. Mack describes how Marshall became "the authentic representative of African Americans in the courts" by walking a fine line between what whites wanted from his representation — proof to blacks that the legal system treated them fairly — and what blacks wanted — a black lawyer who was so accepted by whites that he could attack racial bias in the legal system (p. 112).

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

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

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2 The author quotes Transcript of Program Broadcast (WCAU radio broadcast Feb. 8, 1963) (on file with the University of Pennsylvania Archives and Records Center) (internal quotation marks omitted).
performance by following the lives and careers of two African American women lawyers, Sadie Alexander — married to Raymond Pace Alexander — and Pauli Murray. Like her male counterparts, the black woman lawyer, according to Mack, felt herself first and foremost to be a lawyer. But that identity rendered her, to the rest of the world, something of an oxymoron. Contemporaries were not sure what to make of her and others like her. Mack offers a telling vignette in which Sadie Alexander wore her hat as she stood up in court — as a lady would — only to have the judge order her to remove it — as a male lawyer would (p. 137). As a general matter, black women lawyers found the courtroom inhospitably masculine, and they were often relegated to bookkeeping. Though that is where Alexander began her career, she eventually expanded her office practice outward. She took on more complex cases, advised and negotiated on behalf of prestigious and powerful clients, and moved into the leadership of the black National Bar Association. Even as the courtroom successes of her husband eluded her, she was the one President Harry S. Truman tapped for his Committee on Civil Rights in 1946 (pp. 146-51).

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

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

II. THE NEW CIVIL RIGHTS HISTORY

With the publication of Representing the Race, Mack joins the growing bibliography of the new civil rights history. For major works in this new field, see generally Mark Brilliant, The Color of America Has Changed (2010); Tomiko Brown-Nagin, Courage to Dissent (2011);
ing Mack’s specific engagement with the field, and the ways in which his work amplifies some of its key conclusions, further description of the recent scholarship itself is in order. Though a few scholars have noted developments in legal historical approaches to civil rights history, there has not yet been a full-fledged survey of the field.

The “new,” of course, is always written against the “old.” Two “old” literatures are particularly salient here. The first consists of legal histories of civil rights, which have customarily focused on the Supreme Court, the momentous case of Brown v. Board of Education, or the NAACP’s path to the Court in Brown. Some of these histories have been celebratory, others critical. Richard Kluger’s Simple Justice and Professor Mark Tushnet’s The NAACP’s Legal Strategy Against Segregated Education, 1925–1950 fall into the former catego-
ry; Professor Gerald Rosenberg’s *The Hollow Hope*[^8] and Professor Michael Klarman’s *From Jim Crow to Civil Rights*[^9] are prime examples of the latter. Both groups, however, share a court-centered or major-case-centered, relatively retrospective, and linear approach to the topic.

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

Enter the new civil rights history, which has deliberately and self-consciously challenged the first literature by drawing on the second. It uses the sources and analytics of both legal and social history. It takes law seriously on its own terms but defines “law” capaciously. It attempts to capture what happens before, behind, after, in front of, and with little relationship to the Supreme Court. It is thus less linear, more multiple. It highlights complexity and contingency. In doing so, it addresses the people, institutions, and legal and nonlegal arenas where actors and arguments meet. It identifies intermediaries, liaisons, ambassadors. It explains how ideas, movements, and legal doctrines cross the boundaries of space, class, race, and time. It explores the relationship between the many lay and professional actors involved in changing legal conceptions and in the civil rights struggle more generally.

I should properly speak of “a” — and not “the” — new civil rights history. There are other new histories of African American civil rights as well, which combine the old social history with religious[^13] politi-

[^9]: MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004); see also GENNA RAU MCNEIL, GROUNDWORK (1983) (viewing Houston’s efforts in the 1940s as “groundwork” for Brown); LOREN MILLER, THE PETITIONERS (1966); J. CLAY SMITH, JR., EMANCIPATION (1993).
[^13]: See generally, e.g., DAVID L. CHAPPELL, A STONE OF HOPE (2004); ANGELA D. DILLARD, FAITH IN THE CITY (2007); JAMES F. FINDLAV, JR., CHURCH PEOPLE IN THE STRUGGLE (1993); CHARLES MARSH, THE BELOVED COMMUNITY (2005); RHETORIC, RELIGION AND THE CIVIL RIGHTS MOVEMENT, 1954–1965 (Davis W. Houck & David E. Dixon...
cal,\textsuperscript{14} diplomatic,\textsuperscript{15} and cultural history.\textsuperscript{16} It might perhaps be more accurate, then, to call the literature I am describing “the new legal history of civil rights.” But that appellation falters not only because it is unwieldy and the name of a new field should be pithy, but also more substantially because it seems unduly narrow. This new field is not limited to legal history in any traditional sense. It is truly a marriage of legal and social history — it has its roots in both, and it makes contributions to both. To the old legal history, it decenters courts and introduces the social history of law. To the old social history, it reintroduces law as part of, not contrary to, civil rights claims-making and identifies its importance to many lay actors. To both, it reworks the relationships between what have long, but somewhat reductively, been called “above” and “below” or “law” and “society” by viewing law creation as a dynamic and multidimensional process that involves both conflict and collaboration.\textsuperscript{17}

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

\textsuperscript{14} In particular, there is a new literature analyzing the rise of political conservatism in the context of civil rights battles. Many of these works engage with legal history as well, particularly \textsc{Walker}, \textit{supra} note 3. \textit{See also}, e.g., \textsc{Kevin M. Kruse}, \textit{White Flight} (2005); \textsc{Matthew D. Lassiter}, \textit{The Silent Majority} (2005); \textsc{Becky M. Nicolaides}, \textit{My Blue Heaven} (2002); \textit{Gross}, \textit{supra} note 4. Others have combined political with social history in discussing racial liberalism. \textit{See, e.g., Shana Bernstein}, \textit{Bridges of Reform} (2011).

\textsuperscript{15} \textsc{Carol Anderson}, \textit{Eyes Off the Prize} (2003); \textsc{Mary L. Dudziak}, \textit{Cold War Civil Rights} (2000).

\textsuperscript{16} A new and growing literature on black power and nationalism has especially drawn on cultural studies and African American studies as well as social history. \textit{See, e.g., Algernon Austin}, \textit{Achieving Blackness} (2006); \textit{Black Power in the Belly of the Beast} (Judson L. Jeffries ed., 2006); \textsc{Matthew J. Countryman}, \textit{Up South} (2005); \textsc{Peniel E. Joseph}, \textit{Waiting ’Til the Midnight Hour} (2006); \textsc{Kevin Mumpford}, \textit{Newark} (2007); \textsc{Donna Jean Murch}, \textit{Living for the City} (2010); \textsc{Jeffrey O. G. Ogbar}, \textit{Black Power} (2004); \textit{The Black Power Movement} (Peniel E. Joseph ed., 2006).

\textsuperscript{17} \textit{See generally Robert W. Gordon}, \textit{Critical Legal Histories}, \textit{36 Stan. L. Rev.} \textit{57} (1984), for a critique of a distinction between the two realms.
shifts in focus, highlighting the contingency of the law-creation process.

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

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

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

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19 See generally GOLUBOFF, supra note 3; see also generally LOVELL, supra note 3; Lee, *Hotspots in a Cold War*, supra note 3.
negotiation to achieve their civil rights goals. Professor Thomas Sugrue shifts focus from Jim Crow in the South to Jim Crow in the North. Professor Sophia Lee moves the emphasis from courts to administrative bodies like the National Labor Relations Board and the Federal Communications Commission to explore how lawyers presented their arguments in those fora and how administrators themselves conceived of discrimination and equality. Professor Serena Mayeri explores the intersections between race-based civil rights and sex-based civil rights. Professor Mark Brilliant moves beyond the black-white paradigm of civil rights, describing how multiple minority groups pursued reform in California. And Professor Anders Walker focuses on the civil rights conceptions of white moderates rather than African Americans.

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

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

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20 See generally BROWN-NAGIN, supra note 3.
21 See generally SUGRUE, supra note 3.
23 See generally MAYERI, supra note 3.
24 See generally BRILLIANT, supra note 3.
26 See supra note 7.
torians have heeded that call, and they pick up specifically on a minor strain in Hartog's article that linked lay legal experience with formal legal processes. Constitutional history, Hartog wrote, "requires a perspective wide enough to incorporate the relations between official producers of constitutional law, and those who at particular times and in particular circumstances resisted or reinterpreted constitutional law."\(^{28}\) Hartog suggested that "[l]awyers' categories, formal legalistic language, [are] important subjects of study, but as translations and as mediations of aspirations and claims, not as the ends of inquiry."\(^{29}\)

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

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

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

\(^{28}\) Id.

\(^{29}\) Id. at 1033.

\(^{30}\) See generally, e.g., BRILLIANT, supra note 3; BROWN-NAGIN, supra note 3; GOLUBOFF, supra note 3; MACLEAN, supra note 3; MAYERI, supra note 3; SUGRUE, supra note 3.

\(^{31}\) See generally Lovelace, \textit{Atlanta's Image}, supra note 3; Lovelace, \textit{International Legal History from Below}, supra note 3. For works exploring legal consciousness among nonlawyers, see generally, for example, CHANA KAI LEE, \textit{FOR FREEDOM'S SAKE} (1999); BARBARA RANSBY, \textit{ELLA BAKER AND THE BLACK FREEDOM MOVEMENT} (2003).

\(^{32}\) See GOLUBOFF, supra note 3, at 7.
tation that encompasses economic, material, and private oppressions as much as formal, symbolic, and state-imposed ones, came originally from scholars who wedded labor and African American history. Historians like Professor Eric Arnesen, Professor Robert Korstad, and Professor Nelson Lichtenstein brought civil rights concerns into labor history.33 Their expansion of the definition of Jim Crow served to undermine the idea of southern exceptionalism. If one understands Jim Crow as a state-mandated system of segregation, then the South and the North may look quite different. (Though as Sugrue and others have recently shown, the difference is perhaps not as great as we used to think.34) If one includes economic discrimination and exploitation as part of Jim Crow, then the North and the South are not so far apart.

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


35 See generally Brown-Nagin, supra note 3; Goluboff, supra note 3; MacLean, supra note 3; Reuel Schiller, Forging Rivals (forthcoming 2014); Sugrue, supra note 3;
Even as new civil rights histories move beyond the Supreme Court and the headline cases, they nonetheless remain deeply interested in the formal mechanisms of the law and the work product of legal professionals. Professors Serena Mayeri and Christopher Schmidt, for example, emphasize detailed doctrinal analyses in works that simultaneously move beyond the traditional civil rights narrative. More generally, the new literature explores lay rights consciousness, social movement constitutional practices, and formal doctrine in all the myriad arenas in which these forms of law are made, asserted, interpreted, embraced, and excluded. In other words, new civil rights scholars deviate from the old legal scholars by conceiving of law as plural. And they differ from the old social historians by conceiving of legal doctrine as deeply important, both to the actors themselves and to history.

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

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

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36 See Mayeri, supra note 3; Schmidt, *Conceptions of Law*, supra note 3, at 643.

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

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

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

38 Engstrom, supra note 3, at 1074–75; Lee, Hotspots in a Cold War, supra note 3, at 339–31; Lee, Race, Sex, and Rulemaking, supra note 3, at 799.
39 See generally BRILLIANT, supra note 3; BROWN-NAGIN, supra note 3; GOLUBOFF, supra note 3.
40 See generally GOLUBOFF, supra note 3.
41 See generally BRILLIANT, supra note 3; see also generally BERNSTEIN, supra note 14; MARC SIMON RODRIGUEZ, THE TEJANO DIASPORA (2011); EMILIO ZAMORA, CLAIMING RIGHTS AND RIGHTING WRONGS IN TEXAS (2009).
42 See generally MAVERI, supra note 3.
43 See generally BROWN-NAGIN, supra note 3; SUGRUE, supra note 3.
In changing the methodological approach, the new civil rights history increases historical and legal understanding. It upends much of what scholars once thought about the history of civil rights law and opens up space for alternative conceptions. If the struggle for civil rights historically included politics and law, national offices and local branches, private lawyers and government officials, lay consciousness and professional discipline, then it was not singular in the past and it need not be singular now. The new civil rights history thus explodes myths about how civil rights law must be structured, where it must be negotiated, and who must define it. By showing the complex construction of law in the past, the new field increases our understanding of law creation today as well.

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

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

III. FROM CIVIL RIGHTS LAWYERS TO CIVIL RIGHTS LAW

As must be clear by now, several of the defining characteristics of the new civil rights history are also defining characteristics of Representing the Race. It is not especially remarkable that a new book of civil rights history bears a fair resemblance to other recent works in the field. For instance, it is explicitly Mack’s project to downplay the Supreme Court, to make lawyers his central figures, and to take a prospective approach to civil rights history. What is more
noteworthy, however, is that even where Mack’s project does not explicitly draw on the new field — as scholars often do, Mack engages with some aspects of the field more than others — it nonetheless reinforces many of its primary lessons.

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

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

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

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

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45 *334 U.S. 1* (1948).
46 See generally, e.g., BRILLIANT, *supra* note 3; BROWN-NAGIN, *supra* note 3; GOLUBOFF, *supra* note 3.
and he replaces a retrospective vantage point with the perspectives of those lawyers themselves.

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

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

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

47 TUSHNET, MAKING CIVIL RIGHTS LAW, supra note 7, at 30.
places were most likely to support a legal challenge to segregation” (p. 258). For Mack, like for Tushnet, the purpose of Marshall’s client contact was not to identify what problems African Americans in a particular place faced and find ways to challenge them in court, but rather to find support for his organization’s own agenda. I say this not as a criticism of Marshall or the NAACP — they were entitled to their own views about the legal cases they would bring — but rather as the basis for an observation about representation. It is inherent in the nature of lawyering that lawyers’ specialized knowledge creates gaps between what clients want (in terms of both ends and means) and what lawyers think the law can or should do. And it is not clear, as Professor Derrick Bell noted more than thirty-five years ago, that the lawyers’ choices always serve either their clients or the cause of greater equality particularly well.\textsuperscript{48}

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

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

\textsuperscript{48} See generally Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470 (1976).
the consensus views of the Loudoun lawyers on the outcome of the case — guilt for Houston's client — and "suppressing the racially divisive issues that once seemed to define the meaning of the trial" — exclusion of black jurors and other forms of overt race discrimination (p. 108). Mack thus follows the new civil rights history by bringing Crawford into the picture, discussing how Crawford's (and a few other clients') interests may have diverged from those of the lawyers, and narrating the contemporary consequences of Houston's racial performance. He diverges from the new field, however, by not making this aspect of the problem of representation — of actual representation in the lawyer-client relationship — particularly central to his project. When Mack writes in an analytic register, representation is a general problem of lawyers and "the race," or (as during the sections on the Depression) lawyers and segments of "the race" (pp. 179–80). He portrays without deeply analyzing the principal-agent problem inherent in representation. Even so, stories like this one reinforce that it was not only that particular lawyers might or might not represent the race metaphorically; they might or might not represent the client literally.

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

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

49 See generally, e.g., Goluboff, supra note 3; McNeil, supra note 9. Mack discusses these concerns in an earlier work. See generally Mack, Rethinking Civil Rights Lawyering, supra note 4.
ers, lawyers did not ultimately pursue those claims; the resulting civil rights doctrine that the Court embraced in *Brown* largely erased them. In the post-*Brown* era, economic arguments resurfaced and made greater headway in administrative arenas. In the 1960s and 1970s, movement participants, clients, and some lawyers also reworked and reasserted such claims with varying degrees of success.

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

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

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


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

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

Mack does occasionally venture into the various ways lawyers thought about law, but his forays are both marginal and partial. Somewhat ironically, the book most explicitly links biography to legal doctrine in its discussion of Murray (pp. 207–33). Mack thus connects lawyers to law not in the context of racial civil rights — the book’s main preoccupation — but in the context of sex discrimination (p. 208). In addition, Mack does not quite connect this law creation to the representation paradox itself. To the extent that courtroom performance played a role in Murray’s development, it was as a defendant before she attended law school rather than as a lawyer herself (pp. 222–25). Murray’s doctrinal concerns were rooted far more in her general self-presentation, her personal anxieties, and her experiences of employment discrimination than in a paradox about her lawyering in
the courtroom or elsewhere (pp. 232–33). Though her story suggests productive links between the personal and the doctrinal, it does not suggest how the representation paradox specifically played out in legal understandings and strategies.

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

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

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

53 See generally MACLEAN, supra note 3; MAYERI, supra note 3; see also generally GLENDA ELIZABETH GILMORE, DEFYING DIXIE (2008).
54 See GOLUBOFF, supra note 3, at 141–73.
ture of pursuing professional success as a lawyer, he magnifies and deepens that theme. What the collective biography suggests is that these lawyers — and likely any lawyers — were far more self-interested than previous scholars have shown.

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