

REPRESENTING THE RACE

KENNETH W. MACK

The
Creation
of the
Civil Rights
Lawyer

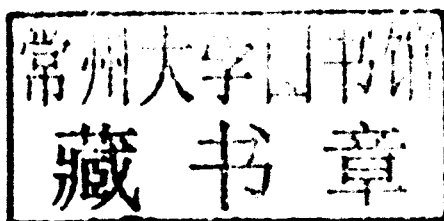


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KENNETH W. MACK



HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts
London, England
2012

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Printed in the United States of America

Library of Congress Cataloging-In-Publication Data

Mack, Kenneth Walter, 1964–

Representing the race : the creation of the civil rights lawyer / by Kenneth W. Mack.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-674-04687-0 (alk. paper)

1. African American lawyers—Biography. 2. Cause lawyers—
United States—Biography. 3. Civil rights movements—United States—
History—20th century. I. Title.

KF372.M33 2012

340.092'2—dc23 2011040342

REPRESENTING THE RACE

*For my father, Jesse Mack,
my late mother, Readymae Mack,
and Gwendolyn and Carlton*

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Introduction:
The Problem of Race and Representation

He had been in close contact with the best element of . . . white people, and naturally acquired their habits of thought and action and imbibed their self respect and innate feeling of perfect equality with all mankind.

P. B. S. Pinchback, on the nineteenth-century black lawyer
John Mercer Langston

There are circumstances which compel one to question what is a representative man of the colored race. . . . I have in mind a young man in Baltimore, Bernard Taylor by name, who to me is more truly representative of the race than half of the "Judges," "Colonels," "Doctors" and "Honorable" whose stock cuts burden the pages of our negro journals week after week.

Paul Laurence Dunbar

DECADES after he began practicing law in his native Baltimore, Thurgood Marshall remembered the 1935 case that desegregated the University of Maryland Law School as encapsulating his early career as a lawyer. Marshall recalled that even while he was studying law at the historically black Howard University, "my first idea was to get even with Maryland for not letting me go to its law school." Skipping lightly over his early years in private practice, Marshall remembered the Maryland victory as the first step on a road that would lead directly to his most famous accomplishment, the decision in *Brown v. Board of Education*. The story fed into local legend and was picked up by news accounts, reference works, and biographers, and even made it into the one-man theatrical production about Marshall's life that has played to enthusiastic audiences in recent years: The defining feature of Marshall's professional life was his application

to, and rejection by, his segregated local law school. He went to Howard with a chip on his shoulder and returned to Baltimore determined to seek his revenge in the form of a desegregation impulse that would take him to *Brown*. Out of that one decision to exclude a young black man who simply wanted to study law in his hometown would come a challenge to the legal underpinnings of segregation in America.¹

The problem is that there is no historical evidence to support the local legend. Surviving records contain no mention of Marshall ever applying to Maryland. His biographers divided among themselves on the subject, with the author of the leading academic account of his career refusing to take sides on the issue. Yet even those who conclude that he did not apply still take pains to accept Marshall's story that his inability to attend was the shaping fact of his career.²

In Marshall's telling, the story of race relations in modern American history begins with a simple act of segregation, backed up by law. The act defined him as it would the black lawyers of his generation. Race and professional status inexorably pointed them toward desegregation work as their principal professional challenge. For Marshall, the story of his rejection by his hometown law school—regardless of its truth or falsity—folded seamlessly into the larger narrative. Marshall, as everyone around him knew quite well, was a powerful storyteller. By the 1950s, his recollections, and those of his generation of African American lawyers, began to play a key role as these lawyers wrote their own professional lives into the core narrative of American history. To oral historians, biographers, scholars, and the public at large, the experiences of these men and women seemed to provide a transparent window into the world of black life under the Jim Crow legal regime, forgetting, of course, that past experience is often opaque and always filtered through memory, culture, and the imperatives of present-day politics.³

Thurgood Marshall, like most black Americans of his time and place, chafed under segregation and fully understood that most southern institutions, including the University of Maryland, were closed to him. But he also self-consciously framed the story of his past, and by extension the story of race relations in the twentieth century, through a lens that looked forward to *Brown* and the civil rights acts of the 1960s. He had plenty of help in this process, and indeed, many of the leading shapers of America's public memory of race were his allies. The eminent historian C. Vann Woodward helped popularize the expression "Second

Reconstruction" to describe the civil rights victories of the 1950s and 1960s, tracing a direct connection to the unfulfilled promise of the Reconstruction-era constitutional amendments that Marshall sought to mobilize as an NAACP lawyer. Woodward's *The Strange Career of Jim Crow*, which Dr. Martin Luther King Jr. publicly invoked in service of his own objectives, reads like a historical brief in support of Marshall's litigation project, which it was. Its first draft emerged in the wake of Woodward's participation in the *Brown* litigation along with other influential scholars such as Kenneth Clark.⁴

In their hands, the dominant story of race relations in modern America began to take shape. The story began with the legal construction of Jim Crow in the late nineteenth century, continued with the founding of the NAACP and its early school-desegregation cases, and reached its zenith with the social movements, litigation, and legislative victories of the 1950s and 1960s, which finally wrote back into law what had been taken away in the late nineteenth century. Nearly twenty-five years after *Brown*, that interpretation was so settled that works like Eric Foner's magisterial history of Reconstruction, subtitled *America's Unfinished Revolution*, invited its many readers to trace a direct line of precedent from the unfulfilled promises of Reconstruction-era citizenship to the still-unfulfilled ones of the 1960s. Guided by Marshall, his allies, and their successors, the tracks of legal precedents that had been mobilized to secure courtroom victories now became historical precedents that were used to remember the past. Memory shaded into history, and then into a nation's public recollection of its racial past. Looking back from *Brown*, the Maryland law school desegregation case became a starting point for both legal precedent and history.⁵

The story that follows is a collective biography of a group of African American civil rights lawyers during the era of segregation, but it tells their story by putting aside the segregation-to-integration narrative that Marshall and others planted as the core narrative of American race relations. It puts aside, as well, the stories that accompany that narrative—stories of protest and accommodation, heroes and villains, assimilation and black separatism, movement building and backlash, progress and retrenchment—that are the usual subjects of race-relations history in the post-civil rights era. It also declines the invitation to recover the agency of oppressed people living under slavery and segregation—a project that has nourished several generations of race-relations historians.

There will be progress and retrenchment, agency and powerlessness, and movements and countermovements enough in the pages that follow, but it is not the main purpose of this story to recount them.

Instead, the story presented here begins with an enduring paradox of race relations. From their beginnings, Americans imagined that they inhabited a country composed of distinct racial, ethnic, and religious groups that somehow constituted a unified nation—an idea that, for some, is encapsulated in their historic national motto, *e pluribus unum*.⁶ Just as assuredly, since the time of the nation's founding Americans have imagined that certain minority groups fit uneasily, or perhaps not at all, into the national whole. Among the most prominent of these groups have been African Americans, and what has connected this particular minority group to the larger nation has been its representatives—those who claimed to speak for, stand in for, and advocate for the interests of the larger group.

The usual story of black civil rights lawyers in American history is that these lawyers represented the interests of a unified minority group that wanted to be integrated into the core fabric of the nation—or, as more-recent accounts have described them, perhaps these lawyers failed at their task of representation.⁷ But the story was not so simple as either of these accounts would have it. Rather, from their beginnings, black civil rights lawyers were people caught between the needs and desires of the larger, white-dominated culture, and those of their own racial group, and there was no simple way out of that dilemma.

Whenever leaders of minority groups have stepped into the larger world of public life, as lawyers like Marshall did in the early twentieth century, the first question that arose was whether they represented the cultural values of the larger group, or those of the minority. Being a prominent black person has often meant that prominent whites must recognize you as one of their own. During most of American history, access to the upper reaches of wealth, power, and public notice depended on resources outside the control of the minority group. The idea of the “representative man” was one response to the problem. A representative man (or perhaps a representative woman)—to use the term that came into common usage in mid-nineteenth-century America—was a person who encapsulated the highest aspirations of his racial or cultural group, in terms of education, professional advancement, and intellectual ability. The very existence of such persons was a potent argument for inclusion of marginalized peoples in the larger fabric of American life.

But the problem of the black lawyer as racial representative was not simply a case of the larger society demanding one thing and the minority group demanding another. Both blacks and whites were unsure of exactly what they meant when they demanded that civil rights lawyers be “representatives” of the minority group. In an era when segregation limited what most African Americans could accomplish in the world, a representative black person often had to be as unlike most members of the minority group as possible. Black Americans themselves often took great pride in the achievements of atypical members of their race. At the same time, however, both blacks and whites often demanded that the representative be an “authentic” black person—someone as much like the masses of black people as possible. From the middle of the nineteenth century onward, Americans spoke often of the “representative colored man,” or later the “representative Negro.” But no one knew which of these two senses of representation they meant when they casually applied the term to prominent African Americans, often lawyers. In fact, people often spoke of representation in both senses at once. There was no escaping that tension in the nineteenth and twentieth centuries, and it still lives with us in our own time. Americans have always needed—and still need—the representative Negro, even though they have always been unclear about exactly what that meant.⁸

African American civil rights lawyers have been a prime example of this larger phenomenon at work. Historically, law was different from other lines of work. In the early years of the Republic, lawyers reinvented their profession as a route to success in business and public life that was open to any ambitious young man—and later woman. After the Civil War, law opened itself nationally to blacks as well as whites, thus creating an opportunity for a black person to cross racial lines like few other African Americans could, simply by deciding to become a member of the bar. Legal professionalism supposedly had no racial identity. In reality, though, law was a field dominated by whites. Inside the courtroom, where most black lawyers made their livings, none of the decision makers would be members of their own race. There was usually little chance of appearing before African American judges or jurors until relatively recent times. To succeed in law, a black person labored publicly under the gaze of white observers as in no other field.

Lawyers like Marshall represented their race in the ordinary sense of lawyers representing clients and advocating for group interests, but

they also represented the larger minority group in the eyes of observers, then and now, who read into these lawyers' experiences the hopes and dreams of an entire race. Simply by becoming a lawyer and coming to court, a black person stepped outside his individual identity as practicing lawyer and, for blacks and whites alike, seemed to stand in for the masses of African Americans who could never come to court and interact with whites as equals. But to be a successful lawyer, one had to also represent the core identity of what was a white-dominated profession. Early black lawyers pioneered the questions that would be asked of succeeding generations of African American leaders as the civil rights era finally put black figures into politics, corporate boardrooms, the judiciary, and other places in public life.

What does it mean to represent a race? The familiar notion of civil rights representation took root as a dominant idea only in the 1950s, when lawyers of Marshall's generation began to remember their pasts as the story of unproblematic group representation in the struggle against segregation. That protest theme meshed well with the intellectual trends of the two succeeding decades, when social historians called attention to the question of agency—the humanity and protests of oppressed people living under the regimes of slavery and segregation. Racially subordinated peoples preserved their humanity and fought the system even in its worst manifestations, many scholars argued, reinforcing the choice between accommodation and resistance that had helped define the emerging field of African American history. The civil rights narrative fit easily into this framework, for that narrative was, at its core, the struggle of “discrete and insular minorities,” as the Supreme Court famously named them,⁹ fighting for recognition in the larger world of American politics. The story of civil rights became the story of a race—represented by its lawyers in courtrooms across the country—crafting the legal precedents that would restore the lost promise of the civil rights laws and constitutional amendments of the Reconstruction era.¹⁰

The search for agency remains a powerful idea and has pushed civil rights historians to embark on their own search for the true representatives of a race. More-recent work in the field has turned away from the NAACP lawyers and leaders, liberal Supreme Court justices, and well-known figures like Martin Luther King Jr. who dominated the first wave of writing and remembering. Admirable as they are, such

figures seem too respectable in a world driven by the need to find agency in the authentic voice of protest among the masses of African Americans themselves. Some found that voice in the ideas of black parents who dissented from the views of the integrationist civil rights establishment and simply wanted good schools for their children, whether integrated or segregated. Others found it in what Lani Guinier has called an “eerie nostalgia for the feeling of community that was destroyed” in the push for desegregation. For others, the authentic voice of protest lay in the left-labor movements of the 1930s and 1940s, bravely working to unite black and white workers in a social democratic vision of America’s future. Others found it in the middle-class activists and intellectuals who sought to speak for African Americans by linking their struggles to the anticolonial movements and the language of human rights during the 1940s and 1950s. Others kept their focus on lawyers, but identified dissenting constitutional traditions that might have helped bring about black freedom but were crowded out by liberal traditions in the second half of the twentieth century.¹¹

Still, the call of grassroots protest and authenticity has remained the strongest impulse in civil rights history, leading many writers to focus on the organizing traditions of local southern black communities that developed their own organic forms of protest far outside the confines of the civil rights establishment. Waves of new writing in this area have emerged over the past several decades, each announcing its rejection of what was now called the “top-down” approach of earlier scholarship in favor of bottom-up history of grassroots protest. As scholars shifted their focus ever more downward to the politics and organizing traditions of local communities and individuals, they continued the search for the story of the real civil rights movement, as told by the people themselves, or more accurately, by their representatives.¹²

Among the central claims of the story that follows is that law constructs race, or more accurately that lawyers construct race. Racial identity varies with social context, and historically part of the work of a successful black lawyer was to demonstrate this fact. In every action that black lawyers took in their professional lives, but particularly so in their performances inside the courtroom, they remained powerful symbols of the fragility of racial boundaries in a nation committed to maintaining them. The idea of race deployed here is captured well by W. E. B. Du Bois’s quip that “I recognize [black] quite easily . . . the

black man is a person who must ride 'Jim Crow' in Georgia."¹³ Even in the era of segregation, racial identity could be fluid and malleable. It was often determined by who had access to public space and what kinds of things they could do and say once they got there.

Black women lawyers fit uneasily into the American narrative of minority group representation, and their struggle to figure out where they belonged in that story would help create sex discrimination as a modern category of American law. Black male lawyers often confounded the expectations of everyone around them by coming to court and being treated like white men, but that was not a viable option for African American women in the first half of the twentieth century. When women lawyers came to court, it was often in woman-identified venues like domestic relations and probate courts, where they rarely practiced in front of a jury. What happened when a woman tried to join the fraternity of lawyers and come to court? Philadelphia lawyer Sadie Alexander struggled with this question all of her life. She became a nationally known figure in civil rights politics, but she did not litigate civil rights cases. That type of work was the province of her husband, Raymond Pace Alexander. What exactly it was that kept her out of the civil rights courtroom she found it impossible to tell.

Pauli Murray, however, was sure of the answer. It was sex discrimination. Murray came to believe that separating people by sex was often just as objectionable as separating them by race—a fringe position in the middle of the twentieth century. That position grew out of her own consciousness of herself as a person who never quite fit in in a society that was bent on segregating its black citizens from its white ones, and separating men from women. In a society that required people to identify as men or as women, Murray felt as though she were something else. That feeling of discomfort would emerge full-blown when Murray decided to become a civil rights lawyer and wanted to come to court. Out of that sense of constantly being out of place, Murray would help write sex discrimination into the fabric of American law.

The story that follows is a multiple biography of a group of African American lawyers whose intersecting lives have come to encompass the story of the civil rights lawyer for many Americans. They range from famous figures, like Thurgood Marshall, to lawyers who have recently become of interest, like the feminist civil rights lawyer Pauli

Murray, to those whose accomplishments were well known in their own time but who have been largely lost to history, such as Los Angeles lawyer Loren Miller. Some of them, like Marshall, had a profound effect on how Americans remember the conventional story of the civil rights lawyer, and this book takes that as an invitation to rewrite the story that they told about themselves. They are all African American, but that is not intended to slight the accomplishments of white lawyers who did civil rights work. It is merely to suggest that these lawyers shared many important characteristics, and that their story can be seen as a coherent whole which illustrates a larger narrative arc of American race relations. What they had in common is that they began practicing law in northern, western, and border-state cities after World War I, in an era when African Americans began migrating out of the rural South in large numbers. It has become commonplace to observe that that migration altered the country's racial history in many ways.¹⁴ The migration also created the civil rights lawyer, in that it made it possible for a large group of black lawyers to believe that they could support themselves at the practice of law. Many of these lawyers could now devote sustained attention to civil rights matters. What these lawyers also had in common was an important professional ancestor—acknowledged by some of them but largely forgotten today—John Mercer Langston's tragic story begins this book, and his struggle with racial representation would set the stage for the subsequent struggles of Thurgood Marshall and others.

It is immediately evident that certain groups of black lawyers are largely absent from this story. The rank-and-file lawyers who sometimes worked part time, did little-to-no civil rights work, scratched out a living, and often could not support themselves at the practice of law are not represented here. Theirs is a very different story and deserves to be told on its own terms. Where possible, the personal papers of a few that survive, like Baltimore's Dallas Nicholas, and oral interviews with others provide a contrast to the lawyers who form the subject matter of this book.

In addition, southern black lawyers, particularly those in the Deep South, are also largely absent from the core narrative of this book, although some of their story appears in its early chapters. For black lawyers, the South was indeed another country. Large parts of the South were no-go areas for black lawyers, and those who practiced were

sometimes placed in mortal danger for pursuing the type of civil rights advocacy that their counterparts to the north could do as a matter of course. Although some prospered in southern cities, they were few in number, and they experienced a set of professional circumstances that were vastly different from those of their counterparts in other parts of the country. By the late 1940s, one study showed just three black lawyers serving a population of one million African Americans in Alabama, while Washington, D.C., with a black population of just 220,000, had 136 black lawyers.¹⁵ Those few black lawyers who persisted in places like Mississippi and Alabama, and the greater numbers who made a go of it in places like Atlanta, Nashville, Durham, and southeastern Virginia, inhabited a world markedly different from that of their peers in other parts of the country.

The story told here focuses on two main racial groups—blacks and whites—but the way that it unfolds has been deeply shaped by recent writing that acknowledges that “the color of America has changed,” as the historian Mark Brilliant has recently argued. It has become a commonplace observation that America’s racial composition is being transformed in an unprecedented way, with the controversy over which categories the United States census should record just one element of a larger debate. One strand of recent writing in civil rights history has explicitly acknowledged this change and begun to focus on more than one minority group at once—blacks and Japanese Americans, for example, or African Americans and Mexican Americans. Although driven by differing impulses, what that work often shares is a focus on the messiness of racial categories and complexity of group identity.¹⁶ What follows might be termed an invitation to rework perhaps the foundational story of race in American history—the story of the evolution of slavery and freedom in African American life—using insights drawn from those who have sought to transcend it.

Half a century ago, the memories of veteran civil rights lawyers helped cement in American national consciousness what remains the core narrative of race relations in modern history—a continuous journey from slavery and segregation to freedom and equality, led, in part, by lawyers with firsthand experiences of life as second-class citizens. It was a heroic narrative formed at a time when the struggle for equal citizenship was paramount in African American life, and it understandably focused on agency, resistance, and organized protest. It also made