Response to Ken Mack—and New Questions for the History of African American Legal Liberalism in the Age of Obama

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I so appreciate Professor Mack's generous comments on *Freedom Is Not Enough*—and even more his critical engagement with it. It's an author's dream to have a leading scholar in a related field read with such care and insight, and I am very grateful for this opportunity to converse about the intriguing issues he has raised. I first encountered some of Ken's articles about civil rights lawyering before *Brown* after *Freedom Is Not Enough* was in press, and I thought then that my discussion of the earlier history would have been enhanced by them because his portrayal was so rich while our perspectives on the relationship between law and activism were so congruent. Now, reading his comments on the work as published, I wish I had studied law with him! His challenges would have made it a better book.

Here I should confess that I embarked on this project as a social historian wanting to write a history of affirmative action in employment, but without any training in legal history. Stretching to master new subfields of my own discipline important to the story—including Mexican American history, Jewish American history, and conservative history—I realize now that I was too deferential to the conventions of the also new, to me, (and sometimes intimidatingly technical) civil rights legal literature. Ken rightly points to this in portraying my core framing of the Civil Rights Act as formalist. But that is why a conversation across specialties like this is so exciting:

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Law and History Review Fall 2009, Vol. 27, No. 3

it reveals how much can be gained by changing the lens with which we examine a complicated story. I won't respond to Ken's summary of the book and the interventions it makes because he captures its arguments and intended interventions so well (and kindly).

Instead, I want to concentrate on the important questions he raises in three particular areas that can deepen our understanding of civil rights history—and of the reinvigoration of African American liberalism in the Obama era: (1) periodization, (2) the political implications of a formalist versus realist conception of the Civil Rights Act, and (3) the gender politics of black women's legal activism over the last half century. To start with the first, periodization, Ken suggests that my narrative of the Civil Rights Act's impact may overemphasize discontinuity, positing too stark a before-and-after story around its passage. My response is yes—and no. I agree that the appearance of a rupture is partly a result of the later suppression by some participants, for political reasons, of the more complex and protean prehistory, a suppression that has made it into scholarly narratives. (Indeed, it seems relevant here that Bayard Rustin, whom Ken cites in particular, was part of the once social-democratic New York milieu including Albert Shanker and the United Federation of Teachers, which in the later 1960s helped to develop neoconservatism and construct what I called in chapter 6 a new "creation myth" of affirmative action.)[1]

As Ken notes, I found nearly hegemonic in the existing literature the notion of a mid-sixties break between an earlier, allegedly narrow and formalist understanding of civil rights and a subsequent more robust conception that included economics and substantive equality. That perplexed me because the archives revealed no such sharp distinction among movement activists and strategists. Rather, their records evinced concern with both sides of this alleged dichotomy from early on, but also tactical shifts that foregrounded the former until legal rights were secured, the latter once they were in hand. To some degree, this was also a regional difference of emphasis, with northerners and westerners freed by their possession of basic civil and voting rights to concentrate on such matters as employment, housing, and police conduct, while southerners needed to win basic rights before they could affect policy in such areas.[2]

I was more confident about challenging the false dichotomy at the heart of this before-and-after narrative as it was applied to social movement

1. For more on the complexities of Rustin's situation in these years, see John D'Emilio, *Lost Prophet: The Life and Times of Bayard Rustin* (New York: Free Press, 2003).

2. See, for example, for the North, Martha Biondi, *To Stand and Fight: The Struggle for Civil Rights in Postwar New York City* (Cambridge: Harvard University Press, 2003), and for the West, Robert O. Self, *American Babylon: Race and the Struggle for Postwar Oakland* (Princeton: Princeton University Press, 2003).

organizing, my expertise, than as it was applied to legal history, where I was a newcomer. Archival limitations also led me to caution in questioning the conventional wisdom about the evolution of the legal struggle. Whereas the records of the NAACP, the SCLC, SNCC, unions, and myriad local community civil rights groups are open to researchers, the relevant records of the NAACP Legal Defense and Education Fund ("the Fund") housed at the Library of Congress remained restricted and its officers did not reply to repeated requests for access. Perhaps others can gain access to the Fund's papers and so deepen our understanding of its pre– and post–Civil Rights Act litigation. In the meantime, I appreciated the chance to learn about the work of Owen Fiss and Sophia Lee, whose scholarship challenges the prevailing paradigm concerning the pre-1964 period.

Now for the "no" part. While I happily grant Ken that there was more conflict and ambiguity in the earlier legal history than *Freedom Is Not Enough* may convey, and also that state fair-employment practice committees were terrains of vigorous struggle to define the law's meaning, I stand by the argument that Title VII was a watershed. That is how it was understood both by victims of employment discrimination and by labor and legal activists who had been struggling for years, often nearly in vain, for racial (and gender) justice on the job. Again and again, they used language like "before that, we had nothing to stand on." For his part, Herbert Hill, the NAACP labor secretary in the forefront of the national fight against employment discrimination, regularly dismissed the state FEPCs—including the flagship New York agency—as woefully inadequate in making the case for a strong employment title in the Civil Rights Act and a more aggressive federal contracting program. When the Civil Rights Act finally passed, Hill and others regarded its Title VII as a breakthrough—even as he regularly reminded workers that it was "not self-enforcing" and implored them to put it to work by filing charges.[3] To recognize the way the new legislation transformed the terrain of struggle is not to deny or minimize the efforts incubating prior to its passage, thanks to the creativity of grassroots activists and civil rights attorneys. It is, rather, to draw our attention to how profoundly the state shapes the agenda of social movements through law—whether to limit, license, or channel—and to underscore what a vast difference reform legislation

3. On Hill's work, see the posthumous special issue entitled "Up for Debate: Assessing the Legacy of Herbert Hill," *Labor: Studies in Working-Class History of the Americas,* 3 (Summer 2006), 11–39. The sociologist Anthony Chen helpfully demonstrates how the obstacles congressional conservatives posed to fair employment legislation and the restrictions they built into the Civil Rights Act's Title VII all but made hard affirmative action inevitable in his 2002 dissertation, revised as *The Fifth Freedom: Jobs, Politics and Civil Rights in the United States, 1941–1972* (Princeton: Princeton University Press, forthcoming July 2009).

can make in the hands of those committed to effecting change on the ground.[4]

That said, where Ken is spot on in this matter of how exactly to understand the Civil Rights Act—and where I especially wish we'd had this conversation before publication of *Freedom Is Not Enough*—is in his insistence on the protean potential of the law itself. As he points out, this matters not only to getting the history exactly right, but also to the political struggle over the future of civil rights. Ken argues that my more formalist rendering of the legislation might give ground to the restrictive interpretation of its content that conservatives have promoted in their fight against affirmative action—none more pithily than William F. Buckley, Jr., who said at the time of the fight over the *Weber* case that the original, allegedly narrow language of the act was "about as ambiguous as 'John hit the baseball.'"[5] In appearing to in any way uphold this reading by making the case that social movements developed the law in applying it, I fear I made a rookie mistake as a newcomer to legal history.

Contemporary conservatives certainly believed that the Civil Rights Act had the capacity to produce profound changes in American law and life. North Carolina U.S. Senator Sam Ervin, a Harvard Law alumnus, former state supreme court associate justice, and judicial originalist (as virtually every serious segregationist was), attacked the version of the Civil Rights Act passed by the House as "a monstrous blue-print as full of legal tricks as a mangy hound dog is of fleas."[6] Only after failing to defeat passage of the law with arguments about how radical it was—and after observing how it enabled affirmative action—did conservatives, as the Buckley example illustrates, suddenly change course to frame it as narrow and restrictive.

What we need now, I believe, is follow-up research by others to uncover the rich substantive possibilities embedded in the original act and its legal prehistory, much as attorneys and judges mined it to produce paradigm-altering decisions such as *Griggs v. Duke Power Co.* An excellent place to begin such study would be the shockingly neglected Papers of Clarence Mitchell, Jr., held by the Library of Congress. An attorney himself as well

4. For a contained case study of this impact, see my article "The Civil Rights Act and the Transformation of Mexican American Identity and Politics," in *Berkeley La Raza Law Journal* 18 (2007), 123–34, in the forum "More Than Whiteness: Comparative Perspectives on Mexican American Citizenship from Law and History," edited by Marc Simon Rodriguez.

5. Quoted in Nancy MacLean, *Freedom Is Not Enough: The Opening of the American Workplace* (Cambridge: Harvard University Press, 2006), 256.

6. Quoted in Nick Kotz, *Judgment Days: Lyndon Baines Johnson, Martin Luther King, Jr., and the Laws That Changed America* (Boston: Houghton Mifflin, 2005), 135. Kotz's fascinating account of the pitched battle over the Civil Rights Act and razor-thin victory provides a helpful starting point for legal realist analysis along the lines Ken's comment invites.

as the chief lobbyist of the NAACP over the pivotal civil rights decades, Mitchell was widely revered as "the 101st Senator" for his comprehensive knowledge of the law and of Congress.[7] The huge lacuna in our knowledge of the post-*Brown* work of figures like Mitchell seems to be an artifact of how the New Left/Black Power critique of liberalism led progressive young researchers to assume, a priori, that there could be nothing of interest to learn from the examination of liberal activists. Looking back in the harsh light of the contemporaneous rise of the right, that critique appears not only analytically flawed but also historically and politically tragic.[8]

In what I hope will be a new wave of attention to the tradition of robust African American legal liberalism in years ahead, scholars will need to keep in mind, as Ken rightly observes, how both the formal and the substantive interpretations of antidiscrimination law, the restrictive and the capacious, have been present and in tension for a very long time. Not infrequently, both coexisted in the minds of individual civil rights activists, especially in the early years when fear of the consequences of race-conscious marking of job candidates was understandably widespread. This was also sometimes a source of contention between groups of civil rights advocates, as I describe in chapter 6 of *Freedom Is Not Enough*. It explains why Jewish American advocacy organizations in the 1970s broke ranks with feminists and with former African American and Mexican American civil rights allies to promote a restrictive interpretation of civil rights, which they found better suited to the experiences, goals, and values of their constituency than the expansive interpretation that supported affirmative action goals and timetables.

Tension is a good segue to the last challenge Ken offers, because our deepest differences concern the tension between rival models of gender held by leading black women attorney-activists. With lush and evocative detail, he suggests that Pauli Murray, who features prominently in *Freedom Is Not Enough,* is unrepresentative of black women as compared to Sadie Alexander, and that Murray's atypicality may skew my interpretation of what African American women sought in the way of workplace justice.[9] There is no question that Alexander was more representative than Murray

7. Ibid., 98. For a rare and foundational examination, see Denton L. Watson, *Lion in the Lobby: Clarence Mitchell, Jr.'s Struggle for the Passage of Civil Rights Laws* (Lanham, Md.: University Press of America, 2002).

8. For more on the flaws of that critique, see Nancy MacLean, "Southern Dominance in Borrowed Language: The Regional Origins of American Neo-Liberalism," in *New Landscapes of Inequality,* ed. Micaela di Leonardo and Jane Collins (Santa Fe: School of American Research, 2008), 24–25.

9. The discussion here concentrates on employment; for education, see the pathbreaking work of Serena Mayeri, in particular, "The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse," *Yale Journal of Law & the Humanities* 18 (Summer 2006), 187–272.

in her sexual orientation, her motherhood, her distrust of white feminists, her vocal support for embattled black men, and perhaps also in her professional deference to her male colleagues, though we know less of standard practice in this area. But those contrasts notwithstanding, I stand by the selection of Murray as not only the most apt choice for a starring role in the breakdown in what she termed "Jane Crow" all the way back in the 1940s, but also as ultimately more representative than Alexander of black women's visions of justice on the job. Murray looms large in *Freedom Is Not Enough* in part because she played such an agenda-setting role in this history for over four fascinating decades, from participating in the first sit-ins against segregated lunch counters in Washington in the 1940s, to challenging sexism among male civil rights colleagues at a time when many straight women saw it but hesitated to speak, to ensuring that "sex" stayed in the Civil Rights Act in 1964, to breaking the male monopoly of the priesthood in her church in 1977. So multifaceted and persistent an activist is irresistible for a historical narrative.[10]

But, substantively, also, it makes sense to feature Murray because she analyzed the contemporary scene and anticipated the future of gender for black women better than Sadie Alexander. For one thing, she was not alone among black women, as Ken implies, in finding male domination to be a problem in civil rights organizations and seeking ways to both navigate around it and change it: so, too, did her contemporary, the legendary organizer Ella Baker.[11] Indeed, the historian Deborah Gray White, in her incisive long-term study of black women's activism in the United States, depicts the masculinization of the civil rights agenda not as a timeless feature of black culture, but rather as a peculiar—and in the end debilitating—outgrowth of postwar conditions, which Dorothy Height and other veteran leaders looked back upon later with sadness and a sense of lost opportunity.[12] Murray also saw, as Alexander apparently did not, that protective legislation did little to help black women, a fact on which all the women's labor history literature concurs. Because of this, some activist black women of the 1960s appreciated better than their progressive white counterparts why such laws had become anachronistic and needed to go. Some even

10. On how Murray is looming larger as a pioneer on many fronts, see the symposium, "Dialogue: Pauli Murray's Notable Connections," *Journal of Women's History* 14 (Summer 2002), 54–87; and her featured place in Glenda Gilmore, *Defying Dixie: The Radical Roots of Civil Rights, 1919–1950* (New York: W. W. Norton, 2008).

11. See Barbara Ransby, *Ella Baker and the Black Freedom Movement: A Radical Democratic Vision* (Chapel Hill: University of North Carolina Press, 2005).

12. See especially chapters 6, "The Sacrifices of Unity," and 7, "Making a Way Out of No Way," whose titles convey the toll, of *Too Heavy a Load: Black Women in Defense of Themselves, 1894–1994* (New York: W. W. Norton, 2009), 176–256.

identified gender-specific "protection" as a variant of "separate but equal." That is why the laundry workers' organizer Dollie Robinson announced "I just want equal treatment" and explained simply, "whatever the men get, I want," and why the economist Phyllis Wallace so deftly connected racial and gender discrimination in the research she directed for the landmark EEOC case against AT & T in the early 1970s.[13]

Moreover, contrary to what Sadie Alexander's story might imply, the desire for equal treatment was actually *more* common among black women than among white women. For all the justified suspicion and anger black women felt toward the young white feminists who suddenly asserted a universal "sisterhood" in the late 1960s and the 1970s, and for all the fiery denunciation of that hubris by eloquent critics like Toni Morrison, the fact is that on policy matters pollsters found that black women supported the feminist agenda in larger numbers than white women—and especially in workplace and work-and-family matters. Another indication of their disproportionate commitment is African American women's leadership in envisioning policies that promoted gender equity. Former SNCC activist and Yale-trained attorney Marian Wright Edelman, for example, led the coalition that nearly won universal national child care legislation in the early 1970s, and then founded the Children's Defense Fund in 1973, while Shirley Chisholm worked for an encompassing progressive agenda that included feminist issues before contesting the mostly tightly held male job monopoly—the presidency—in her 1972 campaign.

At the grassroots level, too, black women played outsized roles in interring the Victorian legal apparatus associated with Jane Crow. Half of the early cases that went to the Supreme Court were filed by African American women. They identified sexual harassment more readily than white women because of their consciousness of racial harassment—and their exposure to particularly virulent forms of their intersection.[14] This shared history motivated and informed Eleanor Holmes Norton, whose enslaved great-grandmothers had been raped by their owners, as she led the fight to outlaw sexual harassment while she was head of the EEOC in the late 1970s. Though herself married and the mother of two children, one with Down syndrome, Norton had also pioneered in the quest for civil rights for lesbian and gay men as head of the New York City Human Rights Commission in the mid-1970s. Even Constance Baker Motley—who was mainly known for her work as associate counsel of the Fund in the 1950s and 1960s, and whose personal life and disinterest in feminism put her closer to Alexander than to Murray, Norton, and Chisholm—nonetheless

13. Quoted in *Freedom Is Not Enough*, 119.

14. Carrie N. Baker, *The Women's Movement Against Sexual Harassment* (Cambridge: Cambridge University Press, 2007).

helped break down sex segregation on the job in her landmark 1978 *Ludtke v. Kuhn* ruling that granted women sportswriters access to the New York Yankees' locker rooms.[15]

A stunning fact links such black women attorney-activists: the utter lack of interest scholars have shown in their work to date, despite its powerful impact on the world we now inhabit. Here's one graphic gauge of that disinterest: the Papers of Barbara Jordan held by Texas Southern University have *never* been consulted by researchers, according to archivists there.[16] One can only hope that as a new generation of researchers seeks to explain the success of Barack Obama, they will finally turn to researching African American legal and political liberalism in the post-*Brown* decades and end the neglect that has resulted in our having no scholarly histories of the work of women such as these, let alone of the last half-century's work by the largest membership-based organizations of the civil rights struggle. We have many fine studies of SNCC, Black Power, and the Black Panthers, yet hardly any on the groups who put a far larger stamp on law and policy. It is past time to move beyond the simplistic sixties-derived dismissal of "liberal" actors and examine carefully the important work they did in the face of daunting odds.

In today's situation, finally, Pauli Murray's perspective better addresses the needs and goals of most black women than Sadie Alexander's does. When Murray made her case for including sex in Title VII's prohibition on employment discrimination in 1964, she pointed out that black women headed one-fifth of African American households. They could not count on a male family wage, she noted, and therefore needed access to better jobs. Today, nearly seventy percent of black children are born to unmarried mothers. Conditions in the low-wage jobs to which most of them are still confined help to explain why so many of their families live in or close to poverty. Black women's need for gender as well as racial justice has become all the more urgent with the worldwide demise of maternalist policies such as Aid to Families with Dependent Children.[17] Now that such paltry health and welfare benefits as Americans enjoy are nearly always routed through employers rather than provided by government, Murray stands out

15. On Motley, see Nancy MacLean,"Using the Law for Social Change: Justice Constance Baker Motley," *Journal of Women's History,* 14 (Summer 2002), 136–39. Motley's rarely consulted papers are housed at the Sophia Smith Collection at Smith College.

16. For this revelation, I am indebted to sociologist Nicki Beisel, who learned of this neglect in the course of her pathbreaking current research on African American liberals' pioneering yet all-but-forgotten role in advocating abortion legalization in the pre-*Roe* years. Personal email communication, January 6, 2009.

17. See Ann Orloff, *Farewell to Maternalism? State Policies, Social Politics and Mothers' Employment in the U.S. and Europe* (forthcoming).

as the more prescient in her call to civil rights advocates to recognize that "women's rights are a part of human rights."

It is Murray's understanding, moreover, not Alexander's, that now guides the most visionary human rights and economic development work around the world. As the declaration of the 1995 Beijing World Women's Conference expressed it: "equality between women and men is a matter of human rights and a condition for social justice and is also a necessary and fundamental prerequisite for equality, development, and peace" in the twenty-first century.[18] If scholars are to understand the origins of this emerging international consensus, we need more research into the thought and work of its early architects, among them black feminist legal activists such as those discussed here. Yet another salutary effect of Barack Obama's presidency may be the scholarly interest it spurs in the understudied tradition of black legal liberalism after and beyond *Brown,* a tradition to which Murray and her allies contributed so much.

18. United Nations, "Beijing Declaration and Platform for Action," from the fourth United Nations Conference on Women (New York: United Nations, 2001).