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For my son Benjamin, my sweet prince.

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A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory

LAURA E. GÓMEZ

INTRODUCTION

The point of departure for this essay is the claim that law and society scholars have not been sufficiently attentive to issues of racial inequality, racial ideology, and racial identity. Given their interest, as a group, in inequality and ideology more generally, it is surprising that sociolegal scholars have not paid more attention to racial inequality and racial ideology. What accounts for this? The short answer is that many, if not most, law and society scholars conceive of race as a readily measurable, dichotomous (black/white) variable that affects the law at various points. Even law and society scholars whose work is not positivist in style tend to view race as a concept that is relatively simple to map. But race *is* complicated, and the relationship between race and law is messy. Race does not exist outside of law; it is constituted by law. And, in the United States among other places, law does not exist apart from race; it is constituted by racial classification systems, racial ideology, and racial inequality.

These ideas are the starting point of a relatively new genre of legal scholarship known as critical race theory. By and large, law and society scholars have not engaged the claims put forward by critical race scholars over the past 15 years or so. And even when they do so, they have not taken the literature as seriously as they might. My hope is to persuade law and society scholars that our work would be improved by engaging critical race theory. (In a forthcoming project, I make a similar injunction to critical race scholars: that their work would be improved by more fully engaging the methodologies, theories, and findings in the law and society field.) To do so, I discuss some recent law and society scholarship and discuss how critical race theory has influenced and could have further enhanced their analyses.

Critical race theory emerged in the middle-to-late 1980s, concomitant with a critical mass of racial minorities (particularly African Americans) entering the legal professoriate. Today, more than 20 American law schools offer courses or seminars on critical race theory and one, UCLA, offers an advanced specialization in critical race studies (Harris, 2002; see http://www.law.ucla.edu/crs). Critical race scholars write not only in those doctrinal areas traditionally conceived of as relevant to civil rights and race relations (such as constitutional law, employment discrimination and civil rights generally), but also in an increasingly diverse array of doctrinal areas such as the following: criminal law and procedure (Austin, 1992; Carbado, 2002a; Butler, 1995; A. Harris, 2000; Lee, 1996; Meares, 1998; Alfieri, 1998, 1999, 2001; Johnson, 1993, 1998; Ammons, 1995); torts (Austin, 1988; Matsuda, 2000); property (C. Harris, 1993); family law (Moran, 2001; Banks, 1998; Perry, 1994, 1993; Roberts, 1997); civil procedure (Brooks, 1994); tax law (Moran and Whitford, 1996); and environmental law (Yamamoto and Lyman, 2001).

Critical race theory is one of the few genres of legal scholarship that has drawn widespread attention outside the legal academy, with departments of education, American studies, African American studies, and ethnic studies now posting course offerings in critical race theory (Harris, 2002). Professor Cornel West, a leading scholar of African American studies, has labeled critical race theory "the most exciting development in contemporary legal studies" (1995: iii). Given its positive reception by scholars in the humanities and social sciences, critical race theory would seem a good fit for law and society, given the latter's commitment to multidisciplinary and interdisciplinary scholarship. Critical race theory has even broken out of the academy altogether to capture a popular audience, with critical race scholar Patricia Williams writing a regular column for *The Nation* (entitled "Diary of a Mad Law Professor"; see also Williams, 1991; Rosen, 1996).

All of this is to say that critical race theory deserves to be read by scholars of law and society. But what is "critical race theory"? Three anthologies of critical race theory scholarship, all edited by law professors, provide a good starting point (Valdes, Culp, and Harris, 2002; Delgado, 1995; Crenshaw, Gotanda, Peller, and Thomas,1995). Three law school casebooks also draw heavily from the critical race literature (Bell, 1992; Perea, Delgado, Harris, and Wildman, 2000; Yamamoto, Chon, Izumi, Kang, and Wu, 2001). Crenshaw et al. characterize critical race theory as "a movement of left scholars, most of them scholars of color, situated in law schools, whose work challenges the ways in which race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole" (1995: xiii).

That said, neither what constitutes critical race theory nor which authors write from this perspective are self-evident; both questions are contested by people within the field and outside it (Carbado, 2002b). I take a broad view of the field by including those authors who expressly identify themselves with critical race theory as well as those who engage the scholarship of authors who so identify. I also include, within the critical race theory rubric, other literatures that I view as having their genesis in critical race scholarship, including legal scholarship focused more specifically on the Asian American and Latino/Latina (LatCrit) experiences, race-oriented queer legal theory, and feminist legal theory focused on women of color. Noted critical race scholars Francisco Valdes (see chapter 15 in this volume) and Cheryl Harris (2002) recently have taken a similarly broad view of the field.

Critical race scholars write about race and the law but do so from the perspective of writing against the antidiscrimination model that has been dominant in American jurisprudence and legal scholarship for the past 30 years. This literature has been written almost entirely by white men (Delgado, 1984, 1992). The antidiscrimination model essentially conceives of racism and racial discrimination as individualized, aberrational, and capable of remedy within the current jurisprudential framework, both constitutional (the equal protection clause of the Fourteenth Amendment) and legislative (Title VII of the Civil Rights Act of 1964). In contrast, critical race scholars view racism and racial discrimination as systemic (institutional) and endemic and, therefore, frequently as immune to antidiscrimination remedies (see, e.g., Bell, 1992; Lawrence, 1987; Haney-Lopez, 2000).

Critical race theory and law and society both share at least partial lineage in critical legal studies (CLS) – the leftist scholarly movement that rocked legal scholarship in the 1970s (for an introduction to critical legal studies, see Kairys, 1982). Critical race theory formed, in part, from a rupture within CLS, led by racial minority scholars who rejected the nihilism in the CLS claim that all law is ideology, in the service of dominant class interests (Crenshaw et al., 1995). Instead, critical race scholars continue to write scholarship that attempts to change American law, whether radically or via incremental reforms.

For law and society scholarship, one legacy from CLS has been the oft-noted centrality of research on inequality in the field (Abel, 1995a: 297–357; Sarat, Constable, Engel, Hans, and Lawrence, 1998: 4–6; Munger, 1998: 36). Law and society scholars have sought to document unequal results or outcomes of various legal processes, especially the criminal process. (The representative literature is too voluminous to cite here.) They have posited overarching theories of inequality in the legal system (Spitzer, 1983; Galanter, 1975; Bumiller, 1988; Fineman, 1995; Sarat, 1990). And they have studied social movements organized to promote equality (Handler, 1978; McCann, 1994; Abel, 1995b). While inequality has been a central theme in law and society scholarship, researchers in the field have been much more focused on class- and gender-based inequality than on racial inequality. (See Daly, 1987, 1994, 1998, for an example of a law and society scholar whose work has become increasingly attentive to race, within a central focus on gender inequality.)

When law and society researchers have taken up race, they have tended to treat race as an independent variable that influences the outcome of the legal phenomenon under study (the dependent variable). I am not suggesting that this approach is inherently flawed – it may make a great deal of sense in the context of a particular study. Moreover, law and society scholarship of this nature focused on criminal justice processes, and specifically on the administration of the death penalty, has played an important role in policy debates. Indeed, we might view the positivist approach to race, at its apex in law and society in the 1980s, as quite progressive in that political moment. These studies brought race into law and society research and they contributed to the critique of liberalism as well (by revealing large cracks in the law's veneer of neutrality and fairness).

Today, however, treating race as an easily measurable independent variable has led law and society researchers to have a kind of collective myopia when it comes to studying race. Rarely have they made racial inequality, racism, or racial identity the central focus of their inquiry (the dependent variable), and thus a certain lopsidedness characterizes law and society scholarship on race. In sharp contrast, critical race scholars often have made racial identity, racial ideology, or racism the focus of their

inquiry, with law being the factor that explains race. Indeed, Crenshaw et al. describe the critical race theory endeavor "as uncovering how law was a constitutive element of race itself: in other words, how law constructed race" (Crenshaw et al., 1995: xxv). Critical race scholars, then, often flip the traditional approach of law and society scholars to race: for the latter, racial inequality makes law (or produces legal outcomes), whereas, for the former, law makes race.

Race in Law and Society Scholarship

Ideally, then, sociolegal scholars would borrow this strategy from critical race scholars in order to see what shifting the emphasis might yield for what we know (and think we know) about law and society. To what extent has this occurred? In an attempt to provide one answer to this question, I surveyed articles published over a decade in the two leading law and society journals, *The Law & Society Review* and *Law and Social Inquiry*. Between 1990 and 2000, these two journals published, respectively, nine and 15 articles dealing with race, racial inequality, or legal doctrine in the civil rights arenas (excluding book reviews). (Seven of the 15 articles published in *Law and Social Inquiry* were published in 2000 for a symposium on affirmative action in legal education, vol. 25.)

Although most of these studies are not quantitative, the majority still reflect the tendency to operationalize race unproblematically as a dichotomous, black/white variable that helps predict the legal outcome that is at the center of the research. In most of these studies, racial inequality, racial classification, and/or racial ideology are, at best, peripheral to the analysis despite the fact that the articles explicitly or implicitly deal with legal or social phenomena closely associated with race or racial inequality (see Provine, 1998; Morrill, Yalda, Adelman, Musheno, and Bejarano, 2000; Romero, 2000; Bybee, 2000; Phillips and Grattet, 2000). Some noteworthy exceptions that place race at the center of the analysis and that consider it deeply and contextually are Nielsen (2000), Glenn (2000), Weitzer (2000) and Oberweis and Musheno (1999). By and large, the authors noted above fail to seriously engage the burgeoning critical race literature, despite its bearing on their inquiries and analyses. It is almost as if this genre of legal scholarship does not exist, despite these authors' engagement with a wide range of other subfields of legal scholarship that are quite separate from law and society.

An important exception is a subset of about one-third of these articles, historical in approach, that builds on insights from the critical race literature. Historical studies dealing with race, as a subset of articles on race published in the leading law and society journals between 1990 and 2000, numbered eight, as follows: Brandwein, 2000; Calavita, 2000; Elliott, 1999; Goluboff, 1999; Gómez, 2000; Mack, 1999; Plane, 1998; Polletta, 2000. Each of these articles engages critical race theory, though to differing degrees. Four of the authors expressly situate their work as joining a dialogue previously initiated by critical race theory scholars (Brandwein, 2000: 319; Calavita, 2000: 3; Elliott, 1999: 612; Mack, 1999: 380). Of the remaining four, two more cite authors affiliated with the field (Gómez, 2000; Polletta, 2000). While neither of the two remaining articles invoke critical race theory nor cite scholars identified with that scholarly movement, they nonetheless engage central debates within critical race theory and their work would have been strengthened by incorporating work in the field (Goluboff, 1999; Plane, 1998).

In a similar way, the articles fall along a continuum in terms of their engagement with empiricism – traditionally, one of the hallmarks of the law and society field. One of the authors conducted interviews to supplement archival research – Francesca Polletta, who interviewed more than 100 former southern civil rights workers about their experiences and attitudes. Three of the authors utilized a range of diverse primary sources including court or administrative records, newspapers, appellate decisions (Calavita, 2000; Gómez, 2000; Mack, 1999), with Calavita and Gómez involving analysis of hundreds of case files. Three of the studies focused exclusively on discourse or rhetoric in legislative debate and/or case law (Brandwein, 2000; Elliott, 1999; Plane, 1998), with Elliott and Plane consisting of a close reading of only one or two appellate cases. Thus, methodologically, the subset of historical articles is quite diverse.

Also, although each focuses on some period in the past, they foreground a range of different time periods, as far back as the US colonial period (Plane, 1998) and as recent as the 1960s (Polletta, 2000). Five authors' engagement with the late nineteenth century (Brandwein, 2000; Calavita, 2000; Elliott, 1999; Gómez, 2000; Mack, 1999) suggests the importance of that historic period for understanding the contemporary American racial hierarchy. Brandwein and Elliott concern themselves specifically with the repercussions of the Civil War, and how the ideology of white supremacy would come to be worked out and reproduced in legal discourse. Mack continues the interest in the south, focusing on the complexity of the links among race, gender, and social class in Tennessee in the last quarter of the nineteenth century and early twentieth century. Calavita and Gómez examine the same time period, but shift our gaze to the southwest and west and to nonblack racial minority groups. Four of the articles focus on nonblack groups: Calavita on the Chinese, Elliott on Indians and blacks, Gómez on Mexicans (and somewhat on Indians), and Plane on Indians, while the remaining authors focus exclusively on blacks and/or black/white relations (Brandwein, Goluboff, Mack, Polletta). In addition to explicit comparisons across racial groups, several of the articles in this subset consider how racial identity intersects with other bases of social status, namely, gender and sexuality (Mack, Plane) and social class (Calavita, Goluboff, Gómez, Mack, Polletta).

The resonance between this group of articles, as a subfield of law and society, and critical race theory and critical race theory is striking and evidenced by two common themes. The first theme involves the related claims that race is socially constructed and that law has played a major role in the construction of race. The second theme explores how race has shaped law, but race is operationalized in a more nuanced, complex way as *racial ideology* and *racial conflict*. In each section that follows, I first describe how critical race scholars have engaged these themes and then how this subset of law and society scholars has approached them.

Law's Role in the Social Construction of Race

It has become axiomatic that race is socially constructed, that racial classifications are historically contingent, the product of political contestation, and that, by definition, they are dynamic rather than fixed or essential. Yet this view of race has not been broadly accepted for long and, indeed, in law, race has been viewed at times in quite the opposite way. Supreme Court justices, taking a page from popular and scientific attitudes, often have viewed racial difference as rooted in essential

and immutable characteristics, and this has had a profound and lasting affect on how lawyers, legal scholars, and others have viewed race. Only in recent decades and largely due to the pressure from both the more radical and mainstream elements of the mid-twentieth-century civil rights movement has there been a shift toward viewing racial categories as devoid of meaning and, as a result, recognizing that the intense meaning carried by those categories even today is the result of human interaction, politics, and social conflict (i.e., the result of social construction processes). And while the shift from viewing race as fixed and biological to viewing it as dynamic and historically contingent has been accomplished in the social sciences and, to an extent, in popular culture, mainstream legal scholarship and jurisprudence lag far behind.

Critical race scholars have been at the vanguard of legal scholars who have embraced the social constructionist perspective, even as they have emphasized that it does not lessen the historic or contemporary significance of race and racism (Alfieri, 1996; Calmore, 1992; Espinoza and Harris, 1997; Haney Lopez, 1994a, 1994b; Kang, 2000). In particular, critical race scholars have argued that law (in its varied forms as positive law, legal institutions, and law in action, to name just a few) has played a central role in the social construction of racial identity (Aoki, 1997; Carbado and Gulati, 2000, 2001a, 2001b; Gross, 1998; Montoya, 1998). Critical race scholars have documented the central role of law in shaping racial inequality (Johnson, 2000; Lee, 1996; Volpp, 2002). Others have emphasized law's role in the construction and reformulation of racial ideology, and vice versa (Gotanda, 1991; Harris, 1993).

Six of the eight law and society articles mentioned in the previous section expressly took up the theme of the social construction of race and law's role in the construction process (Calavita, 2000; Goluboff, 1999; Gómez, 2000; Mack, 1999; Plane, 1998; Poletta, 2000). Three of these authors (Calavita, Gómez, Mack) took this on as a central theme, and their focus on mid to late nineteenth-century law and society suggests the importance of this period's racial dynamics in shaping both historic and contemporary racial ideology in Supreme Court jurisprudence and in the USA generally.

In her essay on late nineteenth-century laws targeted at Chinese immigrants to the USA, sociologist Kitty Calavita begins with the premise that both race and social class are socially constructed and that they interact with each other in important, mutually constitutive ways (2000). "The most critical of these contradictions," she says, "involved paradoxical assumptions about race as a biological condition on one hand, but offset by class status on the other" (Calavita, 2000: 2). When Congress enacted a xenophobic ban on Chinese immigration in 1884, however, it targeted only Chinese laborers, leading those who applied the law to effectively carve out an exception for Chinese immigrants who could argue they were merchants rather than laborers. In this way, the administrative law in action created a space for Chinese immigrants to strategically construct their identities and to resist legislation widely acknowledged as racist in its orientation.

Calavita's dependent variable is the law in action or, specifically, how gatekeepers in the immigration service applied the Chinese exclusion law, given that the law on the books excluded only Chinese laborers. The inherent discretion delegated to immigration service workers may have softened the impact of the law, and such an outcome may or may not have been intended by members of Congress. (Calavita seems to take it for granted that Congress would not have wanted this loophole, but

I find it just as plausible to believe that some in Congress would have wanted immigration gatekeepers to broaden the exception, either to preserve the interests of American capitalists whose fortunes were linked to Chinese merchants or to soften the blow of the exclusion law for geopolitical reasons.) Thus the "paradox" to which Calavita refers in the title of her article arises because some Chinese immigrants successfully asserted membership in the merchant class despite being working class ("passing"), therefore circumventing the legislation's intent to exclude Chinese workers. She concludes that "the indeterminancy of law parallels and reflects (what is for all practical purposes) the indeterminancy of identity" (2000: 3).

Calavita builds upon critical race scholars' work on the social construction of race (whom she cites), but she ultimately does not sufficiently mine the critical race literature for its application to her work. For instance, she could have effectively drawn upon a growing literature within critical race scholarship that employs the notion of "performance" of race in a manner linked to her notion of "passing" (which was undertheorized in the article) and that takes seriously the intersection of racial, sexual, and class identities with which she is concerned (Carbado and Gulati, 2000, 2001a, 2001b; Gross, 1998, 2001).

Like Calavita, Mack (1999) takes seriously the ways in which racial identity was continually reconstituted based on intersections with other bases of identity (gender, social class). He is more explicit in building upon critical race theorists, whom he credits with two foundational insights: "that racially neutral laws and legal doctrines often perpetuate race and gender privilege, and that racial identity itself can be a creation of law" (Mack, 1999: 380). Mack uses railroad segregation practices as the context for studying the links between social mores, the law, and racial identity. He argues that the legally informal social practice of segregating public transportation (*de facto* segregation) that eventually led to a hardened segregation enshrined in state statutes (*de jure* segregation) both produced spaces for shaping black (and, less central in his analysis, white) identity.

Tennessee in the 1870s and 1880s, like most of the south, was characterized by a complex, sometimes contradictory, system of informal racial segregation in all walks of life, including the transportation sector. In this complexity, Mack identifies what amounted to flexibility for certain blacks to avoid some of the costs of segregation, often, according to him, by parlaying class and/or gender strategically. Prior to *de jure* segregation of common carriers, middle-class black men and, especially, black women sought to assert their rights to access to typically white-only "ladies' cars" on trains. But they faced a dilemma: "to gain access to ladies' cars and claim the mantle of respectability, they often had to appear subservient and deny that very respectability" (Mack, 1999: 390). After all, black women and men who accompanied white women as servants or employees had no problem gaining access to the ladies' cars; but middle-class blacks' respectability hinged in large part on their occupational mobility away from precisely that kind of dependence on white employers (Mack, 1999: 390–3). Middle-class black women asserted their rights – and their respectability – by regularly bringing lawsuits against conductors and train companies for their exclusion from ladies' cars prior to the 1905 enactment of Tennessee's first *de jure* segregation statute dealing with common carriers. Thus these women used legal strategies to affirm their identity as black *and "respectable"* (middle-class), and, in this way, law shaped racial identity.

One of the most fascinating aspects of Mack's analysis is the complexity of the interaction between class, race, gender, and sexuality. More specifically, sexual

stereotypes grounded in racist ideology very much shaped white demand for segregation (*de facto* and *de jure*), as well as blacks' resistance to it. On the one hand, both middle-class whites and blacks recognized the legitimacy of excluding "jezebels" from the ladies' cars, though they disagreed mightily about which women would fall into that category. "The image of the Jezebel, the sexually promiscuous Black woman, helped solidify the identities of the white women riding in ladies' cars, and possibly those of the white men as well . . . No ladylike treatment [by conductors] was necessary for presumed Jezebels" (Mack, 1999: 389). In bringing lawsuits against their ejections from ladies' cars by conductors, black women fought against this stereotype as applied to themselves, and in doing so may have solidified its applicability to lower-class black women. Middle-class black men, too, faced sexual stereotypes, as train employees and other whites often justified their exclusion from ladies' cars by invoking the racist stereotype of the "black beast rapist" – "lustful, predatory creatures who could not control their desire for white women" (Mack, 1999: 396).

In my article on territorial New Mexico (Gómez, 2000), I similarly explore the role of law in the social construction of race and racial identity, but by situating the analysis within the context of American colonization. The colonial transfer of power from a Mexican sovereign to an American sovereign in mid-nineteenth-century New Mexico provided the opportunity to explore the effects of the law in action in constructing the numerically dominant group, Mexicans, in a number of contradictory ways: as both "native" and citizen, as both citizens and members of a racially subordinate group (2000: 1140–4). The colonially imposed legal system provided Mexican men with the incentive to claim whiteness and to disenfranchise Pueblo Indian men, who, under Mexican positive law, had citizenship rights. In this sense, the law shaped Mexicans' racial identity as legally "white," despite the social reality of Mexicans' position as nonwhite in the larger American racial structure. (For additional explorations of Mexicans' simultaneous claims of and distance from whiteness, see Martinez, 1994, 1997, 1999). At the same time, other facets of the colonial law in action shaped Mexicans' identity as racially subordinate to European Americans who were both private citizens and appointees to the colonial government. I argue that a variety of criminal litigation processes spearheaded and, over time, hardened Mexicans' collective identity as a group marked as "othered" and racially inferior.

Michael Elliott expressly seeks to elaborate upon critical race theory insights and to bring them into dialogue with the field of American studies (1999: 613). He begins from the social constructionist position, contending that "those confronted by issues of race and racial difference drew from a compendium of competing ideas, ideas that were constantly being reshaped and redefined. Race, in other words, was being continually reinvented – and some in the nineteenth century recognized this process as surely as we do today" (Elliott, 1999: 614). Elliott uses a close reading of two post-Civil War legal texts, published appellate decisions, to argue that judicial opinions constituted an important source of construction and reformulation of racial categories and racial identity.

Plane (1998) tells the story of a single legal struggle in early eighteenth-century Massachusetts involving threats to an Indian leader's political authority for the purposes of Anglo acquisition of grazing lands. The Indian leader, Jacob Seeknout, appealed a county court's ruling that he return 420 sheep that he had impounded for illegal grazing. In the process of the appeal, Seeknout's Anglo lawyer, Benjamin

Hawes, crafts a narrative in which he manipulates local Indian mating practices to conform to contemporary English norms and laws about paternity, legitimacy, and inheritance. Plane argues that, in so doing, the lawyers "managed to bring an order and a 'civility' to Indian practices of marriage in that century" that led both to his client's victory on appeal and the creation of "complementary racial identities" of some Indians as "civilized" and others as "savages" (1998: 58). Hawes's translation of Indian customs as "civilized," within the Anglo cultural and legal context, allowed for his client's legal victory, but ultimately functioned as a cultural straightjacket for Indians in the region who were not connected with the litigation. And, at the end of the day, Seeknout and his tribe lost the larger battle, since the Anglo lawyer took much of the disputed land as payment for his legal services.

Two additional law and society scholars (Goluboff, 1999; Polletta, 2000) explored how legal struggle shaped African Americans' racial identity, but they did so largely without drawing on the substantial, relevant literature produced by critical race theorists. Goluboff traces southern blacks' petitions, in the 1940s, to the federal government, claiming their children were being held as "peons" by Florida companies, in violation of the Thirteenth Amendment. Goluboff's agenda is an important one:

> [to] remind us that African Americans in World War II lived in a post-Plessy v. Ferguson, pre-Brown world in which the federal courts had not yet vindicated the rights of African Americans in any significant way, and the president had not yet dispatched troops on their behalf. In this pre-Brown world, claims to equality and federal protection against local injury were often emphatically denied. (1999: 781)

Thus, she argues, these unorganized efforts facilitated the emergence of rights-consciousness at the grass-roots level.

Goluboff's claim mirrors critical race scholars' responses to CLS claims about rights being illusory at best, and at worst contributing to the downfall of radical political movements. Crenshaw et al. (1995) recount this debate, in which critical race scholars parted ways with the CLS view of rights, rights discourse, and rights organizing as furthering a kind of false consciousness among people of color. According to crits, rights are problematic because they inherently are "indeterminate and capable of contradictory meanings" and, as a result, function to legitimize the status quo (Crenshaw et al., 1995: xxiii; see also Crenshaw, 1988). In sharp contrast, many scholars who attended the early critical race theory workshops believed that "the transformative dimension of African-Americans re-imagining themselves as full, rights-bearing citizens within the American political imagination" was a key part of a radical movement for social change (Crenshaw et al., 1995: xxiii–iv).

Goluboff's study essentially functions as an empirical test of that critical race claim, but it is weakened by her failure to expressly engage the critical race literature. In her study of black participants in the civil rights movement, Francesca Polletta (2000) takes up a similar project: to empirically test the critique of rights. Unlike Goluboff, Polletta squarely address the CLS claim that rights claiming and organizing around rights actually hurts radical politics. Unfortunately, she is not as comprehensive in drawing from critical race scholars: she cites an article by critical race scholar Patricia Williams, but she does not identify the critical race theory movement or cite the relevant work of other critical race scholars.

Despite this omission, Polletta's study is engaging and important. She isolates the CLS critique of rights around the idea that talk and organizing about rights essentially functions to deradicalize and coopt radical political movements. To test the claim, then, Polletta interviewed participants in the radical wing of the US civil rights movement, represented by organizations such as the Student Nonviolent Coordinating Committee (SNCC) and the Congress of Racial Equality (CORE). She explored how these activists understood the links between "rights, politics, and protest" (Polletta, 2000: 368), and she finds that rhetoric and activities centered around claims to be a "first class citizen" shaped black activists' racial identity and fueled (rather than inhibited) more radical political demands. Polletta identifies several conditions around rights claiming that were more likely to result in maintenance of a radical agenda: the relative autonomy of institutional arenas, organizers' distance from national centers of state and movement power, and interorganizational competition (2000: 380). But Polletta's seeming preoccupation with identifying only "color-blind" (or race-neutral) conditions ultimately leads her to overlook empirical exploration of how the race-based nature of these organizations' membership and goals might have blunted cooptation along the lines of the CLS critique.

How Race Shapes Law

I have argued that at least a subset of law and society scholars have begun to take seriously the insights of critical race theory as they relate to law's powerful role in constructing race, racial inequality, and racial identity. Yet for critical race scholars, this is only half of the equation; they are equally concerned with how race, in all its manifestations, has shaped the law. "Racial power, in our view, was not simply – or even primarily – a product of biased decision-making on the part of judges, but instead, the sum total of the pervasive ways in which *law shapes and is shaped by "race relations"* across the social plane" (Crenshaw et al., 1995: xxv). Thus, just as law and society scholars have argued that the dimensions of "law" and "society" are mutually constitutive (Munger, 1998), so too do critical race scholars take as axiomatic that race and law are mutually constitutive.

At one level, it might seem that this is quite similar to what I characterized as the traditional sociolegal studies approach to race: treat race as an independent variable that impacts law, as the dependent variable. But, as the quote above shows, thinking about how race shapes law involves more than simply analyzing judges' racial bias. Instead, critical race theory beckons a deeper, more complicated vision of "race." Rather than conceive of race – as quantitative social science studies often do, for instance – as an easily measurable, dichotomous independent variable, we should attempt, in terms of how we empirically operationalize race, to capture some of the complexity of race as a social reality that changes in different historical and social contexts.

One way in which critical race scholars have done this is to explore individual and group identity as multifaceted and, in so doing, view racial identity as intersecting with other identities, such as gender, sexual orientation, social class, and immigrant status (see Austin, 1989, 1992; Caldwell, 1991; Carbado, 2000, 2002b; Chang, 1993, 1999; Crenshaw 1989; Gross, 2001; Harris, 1990; Hutchinson, 1999, 2001, 2002; Iglesias and Valdes, 1998a, 1998b, 2000; Ikemoto, 1992, 1993; Johnson, 2002; Valdes, 1997a, 1997b, 2000; Volpp, 1994, 1996, 2001, 2002; Wing, 1997).

Another way to make race more complicated (and, hence, to more accurately map its impact in the real world) is to conceive of race as more than racial identity or racial categories, the ways in which social scientists typically operationalize race. For instance, critical race scholars have analyzed how race as *racial ideology* has shaped legal doctrine (Gotanda, 1991; Flagg, 1993; Harris, 1993; Lawrence, 1987, 1995).

In some respects, however, critical race scholars have not taken this approach to its logical conclusion and, in my view, this is due in part to a failure to engage methodologies common in law and society research. Thus law and society scholars who draw upon critical race insights are uniquely situated to carry this project forward. Judging by the articles in the historical subset of law and society work on race, the project is well under way.

Pamela Brandwein expressly incorporates insights from critical race theory into her work and cites contributing to critical race scholarship as one of the four benefits of her article (2000: 320). She documents the role of the ideology of white supremacy in shaping US Supreme Court doctrine on the Fourteenth Amendment and, specifically, in the Court's 1873 decision in the Slaughter-House Cases. Previous constitutional scholars and legal historians have emphasized these doctrinal developments as essentially stemming from conflicting interpretations of original intent, but, Brandwein argues, in so doing they have missed the most central influence on doctrine – that stemming from partisan conflict about race and African Americans' place in the nation. "The Northern Democratic narrative was shaped by a strong strain of white supremacy that denied black membership in "the people." Republican war narratives contained a weaker strain of white supremacy but also a commitment to black membership in the national collective" (Brandwein, 2000: 320). In the Slaughter-House Cases, the Supreme Court embraced the Democrats' narrative about the causes and effect of the Civil War and, in so doing, the "Northern Democrats' racial ideology was silently institutionalized in Reconstruction-era [Supreme] Court doctrine" (Brandwein, 2000: 316). Although the Republicans won the Civil War, Democrats espousing white supremacy won the war in the Supreme Court, which left its own powerful legacy in the form of a narrow and stilted equal protection doctrine that lingers today.

Michael Elliott (1999) also explores the role of racial ideology in the post-Civil War era, but with a focus on how white supremacy shaped the legal doctrine governing racial classification. The larger racial ideology of white supremacy was supported by "a single hypothesis necessary to the idea of race itself: that each individual belongs to a race and to only one race" (Elliott, 1999: 613). Whites could believe they were superior to blacks and other nonwhites only if they could be sure the demarcations between these groups had a hard meaning. And because a wide range of nineteenth-century laws were racially specific (e.g., miscegenation laws, voting law, citizenship requirements, etc.), "American judges throughout the nineteenth century were forced to tell narratives of racial taxonomy – legal opinions that set the boundaries marking particular bodies as white, black, Indian, and Asian" (Elliott, 1999: 614). In this way, the ideology of white supremacy (which was both a racial and a racist ideology) made law.

Three additional authors – Mack (1999), Calavita (2000) and Gómez (2000) – explore how race constitutes law by looking at the law in action rather than legal doctrine (for summaries of the articles, see above). In addition to revealing how law shaped African American identity in late nineteenth-century Tennessee, Mack's

study is equally impressive in demonstrating that racial conflict and racialized social patterns over a 30-year period shaped the judicial and legislative responses that eventually culminated in state-mandated segregation of common carriers. Because of the US Supreme Court's 1896 holding that such statutes comported with the Fourteenth Amendment in *Plessy v. Ferguson*, we tend to see these processes as inevitable historical movements, but Mack's work shows that this is anything but true. Instead, racial identity and racial conflict evolved in complex and often contradictory ways, and how they affected the law must be explored in highly contextualized, locally situated sites of social action.

Calavita's study is similar to Mack's in foregrounding the complexities of the interaction between racial identity and the law. But her work differs from his in its emphasis on the agency of legal system actors – customs workers who functioned, literally, as gatekeepers to the nation. These legal workers' own racial reality (i.e., how they conceived of themselves racially and how they conceived of racial "others," especially potential Chinese immigrants to the USA) was a powerful force in how they implemented the Chinese Exclusion Act, given that they had great discretion to decide who fit the exception to being a Chinese "laborer." In this way, racial identity had a powerful impact on the law in action.

My study focuses a great deal on race as *racial conflict*, specifically, social conflict between European Americans and Mexicans, who were racialized as inferior to their American colonizers (Gómez, 2000; see also Gómez, 2002). New Mexico Territory's demographic character as majority Mexican, combined with the fact that Mexican men had citizenship rights, created a unique situation for colonizers bent on the consolidation of American political and legal authority in the region. The result, at least in one northeastern county, was the creation of what I term a racial power-sharing regime that governed the administration of the criminal justice system (2000: 1164–76). Racial conflict, then, shaped law by resulting in the institutionalization of Mexican participation in a variety of ways, including as the majority of grand and petit jurors. One of the strongest symbols of Mexicans' major role in the criminal justice system was the prominence of the Spanish language in trials and in other legal proceedings. At the same time, the highest levels of the system were controlled exclusively by European American newcomers to the region, who held the appellate and trial judgeships (that were one and the same) and who made up the vast majority of the bar.

Conclusion

If the articles published in the field's two most important journals are representative, it appears that law and society scholars are lagging behind in their recognition of and engagement with the ideas of the emergent critical race literature. Although law and society has in some senses moved away from a staunch positivist tradition to embrace a set of more ecumenical methodologies (Handler, 1992), law and society scholarship on race seems not yet to have found a new course. My hope is that those of us writing about race from within the field will look carefully at critical race theory to see whether it provides new questions and new approaches.

I am encouraged that a subset of scholarship that is historical in its approach *is* engaging and building upon this literature. These works prove that at least some law and society scholars are taking critical race theory seriously, and I hope this analysis

has persuaded the reader that their venturing into this legal genre has been intellectually profitable. In many respects, the much more pronounced engagement of critical race theory by sociolegal scholars doing historical research makes sense given the centrality of history within critical race theory. Explorations of history and historical methodologies have been deployed in a range of contexts by critical race scholars (Cho, 1998; Iijima, 1998; Gotanda, 1991; Harris, 1993; Martinez, 1994, 1999; Yamamoto, 1998). Crenshaw et al. argue that, for critical race scholars, historical inquiries have been a means of showing "that the contemporary structure of civil rights rhetoric is not the natural or inevitable meaning of racial justice but, instead, a collection of strategies and discourses born of and deployed in particular political, cultural, and institutional conflicts and negotiations" (Crenshaw et al., 1995: xvi).

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The Constitution of Identity: Gender, Feminist Legal Theory, and the Law and Society Movement

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The antecedents of feminist legal scholarship are probably more diverse than those of any other significant theoretical paradigm in contemporary legal studies. Feminist legal theory has grown – albeit to different degrees in different parts of the world – out of relatively autonomous social and political movements as well as out of a range of intellectual movements in philosophy, in political and social theory, in sociology and anthropology, and in law. In Australian, European, and North American contexts, the genesis of feminist legal theory has been closely associated with that of a group of philosophically inspired approaches to legal scholarship which, though themselves diverse, may conveniently be identified as "critical legal studies." The political and policy-oriented commitments of feminist writers, however, have generally entailed a greater degree of engagement with empirical and material questions than has been the case within much nonfeminist critical legal theory. For this reason among others, feminist scholarship has had a central place not only within critical legal studies but also within the law and society or sociolegal movements of many countries (see, e.g., Bumiller, 1988; Daly, 1994; Fineman, 1991, 1994; Smart, 1995).

Over the last decade, however, a number of key theoretical and practical questions have arisen out of feminist scholarship's dual engagement with philosophical and with sociopolitical questions. A heightened (and generally welcome) sensitivity to questions of difference and identity has generated an important set of intellectual debates across the contested borderlines of feminist theory, critical race theory, queer theory, and postcolonialism, and feminist scholars have become important contributors to the debates about the politics of identity and about multiculturalism that have come to occupy such a central place in the academy in recent years. One important strand within this genre of feminist scholarship has drawn on the insights of post-structuralist philosophy to explore the ways in which embodied femininities