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Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field

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Abstract

This article argues that law and race coconstruct each other. The idea that race is socially constructed has become widely accepted, and studies increasingly have explored law's role in shaping racial categories, racial conflict, racial ideology, and the racial order. Fewer studies have utilized a well-developed concept of race to examine how it has affected legislation, legal processes, legal ideology, and so forth. To explore how law and race are mutually constitutive, I draw on examples from a dozen monographs (all but one published since 1999) that are in-depth case studies of how law and race have interacted in diverse geographical regions over the past 400 years. Cumulatively, they present new insights about how law and race are coconstructed to reproduce and transform racial inequality in society. They represent an emerging genre of sociolegal studies that reveals how law and race shape each other in an ongoing, dialectic process.

INTRODUCTION

This article examines the relationship between law and race, highlighting the fact that law and race shape each other in powerful ways that until recently have been little explored by scholars. Social scientists who study law have tended to focus on race as an independent variable that helps predict a legal outcome, and they have often narrowly defined race as phenotype and measured it in binary (Black or White) terms (Gómez 2004, Obasogie 2007).[1] Critical race theorists (mostly legal scholars), in contrast, have made race their central focus and have treated law as an independent variable that explains race, in its various manifestations, though they have not tended to systematically use social science methods (Gómez 2004) (see sidebar on Critical Race Theory).

The past two decades have seen the rise of a literature that looks deeply at the role law has played in constructing racial identities and categories and that compares how law has shaped the experiences of different racial groups in the United States (Berger 2009; Calavita 2000; Davis 1999; Elliott 1999; Franke 1999; Gómez 2000; Goodman 2008; Gotanda 1991, 2000; Gross 2008; Haney López 1996; Harris 1993; Hernandez 2001; Kang 1999; Mack 1999; Martinez 1997; McKinley 2010; Mertz 1988; Moran 2001; Parker 2001; Sharfstein 2003; Sohoni 2007). A related recent literature has explored law's role in shaping ostensibly nonracial categories that are heavily endowed with considerable racial meaning, such as citizens, criminals, drug addicts, terrorists, etc. (for example, see Carbado 2001, 2005; Gómez 1997; Ngai 2004; Razack 2008; Tehranian 2008; Volpp 2002, 2005; Yamamoto et al. 2001).

More recently, scholars have recognized that the constitutive process goes in both directions: "[L]aw not only constructs race, but race constructs law: racial conflicts distort the drafting and implementation of laws; skew the development, character and mission of legal bureaucracies; alter how various communities, including [W]hites, understand and interact with legal institutions; and twist the self-conception of legal actors, from law-makers to lawyers, cops to judges" (Haney López 2007, p. xviii; see also Gómez 2004, p. 462). This review identifies an emerging genre of sociolegal scholarship that explores how law and race construct each other in an ongoing, dialectic process that ultimately reproduces and transforms racial inequality. By focusing on how law and race mutually constitute each other, we can broaden our usual inquiries to open up how we conceptualize both race and law, while at the same time teasing out a wider view within which race and law both operate.

[1] I follow Pascoe's (2009) lead in capitalizing Black and White because other terms frequently used as racial terms (American Indian, Mexican American, etc.) are capitalized and, for White(s), capitalization "help[s] mark the category that so often remains unmarked, and taken for the norm" (p. 14).

CRITICAL RACE THEORY

Critical race theory emerged in the mid-1980s, along with a critical mass of African American law professors in the United States. It has been described 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" (Crenshaw et al. 1995, p. xiii). Scholars in the field write in the areas of civil rights and race law (with a particular prominence in the fields of constitutional law, antidiscrimination law, and employment law), as well as in an increasingly diverse array of other doctrinal areas such as criminal law and procedure, torts, family law, tax law, and environmental law (for a literature review, see Gómez 2004). Critical race scholars write about race and the law from a perspective that is critical of the antidiscrimination model that has been dominant in legal scholarship and American jurisprudence since the 1970s. The antidiscrimination model conceives of racism and racial discrimination as individualized, aberrational, and capable of remedy within the current legal framework, whereas critical race scholars view racism as institutionalized and endemic and, thus, frequently immune to antidiscrimination law and policy. For edited collections on critical race theory, see Bell (2008), Brown (2003), Crenshaw et al. (1995), Delgado (1995), Moran & Carbado (2008), Perea et al. (2007), Valdes et al. (2002). For the application of critical race theory by scholars outside the legal academy, see Allen (2005), Yosso & Solorzano (2005).

(See Munger 1998 for an analysis of how law and society are similarly mutually constitutive.)

Notably, the field I describe here is nascent and, by and large, has not been described by the included authors in this way. In that sense, I am arguing as much that this subfield should exist as that it does exist. Indeed, some of the authors whose work I discuss may find themselves puzzled about their inclusion here because few of them expressly embrace as a driving force for their work the idea of law and race as mutually constitutive (others, I think, will welcome this interpretation of their work).

I draw on a dozen monographs (all but one published since 1999) that should be seen as constituting this emerging literature. Although the genre is visible in both articles and monographs published in the past two decades, I concentrate on the latter because they have been written by social scientists (or scholars trained dually in law and the social sciences), whereas many of the articles have been written by legal scholars without formal social science training. Important articles that I do not discuss in detail (though they belong in this subset of work that illustrates how law and race mutually construct each other) include a study exploring the construction of Japanese Americans as non-White in the naturalization context (Carbado 2009) and a study examining land tenure and blood quantum for Native Hawaiians and American Indians (Villazor 2008).

Each book that I do discuss focuses on the interaction of law and race in a particular time and place (most in the United States, including regions colonized by the United States such as Hawaii and the Southwest, but also in Canada and Jamaica). Comparing in-depth case studies of how law and race intersect in particular geographic locations at particular times allows us to begin to tease out some general patterns that describe how law and race are mutually constitutive. Although these are historical studies, they are written by scholars trained in the disciplines of anthropology, law, political science, sociology, and history (and combinations of those fields), as well as in interdisciplinary doctoral programs.

A word about why I selected these books is in order. Many books about race take up the law to some extent, but I have included only studies that both feature law in a central way and treat law as a dynamic social and cultural force. Law is broadly defined to include legislation, appellate opinions, trials, litigation/prosecution data, and the activities of legal actors (formal, such as judges and lawyers, and informal, such as mid- and low-level bureaucrats who initiate, implement, or support legal processes). I have not included books concerned primarily with legal doctrine or its evolution.[2] A second selection criterion was how the books approach race: These books embrace the intellectual study of race as a socially constructed phenomenon, and they appreciate law as a central force shaping race. Race is understood broadly to refer to a range of social phenomena that can be operationalized as racial categories and boundaries, racial identity (including how race intersects with gender, class, sexual, and other identities), racial conflict, racial ideology, racism, and so forth.[3]

Although I focus here on historical case studies, I am not arguing that law and race are mutually constitutive only in the past. Law and race continue to interact in powerful ways today (Lucas & Paret 2005, Mullings 2005, Omi & Winant 1994, Winant 2001), but there is something compelling about historical examples of their interaction. In part this is because examples from history allow us to unmask race as a part of the natural world we take for granted; they invite us to step out of our own social world where, in general, it is harder for the beneficiaries of White privilege to see race and racism being enacted. Historical cases are also appealing because there is little contention over the

[2]For example, employment discrimination and immigration law are categories of legal doctrine and policy that deeply implicate race, but I do not include books that primarily trace the evolution of legal doctrine in a particular historical period (e.g., Gyory 1998, Moreno 1997, Salyer 1995).

[3]I do not include books that consider law and race from this perspective but that are not rooted in a thick description of a specific place or region (e.g., Goluboff 2007, Haney López 1996, Pascoe 2009).

general fact that law played a central role in producing and reproducing racial subordination in the past, while there is much more debate over law's current role in reproducing racism (Moran & Carbado 2008).

There also are unique methodological advantages to historical research: Interpretation of archival materials may allow social scientists more latitude in how they capture race, by measuring it variously as racial categories and boundaries, racial identity, racial conflict, racial ideology, and racism, rather than as a dichotomous variable based on self-identification, for example. Moreover, historical methods have been embraced by legal scholars in the critical race theory movement, even when those scholars have not had formal training in history. But an emphasis on historical cases also introduces particular hazards, the most significant of which is the danger of presentism—of blithely applying contemporary ideas about race to historical contexts in which they simply were not relevant. I have tried to guard against the latter and to point out where I think authors have made that error.

THEORIZING RACE

What race means is deeply contested in popular culture, law, politics, and science. Sociologist Ann Morning's (2009) research on contemporary popular conceptions of race finds three dominant understandings of race: (*a*) race as biology (despite the fact that scientists agree that race is not biologically meaningful, people continue to believe, according to Morning's research, that biology produces real racial differences); (*b*) race as culture (people associate racial difference with cultural differences, such as musical preferences, food preferences, or celebration of cultural traditions; here, race is used similarly to ethnicity); and (*c*) socially constructed race (the idea that race is produced by people rather than is real; this can support a conservative orientation such as color blindness or a progressive orientation such as affirmative action) (Morning 2009, p. 1171). Sociologist Eduardo Bonilla-Silva (2003) identified a fourth popular notion of race: color-blind race. Under this view, the social constructionist view of race combines with the notion that people should pretend they do not see race and/or, if they do see race, ignore it.

These four popular conceptions of race also infuse scientific, political, and legal notions of race (Williams 1989, p. 402). For example, the Supreme Court in its case law on the Fourteenth Amendment and antidiscrimination legislation such as Title VII shifts back and forth between a variety of the notions of race (Gotanda 1991). Moreover, these very different ideas about race are not mutually exclusive for most people, but instead coexist, only to be situationally invoked by people to make sense of everyday interactions in which race is salient (Morning 2009, p. 1171).

The concept of race "invokes biologically based human characteristics (so-called 'phenotypes'), [but] selection of these particular human features for racial signification is always and necessarily a social and historical process" (Omi & Winant 1994, p. 55). This view of race as socially constructed emphasizes power relations (subordination) and inequality (stratification), drawing heavily on the historical roots of racial exclusion, rather than, for example, racial identity. From this view, the historical facts of racial exclusion are paramount—exclusion from personhood under slavery; exclusion from citizenship in cases such as *Dred Scott*, in laws that restricted naturalization to Whites (and, after the Civil War, to Whites and Blacks), and in the contemporary demonization of Mexican immigrants as undeserving of citizenship; exclusion from particular spaces via Jim Crow legislation; and exclusion from political rights such as voting, serving on juries, running for elected office, testifying in court, and so forth. "In that history, racial classification turned not on what one felt [or how one identified racially], but, instead, on what others allowed one to do" (Lucas & Paret 2005, pp. 203–4).

Although both race and ethnicity are about socially constructed group difference in society, race is always about hierarchical social difference, whereas ethnicity may be nonhierarchical,

depending on the social context (Bashi 1998). It has become common since the late 1940s for social scientists to prefer to talk about race as ethnicity (Bashi 1998), but I eschew that term because its use tends to defuse the emphasis on race as fundamentally about power and stratification (Morning 2009, p. 1173; Harrison 1995, p. 48). In particular, a focus on ethnicity tends to emphasize individualized self-identification as an unfettered choice, rather than the structural constraints on racial boundaries that exist as the result of historically rooted racial oppression. Despite the facts that ethnicity and race overlap considerably and that ethnicity remains important in diverse societies across the world, I agree with sociologists Cornell & Hartmann (1998, p. 25) that race remains "the most powerful and persistent group boundary in American history."

The studies highlighted here adopt the social constructionist view of race that has become pervasive in the social sciences over the past few decades (AAA 1998, ASA 2003, Morning 2009). As an intellectual approach to race, the constructionist view has three main components. First, it rejects a biological basis for race, i.e., "there is greater variation within racial groups than between them" (AAA 1998; see also ASA 2003, Winant 2000). Second, it views race as a social construct, "a social invention that changes as political, economic, and historical contexts change" (Mullings 2005, p. 674; ASA 2003; Haney López 1996). Third, although race is socially constructed (indeed, because of its power as a social construct), race has real consequences (Cornell & Hartmann 1998, Omi & Winant 1994). In its recent statement on the topic, the American Sociological Association concluded that race is embedded in virtually all American social institutions and practices (ASA 2003).

One of the most compelling theories taking the constructionist position is the theory of racial formation put forth in 1986 by sociologists Omi & Winant (1986, 1994). According to this theory, race has ideological and structural dimensions: "A vast web of racial projects mediates between the discursive or representational means in which race is identified and signified on the one hand, and the institutional and organizational forms in which it is routinized and standardized on the other" (Omi & Winant 1994, p. 60; Mullings 2005). The state (state institutions, state actors, government agencies, and policies) plays a major role in structuring race and racism, and as a result law is a key player in racial formation theory, despite the fact that Omi & Winant did not develop that line of analysis.

The studies in this emerging field build, self-consciously or not, on racial formation theory by situating racial projects within legal systems and processes. In this way, they contribute to our knowledge about how both law and race relate to broader political dynamics and state projects. I proceed by describing how these studies illustrate the process by which law and race coconstruct each other in a continuous, back-and-forth process. Cumulatively, they present new insights about law and race and how they are coconstructed, ultimately reproducing and transforming racial inequality.

The next two sections focus on two trajectories toward reproducing that inequality: (*a*) one that flows from how law is implicated in the production and transformation of the racial categories and racial boundaries so crucial to reproducing racial hierarchy; and (*b*) a second that explores law's central role in producing systems of racialized social control as a way of reproducing racial stratification.

LAW AND THE RACIAL ORDER

Sociologist Renisa Mawani's (2009) book *Colonial Proximities: Crossracial Encounters and Juridical Truths in British Columbia, 1871–1921* provides a gripping portrait of how the racial order and the legal order shaped each other in nineteenth-century British Columbia. She describes this "colonial contact zone" as "a space of racial intermixture—a place where Europeans, aboriginal peoples, and racial migrants came into frequent contact, a conceptual and material geography where racial categories and racisms were both produced and productive of

locally configured and globally inflected modalities of colonial power" and where government officials, missionaries, and private employers (who exercised a quasi-legal authority) generated practices of colonial governance that were fundamentally racialized (Mawani 2009, p. 5). Two examples illustrate how racial dynamics shaped law and how law in turn shaped the racial order.

Some of the earliest sites for interracial encounters were the salmon canneries, central to British Columbia's capitalist development and hence to its emergence as a viable colonial outpost. The canneries relied on a racially diverse workforce that included mostly male White settlers, male Chinese immigrants, and local aboriginal people (men and women). Interracial mixture at work threatened White domination by producing mixed-race progeny and by introducing the potential for interracial solidarity among workers (Mawani 2009, p. 66). One of the mechanisms employed by the cannery owners to decrease these possibilities—in a setting in which they regulated many aspects of workers' lives à la company towns—was to assign housing by race (p. 68). Among Whites, housing was segregated by class as well, with White elites living in larger, single-family homes (located furthest from the worst odors of the cannery) and White workers assigned to private bungalows and cottages. Chinese workers, in contrast, were forced to reside collectively in "overcrowded and unsanitary" bunkhouses, and aboriginal workers were either pushed to the outskirts of the canneries where they worked or remained living in their nearby villages, often located on the periphery of canneries. In this way, law-like residential segregation inscribed preexisting racial differences in order to sharpen those differences (and dampen cross-racial contact) in a newly racially diverse geographic setting.

Another example comes from the legal regulation of prostitution. Putatively, prostitution anxiety focused on aboriginal, mixed race, and Chinese girls and women who were perceived as being exploited by aboriginal and Chinese men who sold "their women" into the sex trade (or allowed them to sell themselves into it). Contrasting and dynamic state responses to aboriginal and Chinese women illustrate how law and the racial order produced each other. In the early contact period characterized by European fur traders, there was no effort to regulate White men's sexual and social relations with aboriginal women (Mawani 2009, p. 87–90). Later, when the numbers of White female settlers increased significantly, colonial authorities promoted interracial prostitution rather than concubinage in order to encourage White endogamy (p. 87). By the end of the century, after an express legal campaign, aboriginal women were contained on reserves and were no longer perceived as a marital or sexual threat to settler society (pp. 101–2, 108). But by that time, the newer population of Chinese immigrants was perceived as "contaminating" settler society (p. 109). Based on her review of the correspondence, legislation, and other official documents written to and by colonial officials, Mawani (2009) concludes that the late-nineteenth- and early-twentieth-century antiprostitution rhetoric became the justification for the physical exclusion of Chinese immigrants at the border (especially female immigrants), as well as a way to justify the continued political exclusion of those Chinese who had already entered British Columbia (pp. 109–10, 119). Thus, legal responses to prostitution themselves hardened racist ideas, while simultaneously reflecting taken-for-granted racial truths.

My book *Manifest Destinies: The Making of the Mexican American Race* (Gómez 2007) explores a different colonial contact zone, nineteenth-century New Mexico, but similarly looks at how law and race interacted and ultimately reproduced and transformed racial inequality. In a setting in which American colonizers had neither a realistic chance of militarily dominating large numbers of native Mexicans and diverse Indian peoples or the hope of quickly attracting large numbers of White settlers, they embraced a divide-and-conquer strategy in which whiteness became a key wedge between Mexicans and Pueblo Indians.

Building on the preexisting Spanish-Mexican racial order, the Americans exploited Mexicans' claims of racial mixture (as a people descended from both Spaniards and Indians) to justify endowing Mexican men with a host of rights (voting rights, the right to hold office, jury service, etc.) and to withhold these same rights from Pueblo Indian men, even though the latter had citizenship rights under Mexican rule and arguably under the treaty ending the 1846–1848 war between the United States and Mexico (Gómez 2007, pp. 81–98). The result was a local racial order in which Mexican Americans functioned as a wedge group between White Americans, located above them on the racial hierarchy, and Pueblo Indians, located below them. At the national level, Mexican Americans again played a wedge role due to their off-White status, buffering Whites above them (and especially marginal Whites like Irish and Italian immigrants) from Blacks at the bottom of the racial order (Gómez 2007; see also Gómez 2009).

In his book *Racism on Trial: The Chicano Fight for Justice*, legal scholar Ian Haney López (2003) explores the twentieth century ramifications of Mexican Americans' nineteenth-century status as an off-White racial group. Although others believe he overstates the case (Romero 2005), Haney López argues that Mexican Americans were poised at the time of the Chicano civil rights movement to choose between a White and a non-White racial identity. The larger society's view of Mexican Americans as non-White others played a crucial role, especially as it was manifested in responses by police and prosecutors in two criminal trials of groups of young Mexican American men for politically motivated offenses in the early 1970s.

Haney López (2003, p. 6) postulates a theory about how racial ideology is reproduced as a key aspect of producing the racial order: "[H]ow do ideas about race operate—how do they arise, spread, and gain acceptance? What is the relationship between race as a set of ideas and racism as a set of practices?" Building on Omi & Winant's (1994) work, he postulates that common sense racism—"a complex set of background ideas that people draw on but rarely question in their daily affairs[,] . . . stock ideas and practices that we have absorbed and heavily relied upon but to which we give little thought"—provides the answer (Haney López 2003, p. 6).[4] For example, the taken-for-granted notion that Mexican Americans were generally inferior to Whites (common sense in mid-twentieth-century California) led Los Angeles County judges to exclude them from grand jury service, even as the judges proclaimed that they did not personally know any qualified Mexican Americans and that they did not intend to discriminate against Mexican Americans (Haney López 2003, pp. 113–27). The racial order virtually ensured the legal system's exclusion of Mexican American citizens on grand and petit juries, and that legal outcome in turn affirmed their racially inferior position in society.

Anthropologist Pem Davidson Buck similarly explores how race becomes naturalized after decades of the commonsense reproduction of racist ideas, in this case ideas about race deeply intertwined with class-based stereotypes. In *Worked to the Bone: Race, Class, and Privilege in Kentucky*, Buck (2001) notes that Kentucky's early homesteads went only to White veterans, but with a built-in class bias: Enlisted men received 100- to 300-acre lots, whereas officers sometimes received thousands of acres (pp. 30–31; for critiques of this book, see Arnesen 2004, Messinger 2002). During this era, homesteading was risky because the region's original inhabitants, Cherokee and Shawnee Indians, adamantly resisted White encroachment on their lands [they continued to do so until they were forcibly removed to Indian Territory (later Oklahoma) in the 1830s]. According to Buck (2001, p. 31), poor White settlers in Kentucky constructed themselves racially against these Indian populations:

[4]Sociologist Mary Romero (2005, pp. 225–27) has criticized the idea of commonsense racism as overly psychological and distracting from the role of the state and political economy in perpetuating racism (issues better addressed by the older concept of institutional racism, she says).

> In essence they became a military buffer between Native Americans and advancing [W]hite settlement. For people without access to capital or land in the heavily settled East, the chance for upward mobility—if they survived—made the risk worthwhile. They now had reason to treasure [W]hite privilege.

But the precariousness of frontier life coupled with rampant land speculation meant that property quickly became concentrated among wealthy Whites: By 1780, 75% of White Kentuckians were poor and landless (Buck 2001, p. 32), and within another two decades, 21 White landowners owned one-quarter of the state's land (p. 41). Some delegates to the state constitutional convention of 1792 argued that the franchise should be restricted to property owners, but given the land distribution, that probably would have led to a revolt among the White masses. Instead, in a move that would have repercussions for the next two centuries, all White men were enfranchised as a way to solidify White privilege and the Black/White racial divide (Buck 2001, p. 33).

Political scientist Julie Novkov (2008) explores similar themes in a very different style in *Racial Union: Law, Intimacy, and the White State in Alabama, 1865–1954*. She rejects ahistorical invocations of White supremacy, instead seeking to link racial ideology to state-building in order "to describe the linkage between racial ideology in politics and culture and its concrete manifestations in state institutions in the postbellum U.S. South" (Novkov 2008, p. 4). She examines antimiscegenation law and its enforcement as a key site "for the creation, articulation, rationalization, and ultimately reflection of the supremacist state, through its attention to the meaning of racial boundaries" (p. 16). Novkov (2008) persuasively illustrates how racial ideology (White supremacy) produced racist laws (intermarriage bans) and how that subsequently led to hardened racial boundaries that ultimately justified the racial order in which Blacks were subordinate to Whites.

Delegates to the 1901 Alabama state constitutional convention vigorously debated but ultimately rejected two amendments to the antimiscegenation law: one that would have defined Blacks via the hypodescent rule and a second that would have added Chinese and Native Americans to those proscribed from marrying Whites. Instead, they effectuated the subordination of Blacks by voting to disenfranchise African American men; within two years, the number of Black men registered to vote plummeted from 181,000 to 5,000 (Novkov 2008, pp. 72–74). The first quarter of the century witnessed a series of antimiscegenation cases (trial and appellate) in which defendants raised various definitional challenges to their status as White or Black, and, faced with inconsistent responses from the courts, the Alabama legislature in 1927 adopted the one-drop rule—any Black ancestry sufficed to make a person Black (Novkov 2008, p. 142). The law both reflected the racial order and helped to produce it in a more intransigent form.

Although legal narratives of the American South often focus exclusively on Black/White race relations, both Buck (2001) and Novkov (2008) are attentive to the presence of American Indians in the South and to the attendant complications of a multigroup racial order. Historian Moon-Ho Jung more directly takes up questions of a triracial dynamic in the U.S. South by interrogating the ideological and material roles of coolies—exploited Chinese contract laborers—in postbellum Louisiana. In *Coolies and Cane: Race, Labor and Sugar in the Age of Emancipation*, Jung (2006) links nineteenth-century immigration law and policy with the national dialogue about slavery and emancipation, while also putting the South in the broader context of both Caribbean sugar production (Louisiana's main competitor at the time) and Chinese migration across the Western hemisphere.

Because sugar plantation owners needed a large, flexible workforce [many more workers were needed during the grinding and planting seasons than at other times (Jung 2006; Stinchcombe 2003, p. 601)], Louisiana planters turned to Chinese laborers as a way to provide flexibility after emancipation so that they would

not be dependent on recently freed slaves. Jung (2006) investigates one sugar plantation's labor policies immediately following emancipation, finding that their hiring rolls included free Blacks (who worked at wages ranging from $8–$19.50/month), White (European) immigrants (who contracted for $20/month pay and their transportation costs from Chicago, if they stayed four months or more), and Chinese contract laborers (who worked for $16/month) (Jung 2006, p. 190). Ironically, Louisiana planters' labor shortage became even more acute after 1877, when Republican rule was defeated in Louisiana and a Black exodus to Kansas led planters to depend even more on immigrant laborers, both White and Chinese (pp. 216–17). In the end, coolies served as a surplus army of labor for sugar planters in Louisiana, even as they played a role in whitening otherwise marginal European immigrants who moved to the region in the postbellum period (see also Lee 2008).

Anthropologist Virginia Domínguez (1986 [1997]) presents a fascinating study of the complex ways in which individual identity choices are heavily constrained by both social meaning and institutional forces (including the legal system) in *White by Definition: Social Classification in Creole Louisiana*. A system of racial hierarchy that accreted over centuries (and three different colonial governments) eventually was codified via Louisiana's antimiscegenation laws, themselves designed to limit the intergenerational transfer of wealth from White men to women of color (and their mixed-race children) (Pascoe 2009, p. 11). Statutory law and case law interacted in sometimes unpredictable (or perhaps highly predictable) ways. In 1910, the state supreme court ruled that a White man had not violated the law by living with a woman who was one-eighth Black because an "octoroon was not negro" but rather was a person of color within the Louisiana tradition. Within 30 days of the ruling, the legislature banned unions between Whites and anyone who had any amount of African ancestry, thereby helping to solidify a new understanding of race as binary rather than tertiary (Domínguez 1986 [1997], pp. 31–32).

As the one-drop rule became entrenched in Louisiana, legal bureaucrats saw it as their obligation to enforce it. Domínguez tells of Louisiana's vital statistics registrar, Naomi Drake, who in the 1950s and 1960s instituted what she termed "race-flagging" of birth and death certificates. Drake investigated as racially "suspicious" 4,700 birth certificates and 1,100 death certificates between 1960 and 1965 alone (Domínguez 1986 [1997], pp. 36–37; see Rountree 1990 for a similar pattern involving Indians in 1920s Virginia). Her enforcement did not stop with the passage of the federal Civil Rights Act or with the social changes in race relations of the 1970s, but only in 1983, when the state legislature mandated self-identification as Louisiana's definitive method of assignment to racial categories (Domínguez 1986 [1997], p. 52). As historian Peggy Pascoe (2009, p. 133) notes, bureaucrats like Drake played as significant a role as other legal actors (legislators, judges, and prosecutors) in reproducing race and racism:

> [Officials like marriage license clerks] carried out their tasks as a matter of bureaucratic routine rather than criminal enforcement, in quiet county offices rather than dramatic courtrooms . . . . [A] seemingly natural documentary "fact" of race was produced in marriage license bureaus.

J. Kehaulani Kauanui, who has a doctorate from the History of Consciousness program at the University of California at Santa Cruz and who teaches in an anthropology department, has recently published a study of the congressional passage of the 1921 Hawaiian Homes Commission Act. Congress enacted the legislation roughly midway between the United States's formal acquisition of Hawaii as a colony in 1898—although American missionaries and business interests had been active on the islands since the 1820s (Merry 2000)—and admission of Hawaii as a state in 1959. In *Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity*, Kauanui (2008) argues persuasively that Hawaii's racial order shaped the law's

definition of who was Native Hawaiian for purposes of receiving land allotments under the law, which in turn came to define (and still often defines today) the category of Native Hawaiians under a 50% blood quantum rule. Hawaii's three-tiered racial order in the early twentieth century consisted of Asians (who were typed as alien, noncitizens), Native Hawaiians, and everyone else, principally Whites but also mixed-race persons who did not fit squarely in the other categories (Kauanui 2008, p. 91).

The Homes Commission Act was ostensibly designed to provide redress to Native Hawaiians, who were suffering from drastic poverty and high mortality rates (Kauanui 2008, pp. 81–82) and who were viewed collectively as capable of eventually assimilating into the White settler society (p. 91). In contrast, Asians (and especially the Japanese, who were numerically dominant at the time), were viewed as collectively unassimilable and also disenfranchised when Congress refused to extend citizenship rights to Asian immigrants living in Hawaii in 1900, though it granted them to Native Hawaiians (U.S.-born Japanese Americans did not vote in substantial numbers until the 1930s) (pp. 94–96). The law's focus on providing reparations to Native Hawaiians (via land allotments) sought to rehabilitate them as against Asians, but sought to do so narrowly, setting a 50% blood quantum definition for Native Hawaiian status. Hawaii's racial dynamics produced the law, but the law exerted a powerful influence on those very dynamics by instituting a rigid definition of ancestry to define Native status [and by rejecting indigenous ideas about kinship that Kauanui (2008, pp. 41–42) argues today trump blood quantum in some contexts].[5] The result was the transfer of property wealth to a narrower segment of those who could have potentially claimed Native Hawaiian status, which left much of the land originally allotted in the public domain and thus available to be leased by sugar plantation owners and eventually owned by Whites (pp. 8, 70).

LAW AND RACIALIZED SOCIAL CONTROL

Anthropologist Sally Merry's (2000) book *Colonizing Hawaii: The Cultural Power of Law* takes us once again to Hawaii, where we can see the ongoing interaction between law and race to produce racialized social control, or state regulation of persons according to race. Like Kauanui, Merry (2000) emphasizes Hawaii's multiracial terrain of Native Hawaiians, Asian immigrant groups, and White settlers as crucial to understanding how the penal code and punishment both reflected and reproduced racial hierarchy (p. 157). "Through convictions, social identities in the larger society are converted into a new register of truth, defined by the authority of the state and backed by its sanctioned violence," Merry (2000) argues, constituting "some as normal and others as deviant, some as citizens and some as aliens, some as having racial identities and others as unmarked racially, defined as the normal" (p. 262). Merry's multidecade data on criminal cases in a small plantation town, Hilo, reveal the dynamic nature of White colonial power exerted via the courts, targeting Native Hawaiians before the 1860s and, after 1880, Asian immigrants.

In the 1850s and 1860s, one-quarter to two-thirds of the entire criminal caseload concerned sexual behavior, and almost all of those charged were Native Hawaiians who were presumed by missionaries and courts alike to be unable to self-regulate sexual desire (Merry 2000, pp. 221–25, 229–31). Most were convicted of adultery, and, literally unable to pay for their crimes (the 1840 statute specified a $30 fine, the equivalent of six months wages) (pp. 247, 251), they were sentenced to six months at hard labor, which consisted of building the Hawaiian road system that would later be crucial to the sugar plantation economy (pp. 245–46). But by the 1890s, as the court system ramped up (p. 80), Native Hawaiians dropped to less than 35% of criminal defendants, whereas Japanese

[5]This may be the least convincing aspect of the book. For a critique that Kauanui's contemporary political agenda has influenced her historical analysis, see Kowal (2009).

immigrants rose to 50% (despite being only 20% of the local population), and Chinese immigrants rose to nearly 20% of defendants (pp. 192–94). Unlike Native Hawaiians, Asian immigrants frequently were prosecuted for crimes related to their work on sugar plantations—"abandoning work," "obstructing justice," or assault and battery (often stemming from resisting plantation foremen) (pp. 210–13). In ways parallel to Mawani's (2009) analysis of relations among White settlers, Chinese immigrants, and aboriginals in British Columbia, the criminal courts ultimately reinforced the limited (though punitive) inclusion of Native Hawaiians and the wholesale exclusion of Chinese and Japanese plantation workers.

In *Beyond the Reservation: Indians, Settlers and the Law in Washington Territory, 1853–1889*, historian Brad Asher (1999) draws on 200 cases from the federal territorial court to explore Indian/White relations in nineteenth-century Washington.[6] During this period, most Indians had been forcibly removed to federal reservations in the western United States; by 1880, the United States had 141 Indian reservations in 21 states or territories (Asher 1999, p. 8). Asher makes the important point that the federal government lacked the resources to police most reservations and that those in the Northwest may have been especially porous, allowing for ample everyday interactions among Indians, Whites, and mixed-race people, especially in settlements or towns near reservations (p. 8).

After an initial period in which American courts largely excluded Indians and Indian/White disputes from their purview, in the 1870s and 1880s they began to play an increasing role in adjudicating such conflicts, thereby incorporating some Indians into the legal system. The racist ban on Indians testifying against Whites severely limited Indians' reliance on the legal system to redress wrongs against them, but it did not entirely foreclose it (Asher 1999, p. 115). Over the 50-year territorial period, the U.S. attorney prosecuted only 35 Whites accused of committing violent crimes against Indians (including 23 homicides), despite Asher's (1999) claim that this was a small proportion of such injuries (p. 114). White jurors internalized anti-Indian and pro-White beliefs, and only five Whites were convicted of crimes against Indians in that half century (p. 115).

But another area of criminal cases, involving Whites accused of selling liquor to Indians, began to challenge those ideas about Indians' capacity for personhood. In 1862, Congress amended the Indian Intercourse Act of 1834 to extend the existing ban on selling liquor to Indians so that it would expressly include off-reservation Indians (Asher 1999, p. 82). This statute implicitly viewed the Indian category as fixed and biologically based, and it explicitly encoded racial hierarchy by saying that Indians were constitutionally incapable of self-control and self-regulation of liquor consumption, unlike Whites. Yet late-nineteenth-century prosecutions of White men accused of selling liquor to Indians had the effect of somewhat eroding both notions. Some White defendants argued that they had not known the buyer was Indian, and debates about Indian status ensued, eventually resulting in a more nuanced view of race as socially constructed via a complex combination of facts including ancestry, appearance, intermarriage, residence (on or off reservation), employment, and other indicia of incorporation into the White or mixed-race communities (Asher 1999, pp. 98–106). At the same time, White prosecutors pursuing these cases were invested in persuading White grand and petit jurors to accept as truthful the testimony of Indian buyers. Both examples

[6]I am mindful of the concern that applying concepts of "race" to American Indians may diminish sovereignty claims; it is clear that Indians exist both as racially non-White persons and as members of sovereign nations. First Nations scholar Bonita Lawrence (2003) captures the dilemma this way: "For Indigenous people, to be defined as a race is synonymous with having our Nations dismembered. And yet, the reality is that Native people in Canada and the United States for over a century now have been classified by race and subjected to colonization processes that reduced diverse nations to common experiences of subjugation. Contemporary Native identity therefore exists in an uneasy balance between concepts of generic 'Indianness' as a racial identity and of specific 'tribal' identity as Indigenous nationhood" (p. 5).

from Washington reveal the central role of race in social control processes, but they also illustrate how race and law are mutually constitutive in an ongoing, dialectic process.

Perhaps no more comprehensive system of racialized social control existed than chattel slavery in the United States. But even at the moment "when slaves were most property-like . . . at the moment of sale or hire," historian and lawyer Ariela Gross (2000 [2006], p. 3) argues that the law of slavery, paradoxically, simultaneously viewed slaves as human subjects and objects of property relations. In her book *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom*, Gross (2000 [2006]) takes both a panoramic view—by drawing on state supreme court opinions from five southern states (Alabama, Georgia, Louisiana, Mississippi, South Carolina)—and a telescopic view—by examining 177 trials in one southern county (Adams County, Mississippi)—to explore how law and race are coconstructed. (For literature on slavery and the legal system, see Gross 2000 [2006], pp. 167–69. For critiques of *Double Character*, see Tushnet 2002, Wahl 2000.)

One example is the creation of "Negro medicine" as a subfield within emerging American medical science (Gross 2000 [2006], pp. 122–37), which allows us to see how racist beliefs about Blacks shaped the law and how, in turn, the law shaped those very beliefs by contributing to the entrenchment of scientific racism. Gross presents warranty trials as a prime site for these developments; these cases typically involved buyers alleging that sellers had misrepresented the value of sold or leased slaves and therefore the reliance by judges and juries on expert witness testimony by southern doctors who claimed expertise in "Negro medicine" (Gross 2000 [2006], pp. 123–25). In one Mississippi case, a total of six medical doctors testified, for the plaintiff and the defendant (p. 133). Based on their examination of the slave in question and general investigation, they testified to the slave's condition as well as to the buyer's and seller's care of the slave (pp. 133–34). White southern doctors legitimated themselves by developing this field, drawing professional expertise and material rewards from their testimony at slave markets and in courtrooms (pp. 123, 132). In so doing, they shaped legal processes directly and contributed to the larger racial project of scientific racism.

Historian Diana Paton's (2004) book *No Bond But the Law: Punishment, Race, and Gender in Jamaican State Formation, 1780–1870* spans nearly a century, during slavery and after emancipation. By covering ante- and postbellum periods, she is able to capture important transitions in the racially legitimated right to use violence:

> Because part of the legal meaning of slavery is that slaveholders have the right to inflict physical violence on their slaves, part of the legal meaning of slavery's abolition is that this right is withdrawn from slaveholders. In practice, because no emancipation process led to the complete liberation of enslaved people from coercion, these rights were taken over by the state (Paton 2004, p. 4).

Paton's (2004) study vividly illustrates racialized social control as it evolved during these stages—from prisons' antebellum role as an important site for disciplining runaway slaves [and showing Jamaica's modernizing trends (Paton 2004, p. 30)], to its role during the four-year "gradual emancipation" period to shield slaveholders from the economic impact of abolition by disciplining "apprentices" (p. 54), to its heyday as the primary social control site in the postemancipation period. Jamaica's prison population more than doubled in less than a decade after slavery's abolition (pp. 123–24); the death penalty came into use (p. 124); and convict leasing became substantial after 1854 (pp. 145–46). Via the penal code and prisons, Jamaican slaveholders ensured that they would continue to wield substantial power over their former Black slaves (Paton 2004; see also Flood 2007). In this way law made race, but it was able to do so because racial conditions themselves produced particular legal outcomes. Over time, crime and punishment became a

key social site in which race was naturalized: prison policies segregated prisoners by race (and gender) and reserved some punishments by race (and gender), so that prisons came to reflect racial inequality in the larger society and also reproduce it in a taken-for-granted way.

DIRECTIONS FOR FUTURE RESEARCH

This review has described an emerging field in sociolegal studies that investigates how law and race are mutually constitutive in an ongoing, dialectic process. I conclude by identifying some empirical and theoretical issues that should comprise the future research agenda for this fledgling field.

Operationalizing Race

Reading these studies together suggests that there is much to gain from rethinking how we conceptualize and operationalize race. Prior work criticized law and society scholarship for its shallow treatment of race (Gómez 2004, Haney López 2007, Obasogie 2007), but this review suggests that there is a rich subset of sociolegal studies that has successfully operationalized race in a way that more accurately reflects its powerful and complex social significance. In these studies, race was variously measured as racial identity, racial categories and boundaries, racial ideology, racial conflict, racial inequality, and racism (and in multiple of those ways within a study).

The underlying point is that scholars should not take conceptualizations of race for granted—either for themselves or other scholars, or for their research subjects. The scientific consensus that race is socially constructed should lead us to deliberately question how we conceptualize race and then how we transparently incorporate that conceptualization into research design. If sociologist and lawyer Osagie Obasogie is correct, this call to action is more urgent because law and society scholars have tended to conceptualize race narrowly as phenotype and to crudely measure race via subject self-identification (Obasogie 2007, p. 459).

Methodology

The case studies in this emerging literature suggest that local studies of law are rich sites for exploring law and race as mutually constitutive and for revealing complex interactions between the two over time (Merry 2004 makes a similar point). At the same time, these studies beg the question of what different methodological approaches might yield. The linkages and disjunctures across these case studies suggest, for example, that comparative research is needed, both in the sense of comparing racial dynamics across geographic or national boundaries (the term's traditional usage) and in the sense of comparing coexisting racial groups in a particular society. In this sense, a deliberate comparative approach can be considered a methodological orientation.

Although quantitative law and society studies that deploy race as an independent variable (typically measured via subject self-identification from a preselected list of options) have been useful for documenting ongoing racial disparities in legal processes (especially in the context of criminal arrests, convictions, and punishments), this approach to studying race has some fundamental limitations in its current form (for a similar criticism applied to quantitative political science, see Lee 2009). Whether in quantitative or qualitative studies, researchers should use multiple measures of race within a single study (and whether conceiving of race as a dependent or independent variable) (for a good example, see Ward et al. 2009). For example, in addition to operationalizing race via the subject's self-identification, researchers could ask subjects what racial label those in her or his social circle would assign to the subject. Although this is a small addition, it begins to be responsive to the socially constructed nature of race and to our knowledge of its flexible and situational nature (as do more open-ended self-identification questions).

Another strategy to conceptualize and operationalize race more accurately is to utilize multiple methods within a single study (for an excellent example, see Obasogie 2010). Quantitative analyses, as described above, and historical studies like those highlighted in this review have been the most commonly used methods to explore the interaction between law and race. Yet we must move beyond these two comfort zones to employ the full range of social science methods (e.g., Goodman 2008, using ethnography in a prison setting).

Multiracial Terrains

The books highlighted here suggest the fruitfulness of comparing the experiences of more than two racial groups in a particular space where colonialism, war, slavery, and/or migration have brought groups together (Gómez 2007, Jung 2006, Kauanui 2008, Mawani 2009, Merry 2000, Paton 2004). I join sociologist Renisa Mawani (2009, p. 206) in calling for greater attention to how multiple "state racisms" coexist and differentially affect various racial groups, including Whites, within the context of a single place.

Among other things, these studies remind us that race is implicated across the spectrum, beyond the binary categories of Blacks and Whites. "Problematizing the focus on [B]lacks," as Haney López (2007, p. xvi) reminds us, invites a series of conceptual steps that advance our analysis of racial dynamics: "more critically examining the assumption that the [B]lack experience represents the quintessential expression of race in the United States; broadening work to examine other racial groups, or focusing on such groups exclusively; and studying comparative racial dynamics." The move to consider how a wider variety of racial groups have interacted with legal systems also broadens the study of law and race beyond the United States and ultimately beyond the former British colonies. The tendency has been to see research on race as parochial, but recent scholarship suggests that racism and racial conflict are global phenomena that are themselves increasingly transnational in nature (Bulmer & Solomos 2008, Mullings 2005, Winant 2001).

Macro-Analyses of the Racial Order

Studies of how the racial order transforms over time to meet new challenges (including the introduction of new racial groups) show us that race and racism are far from rigid and stable and that, in part, their very power comes from their flexibility and transformative capacity. Several monographs in this emerging literature focus on the state and on structural-level economic and political dynamics that shape how law and race interact and ultimately help reproduce racial stratification (Gómez 2007, Jung 2006, Kauanui 2008, Mawani 2009, Novkov 2008, Paton 2004).

This is an important trend given that much prior sociolegal scholarship (and much in critical race theory) focused on micro-dynamics such as racial identity, the performance of race, and the psychological dimensions of race and racism. Although those are important aspects of race, I second Romero's (2005) call to move the research agenda to examinations of how the state and the political economy structure racial hierarchy. Scholars of race and of law/race interaction should pay more attention to how the state and the political economy shape both sides of the law/race equation for different ends (for articles focusing on the state's powerful role in shaping race, see Garland 2005, Kimble 2007; for a comparison to how law and culture are mutually constituted, see Maurer 2004, Merry 2004).

White Privilege

A growing segment of research (though relatively little of it grounded in law) explores the social construction of White racial identity and how that has shaped the racial order (Brodkin 1998, Flagg 1992, Frankenberg 1993, Hale 1999 [1998], Jacobson 1998, Katznelson 2005, Lipsitz 1998, McDermott & Samson 2005 [reviewing the literature], Roediger 1999). Much can be gained by following Buck's (2001)

lead in studying the origins and transformations of White privilege, and more work is needed to engage whiteness studies more directly with legal processes and legal consciousness.

Ideology

Scholars of law and social science do not talk about ideology as much as they used to (for example, at the height of the critical legal studies movement), but these books suggest that race and the law is a subfield where ideology remains of central importance (for articles that focus on racial ideology, see Banks 2003, Calavita 2006, Fleury-Steiner 2002, Mack 2005). The monographs foregrounded in this review show that racial ideology figured centrally in the past, but they also suggest that racial ideology is an essential part of exploring how race and law co-construct each other in ongoing ways. In the contemporary context, it would be particularly useful for scholars to trace the rise of color-blind ideology as having deep roots in law and yet increasingly embraced in society at large, where it has become one of the dominant popular conceptions of race (Haney López 2007, p. xx; Bonilla-Silva 2003).

Indeed, to link these last two topics, it would be fruitful to explore how color-blind ideology intersects with assertions (or denials) of White privilege, as McDermott & Samson (2005, p. 248) have recently suggested:

> In fact, much of the recent work on whiteness concerns how [W]hites minimize, acknowledge, deny, embrace, or feel guilty about their privileged status. The denial of [W]hite privilege is the foundation of color-blind racism, an ideological assertion of the fundamental equality of all racial groups—not only in terms of rights, but also in terms of experiences—that asserts that race-based programs and policies only serve to further solidify racial divisions. This perspective is a reflection of an understanding of [W]hite racial identity that assumes its content is like that of any other racial group—we are only humans, not [W]hites, [B]lacks, or Asians.

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