Review Essay

Still, at the Margins

Emily M.S. Houh

Austin Sarat, ed., *The Social Organization of Law: Introductory Readings*. Los Angeles: Roxbury Publishing Co., 2004. 596 pp. $65.95 paper.

In one of many traditions of critical race scholarship, this review opens with a first-person narrative. When I was asked to review Austin Sarat's new compilation of introductory readings on law and society at the "Change" breakfast of the 2004 annual Law and Society Association meeting in Chicago, I responded affirmatively but with rather tepid enthusiasm, which reflected—as I recall—the level of enthusiasm I felt for the conference overall, despite (or perhaps because of) it being my third year in attendance at the notoriously large and panel-packed meeting. When I was asked further to review the compilation specifically from a "critical race perspective," my lack of enthusiasm quickly transformed to discomfort, and I wanted to immediately revoke my acceptance of the offer to do the review.

Even those who do not identify as "race crits" or "fem race crits"—as I do—are likely aware that law and society is known in certain academic circles for being overwhelmingly liberal (and, therefore, *not* critical) and overwhelmingly white. Moreover, although certainly many race crits do consider themselves part of this large, scholarly community and while I always enjoyed participating in and attending various panels, up to that point I had never sought to make law and society my intellectual "home." As a result, in being asked to review Sarat's new book, I felt both flattered and doomed—flattered because I was being called upon for my "expertise" as a race crit who could write intelligently about the book, and doomed because I was an outsider being invited in, however briefly, to criticize a principal player—an insider's insider—in the

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law and society movement. It was a classic micro-dilemma of "subject unrest" (Culp et al. 2003:2435)—I wanted in and wanted out at the same time, for all the right and wrong reasons. In the moments when I contemplated changing my mind, my tendency toward melodrama gave way to my inability to say no and, more seriously, to my feeling that someone *should* write a critical race review of the book. But my feelings of ambivalence toward this review, even as I write it, have not diminished, and I am all too aware of my positionality as an outsider to the law and society community. This disclosure of outsider positionality is an important one because it frames the substantive critique of this review.

Mission and Audience

The Social Organization of Law is aimed at students, both at undergraduate students who are interested in becoming lawyers or in the legal system more generally, and at law students interested in the interconnectedness of law and society. In his introduction, Sarat sets forth the text's basic premise, that "law seeks to work in the world" (p. 1), and he describes the two ways in which the collection aims to explain how law does so:

> First, the readings in this book highlight law's responsiveness to various dimensions of social stratification. They draw attention to the question of when, why, and how legal decisions respond to social characteristics (e.g., race, class, gender) of those making the decisions as well as those who are subject to them and when, why, and how they should do so. . . .
>
> Second, the book treats law itself as a social organization, emphasizing the complex relations among its various component parts (e.g., judges and jurors, police and prosecutors, appellate and trial courts). . . . (p. 1).

Sarat thematically organizes his anthology around the law's paradoxes. That is, the law works to be "impartial and evenhanded" but also "sympathetic and responsive"; accessible and efficient but not overly so; deterrent of socially unacceptable behaviors but also equitable toward the perpetrators of such conduct; and, most significantly, controlling of violence and also of the sort of discretion thought necessary to control that violence (p. 3). Sarat's stated premises and goals are crucial and promising, but whether he makes a compelling case in his execution—from a critical race perspective—is a different matter that is addressed throughout this review.

In terms of achieving its stated goals, and to the extent that those goals are circumscribed by inattention to the critical voice, the anthology is a success. It is broadly broken into five parts,

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respectively: "When Law Fails," "The Search for Law," "Access to Justice: The Demand for Law and Law's Demands," "Whose Law Is It Anyway?" "Severity and Leniency: Administering a System of Discretionary Justice," and "Organizing Law's Violence." Within each part, the readings are further organized under sections. For example, "When Law Fails" is subdivided into sections on "The Limits of Legal Protection" and "What Law Is For." Sarat's selections cover a broad array of law and society topics that fit easily together and within their topical categories and subcategories.

Moreover, the structure of the book makes obvious sense in light of its stated goals. For example, Sarat provides a good basic foundation of Western liberal legal thought throughout by his inclusion of pieces of works by the likes of Thomas Hobbes and John Stuart Mill. Sarat also provides a solid foundation to the extent that he excerpts works by so many of the leading lights of the law and society movement. But in a sense, this "success" is precisely what is most troubling, from a critical race perspective, about this anthology. The book fails to incorporate a *critical* race or feminist perspective into its stated goals. This is especially problematic given that one of the major organizing themes of the anthology is violence.

Violence as Theme

Cover's brilliant and classic essay, "Violence and the Word" (Cover 1986), appears toward the beginning of Sarat's anthology, in a subsection called "Dispensing and Controlling Violence" (pp. 83–93). Though not technically a member of the critical legal studies camp, Cover was a legal historian and constitutional and procedural law scholar who was widely regarded and respected for his commitments as a teacher, scholar, and activist regarding social justice issues. In his introduction to Cover's essay, Sarat calls attention to how the structure of the law works to do violence, particularly in the contexts of policing and criminal punishment, when individuals are most directly subject to the control and discretion of the state (p. 84). This is, for me, one of his most important goals. This should come as no surprise, since critical race theory may be defined in part by its concentrated analyses of the ways in which the law and those who interpret it have done and continue to do violence on and to bodies of color (Crenshaw et al. 1995; Delgado 1995; Valdes et al. 2002).[1] Thus, considering Sarat's commitment

[1] The three critical race anthologies referenced here are of particular importance because each of them was compiled and edited by some of the founders of and key contributors to critical race scholarship. Each anthology includes diverse readings on topics ranging from, for example, the inadequacies of civil rights law to race and postmodernism to coalition-building and critical race praxis. Significantly, the readings included in each

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to exploring the theme of legal violence, I was surprised by the book's basic failure to include more accounts by or about people of color and women of color, who have historically borne the brunt of this legal violence, and again by its failure to include any writings of critical race scholars and critical race feminists, most of whom have committed their academic careers to writing about such violence.

In fact, the inclusion of Cover's essay within Sarat's larger project is somewhat ironic, for in it, Cover wrote very specifically about "legal interpretation as practical activity" (p. 86) and "legal interpretation as bonded interpretation" (p. 87). As to the former, Cover wrote, "The judicial word is a mandate for the deeds of others. . . . Thus, . . . [legal] interpretations . . . are not only 'practical,' they are, themselves practices" (p. 86). As to the latter, Cover wrote:

> Legal interpretation . . . can never be "free"; it can never be the function of an understanding of the text or word alone. Nor can it be a simple function of what the interpreter perceives to be merely a reading of the "social text," a reading of all relevant social data. Legal interpretation must be capable of transforming itself into action . . .
>
> In order to maintain these critical links to effective violent behavior, legal interpretation must reflexively consider its own social organization. . . . [L]egal interpretation is a form of bonded interpretation, bound at once to practical application (to the deeds it implies) and to the ecology of jurisdictional roles (the conditions of effective domination). The bonds are reciprocal. . . . (p. 87).

While I do not wish to characterize a purely academic controversy as the type of interpretive violence with which Cover was primarily and passionately concerned, his discussions of interpretation as practical activity and bonded interpretation have some application here, albeit on an uber-micro level. For the act of assembling (an introductory) canon in the influential field of law and society is an act of legal interpretation. The institutional context in and through which this interpretation occurs also renders the act a discursive practice. What, then, is the institutional context here? And has Sarat, as the legal interpreter, engaged in the sort of bonded interpretation that has transformed itself into action? Moreover, what action is called for?

Although I have over the past few years heard about and observed tensions between the law and society and critical race theory movements, I am not equipped, as an outsider to the law and

anthology demonstrate the many and proliferating ways in which law and legal discourse have "violently" constructed (both literally and figuratively) race and racial categories in service to the systemic maintenance of white supremacy.

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society community, to respond intelligently to the first question of institutional context. Rather than offering my own observations and intuitions about these two movements (and I have certainly noted them), I present a few relevant questions instead: How are law and society "insiders" and critical race "insiders" positioned within their own institutions—do they occupy roles of power in their institutions, or are they marginalized within them? Are their institutions big players in the national academic game? What is the ideological range of those who write in the law and society tradition and of those who write in the race crit tradition? Are law and society insiders and race crit insiders openly politically active, either in a local or global sense? If so, are they active in an organized, collective sense or, rather, as individuals? As a matter of internal programming and "quality control," do they engage in self-analysis and, if so, to what extent? Addressing contextual questions such as these within the introductory text would have given this compilation more of the reflexivity that Cover sought.

I set forth these questions not only because I think they speak in different ways to the moral commitments, as Cover called them, that drive our own legal interpretive acts and practices, but also because how one responds to them also helps answer the questions of whether one's acts of "bonded interpretation" are translatable into action and what action is called for. In a portion of Cover's essay that does not appear in Sarat's edited volume, Cover wrote: "At its best [legal interpretation] seeks to 'impose meaning on the institution . . . and then to restructure it in the light of that meaning.' There is, however a persistent chasm between thought and action. It is one thing to understand what ought to be done, quite another thing to do it" (1986:1610–1). What meaning has Sarat imposed on the "institution" of law and society in constructing and interpreting its introductory canon? What restructuring is required? And how do we bridge the chasm between thought and action? I engage in my own legal interpretive practice in the next section as I attempt to answer these questions from a critical race perspective.

Who's In and Who's Out

What disappoints me most about Sarat's selection of materials is not merely the absence of critical and/or minority (and not necessarily critical) voices, but the glaringness of that absence. In Cover's terms, the *act* of omission of those voices exemplifies the "persistent chasm between thought and action" within our liberal institutions and organizations. Again speaking in Cover's terms, it is "one thing to understand what ought to be done [incorporate

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critical race voices (and beyond that, voices of scholars of color) into the law and society canon], quite another thing to do it." Concretely and as a matter of bean-counting, out of the 65 selections in the book, I could identify with any certainty only *one* selection authored by a person of color; that selection is an excerpt of a law review article by Harold Hongju Koh, currently Dean and Gerard C. and Bernice Latrobe Smith, Professor of International Law at the Yale Law School, titled "The Spirit of the Laws" (pp. 29–36; Koh 2002). And while Koh is one of the world's foremost scholars of international law, it is doubtful that he would identify as a critical race scholar (Koh 1991, 1994, 2001, 2002; Koh & Slye 1999).[2] In fact, based on my assessment, nothing appears in this anthology that could be identified as critical race scholarship (let alone feminist critical race scholarship).

This is not to say that race is not treated at all in the text. After all, a book that purports to be about the social organization of law could not be taken seriously without a discussion of issues related to race, class, and gender. In the Notes and Questions following each selection, Sarat frequently asks about the relevance of race to the social organization of law. Following a piece by Fletcher on the infamous Bernhard Goetz shooting on a New York City subway (pp. 18–26; Fletcher 1988), for example, Sarat states, "The Goetz case highlights the role of race in organizing perceptions of difference and danger. Should law pay attention to race? If so, when and why? If not, why not?" (p. 26). Similarly, following an excerpt from Turk's "Law as a Weapon in Social Conflict" (pp. 43–7; Turk 2004), Sarat asks, "How do you suppose your social position (your race, class, gender) affects how you perceive the law?" (p. 48). Questions about the mantra-like trilogy of "race, class, and gender" as social positionality appear repeatedly in Sarat's Notes and Questions (for example, pp. 1, 103, 317). But does the anthology equip its student audience to adequately and thoughtfully respond to those questions?

Regrettably, the answer is a resounding no, despite the fact that a few of the selections speak squarely to issues concerning race. I take a moment to discuss these selections, several of which are commendable, but I then move on to discuss other selections that *might* have been included to represent the truly critical perspective that the volume is lacking. Chapter 29, which appears in the section entitled "Who Speaks and Who Is Heard: The Continuing Significance of Class"—a section that should have been well-suited to sophisticated treatments of the intersection of race, class, *and* gender that proliferate in critical race feminism (Caldwell 1991;

[2] These references to some exemplary readings of Koh's work all engage, in one form or another, his known area of expertise, international human rights law.

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Carbado 2000; Cho 1997; Crenshaw 1989, 1991; Harris 1990; Hutchinson 1997)—excerpts from Munger's "Dependency by Law: Welfare and Identity in the Lives of Poor Women" (pp. 243–54; Munger 2002). In it, Munger "describes how the stigma of dependency and being identified as poor plays out in the lives of women on welfare as well as how they react to and counter both" (p. 243). Munger writes particularly about the ways in which welfare law reinforces social fault lines that separate poor black women from others who share their economic needs and interests (pp. 249–50). One might astutely observe that Munger's analysis here sounds like an intersectionality analysis. Given that critical race feminists originated intersectionality theory and analysis in the 1980s, why is there not even a reference in the notes following the Munger excerpt to those pathbreaking scholars (Kimberlé Crenshaw, Patricia Williams, Angela Harris, Mari Matsuda, and Paulette Caldwell among them) and their work?

About midway through the anthology, in the section "Lawyers in Criminal Cases," Sarat excerpts Frohmann's "Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking" (pp. 284–91; Frohmann 1997). In it, Frohmann explores prosecutors' employment of "discordant locales"—the categorization of victims, defendants, jurors, their places of residence, and the location of crime incidents—and the exercise of prosecutorial discretion in sexual assault cases. Frohmann argues, for example, that cases of rape victims who live in poor, minority neighborhoods (i.e., poor women of color) are often unjustly dismissed or not pursued by prosecutors because of juror bias against poor women of color as unworthy, unsympathetic, and even deserving victims (pp. 286–8).

The followings sections, "Juries in Criminal Cases: Biased or Conscientious Judgment" and "Sentencing," contain the book's most explicit and focused discussions of race. In the former, Sarat includes an essay written by history professor Elisabeth Perry that appeared in *The Chronicle of Higher Education* on her jury duty service and the great extent to which race and gender politics played important roles in the jury's deliberations concerning a black male murder defendant (pp. 330–3; Perry 2002). Presumably in an attempt to present "balanced" views on this issue, Sarat follows up Perry's essay with an excerpt from an article coauthored by Weiss and Zinsmeister, "When Race Trumps Truth in Court" (pp. 335–9; Weiss & Zinsmeister 1996). This article, which appeared in a 1996 issue of *The American Enterprise* magazine (of which Zinsmeister is editor-in-chief), attacks the notion of jury nullification, which had then been recently resuscitated by critical race scholar Paul Butler in a well-known and controversial essay in the *Yale Law Journal* (Butler 1995).

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Finally, in the "Sentencing" section, the Honorable Nancy Gertner, a United States District Judge for the District of Massachusetts, criticizes the 1984 Federal Sentencing Guidelines as, in part, having an unjust and disparate impact on minority defendants (pp. 350–5; Gertner 2002). Also appearing in this section is an excerpt from Spohn's "Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process," which suggests that criminal sentencing remains racially discriminatory despite attempts at "neutralizing" it. (pp. 365–80; Spohn 2002).

Sarat's inclusion of authors speaking on race such as Munger, Frohmann, Perry, Gertner, Spohn, and even Weiss and Zinsmeister is not problematic in and of itself. But the inclusion of these authors at the exclusion of critical race scholars, who have been writing extensively on these issues for 20 years now (Crenshaw et al. 1995; Delgado 1995; Valdes et al. 2002), is obviously and extraordinarily problematic. It is obviously problematic in light of the longstanding critique of liberal legal scholarship first set forth by Delgado more than 20 years ago in "The Imperial Scholar: Reflections on a Review of Civil Rights Literature" (Delgado 1984). In it, Delgado identifies the following liberal scholarly tradition:

> It consists of white scholars' systematic occupation of, and exclusion of minority scholars from, the central areas of civil rights scholarship. The mainstream writers tend to acknowledge only each other's work. It is even possible that, consciously or not, they resist entry by minority scholars into the field, perhaps counseling them, as I was counseled, to establish their reputations in other areas of the law (Delgado 1984:566).

Regrettably, Delgado's 20-year-old critique still resonates, rippling out from the specific and original center of civil rights scholarship toward broader and related scholarly fields such as those falling under the tent of law and society. Critical race theory has outlived critical legal studies. A large body of high-quality critical race scholarship continues to develop. The editors of at least three anthologies have identified core and foundational readings in critical race theory and critical race feminism (Crenshaw et al. 1995; Delgado 1995; Valdes et al. 2002), and many of the pieces collected therein have been important not only to the development of American jurisprudence more broadly but also to the development of interdisciplinary approaches to the law. Critical race theory courses are offered at a great number of law schools, and even leading casebooks sometimes explore critical race interpretations of doctrines such as contractual unconscionability (Knapp et al. 2003:571–2).

Thus, there is no lack of quality material that could have been included in this edited volume. In fact, it would have been fairly

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easy to bridge the "schism between thought and action" by including critical race voices (assuming a desire to do so)—one need only flip through the pages of existing anthologies to find works that Sarat could and perhaps should have but did not include in the book. For example, Crenshaw's classic article, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (Crenshaw 1991) is an ideal companion to Munger's piece on the impact of welfare laws on poor women (Munger 2002) in that it illuminates the complex intersectionality of race, gender, and class lived by those very women. Roberts' "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy" (Roberts 1991) provides an insightful and important complement to Frohmann's piece on how race, gender, and class impact prosecutorial discretion (Frohmann 1997). Johnson's "Black Innocence and the White Jury" (Johnson 1985)[3] would have significantly strengthened the section on juries. And finally, as to the Weiss and Zinsmeister critique of jury nullification (Weiss & Zinsmeister 1996), it seems only fair that parts of Butler's *Yale Law Journal* essay (Butler 1995) should have been included in addition to or perhaps in place of the Perry article from *The Chronicle* (Perry 2002). And, in the first place, that Sarat chose to include an ideologically ultra-conservative voice (a voice that also appears quite infrequently in this reader) in a section so explicitly about race without including a critical race response or analysis, speaks volumes (perhaps inaccurately) about the priorities of the law and society movement.

Conclusion: The Meaning of Exclusion of Voice

One might ask what the titles I just suggested (and they are simply few of many) would add to the book. Do they simply restate the existing points in more specific and perhaps compelling terms? Do they provide insights not present in the selected pieces? They do both and as such are valuable in and of themselves. But as it stands, it is the work done by their *exclusion* that counts here, particularly given the intended student audience and the "race, class, and gender" questions so often directed at them. For example, the exclusion of critical race voices reifies the primacy of the "objective" majority scholar and observer who knows his (or in some cases her) subjects and their problems better than their subjects themselves do and, as a result, can best speak for them and on their

[3] Much of the work of Johnson, who is white, is considered part of the rich critical race scholarship on the criminal justice system. Critical race theory, while developed mostly by scholars of color, has and remains open to and inclusive of majority scholars engaged in critical race inquiry.

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behalf. And, as a teacher who, like many of us, urges our students to engage in critical reading and thinking in law school and undergraduate classrooms, it is deeply troubling that a text aimed at students would fail to incorporate the critical voice.

Some might contend—as they did with Delgado[4]—that the critical race pieces I have referred to in this review (and those like them) are simply not as "elegantly" written as those pieces that were selected for inclusion. Similarly, it might be contended that the pieces I have identified (and those like them) are overly academic and too theoretical for the reader's intended audience, and that breadth of form of the included pieces was of great importance. It might even be contended that relevant critical race articles were not included because they are not substantively rigorous and/or analytically sound. But, having read the anthology through and, over the years, an innumerable number of critical race law review articles (including all of those that I referenced above), I would find this last contention utterly incredible and the others about which I have speculated quite unlikely. The inclusion of the above-mentioned critical race pieces (and those like them) would not only have "added value" to the anthology because of the high quality and originality of analysis reflected in them; their inclusion also would have acted to counter the long-standing tradition of scholarly imperialism still so prevalent in the (legal) academy. Unfortunately, the omission of such work from the anthology—whether intentional or not—has instead acted to perpetuate that tradition.

I am finally left to wonder whether critical race voices were excluded from the reader simply because of lack of familiarity with the body of scholarship, or because there was a desire not to convert this compilation into another critical race reader (given the salience of race to the book's themes and topics), or because of the

[4] In *The Imperial Scholar,* Delgado describes an exchange he had with a white male colleague who had shown Delgado a draft of a paper he had been writing on equal personhood and that addressed, in part, the notion of "withered self-concepts" (Delgado 1984). Upon reading the draft, Delgado noted that on the issue of withered self-concepts, his colleague had cited to Frank Michelman, who is white, for authority, and that none of the draft's citations contained references to works of black and/or minority scholars (who might know a thing or two about withered self-concepts). Delgado wrote,

> I pointed out that although Frank Michelman may be a superb scholar and teacher, he probably has relatively little first-hand knowledge about withered self-concepts. I suggested that the professor add references to such works as Kenneth Clark's Dark Ghetto and Grier and Cobb's Black Rage, and he agreed to do so. To justify his selection of Frank Michelman for the proposition about withered self-concept, the author explained that Michelman's statement was "so elegant."
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> Could inelegance of expression explain the absence of minority scholarship from the text and footnotes of leading law review articles about civil rights? (Delgado 1984:564–5).

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political and/or administrative machinations all editors of scholarly compilations must deal with. Any or all of these motivations playing some part in how the selections were made for this anthology should, in my view, result in some serious self-inquiry and analysis on the part of the law and society community, given how such anthologies may, fairly or not, impact the reputation and direction of their affiliated scholarly communities.

To be clear and specific, I am not suggesting that every member or affiliate of the community familiarize themselves with the critical race theory canon—after all, one of the great strengths of law and society is its range in interdisciplinary coverage. But given how many race crits and fem race crits in fact do present their/our work at the annual meetings, and given the great impact that critical race theory and feminism have had in and out of the law school classroom, it seems almost unimaginable that introductory readings on law and society would not include examples of such scholarship.

I finally conclude with two last questions, again from the perspective of an outsider to the law and society movement. If this reader represents a canon of introductory readings on law and society, what messages are conveyed about law and society as a field and community by the glaring absence of critical race voices in it? And, more important, do you/we care?

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