
Looking for Race in All the Wrong Places

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It has been my honor to serve as president of the Law and Society Association (LSA) for the past two years, and I am delighted to deliver this address as my term closes and as I turn over the reins to president-elect Michael McCann.

Let me begin my formal remarks today by acknowledging my mother, Eloyda Gonzales Gómez, and my son, Alejandro Gómez, who are here with me today. My mother is a veteran of many LSA annual meetings, not strictly by choice, but because she is a great mom, always willing to support my endeavors despite having a demanding job as an oncology nurse until she retired a year ago. Alejandro attended his first annual meeting, in St. Louis, when he was 17 months old. We have both benefitted from LSA-subsidized daycare many years running (though not lately). I can't say that he really wanted to come to another annual meeting (or to this luncheon), but I can assure you that the hotel's presidential suite was a big incentive.

I also want to recognize my father, Antonio Gómez, who is unable to join us here today. He was born at home, in a house without indoor plumbing, in Roswell, New Mexico, in 1941. The youngest of seven children, he was the only one who graduated from high school, but he followed two older brothers into the U.S. Army. Aided by the G.I. Bill, he later attended the University of

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New Mexico, where he earned a bachelor's degree in sociology while working full-time to support my mother, my brother, and me. In 1969, when I was five years old, we moved to northern California, where my father began graduate school at the University of California, Berkeley, among the first cohort of Chicano PhD students admitted to Berkeley's top-ranked sociology department. Two years later, he left Berkeley with a master's degree, and we returned to Albuquerque. I dedicate my remarks today to my father, for nurturing my sociological imagination even to this day.

As my predecessors have noted with some regularity, delivering this lecture is a daunting task, and perhaps especially so for a president who is junior to many who have filled this role in recent years.¹ It helps to see the smiling faces of teachers, mentors, colleagues, and friends in the audience.

My connections with LSA began with the 1990 annual meeting at the Claremont Hotel in Berkeley (coincidentally, the last time we met in the San Francisco Bay Area). Lawrence Friedman, my teacher at the time, suggested I attend the LSA's Graduate Student Workshop (GSW), but the student participants had already been selected. Somehow I persuaded the workshop chair, one Austin Sarat, to let me sit in without formal admission. I was hooked, immediately taking advantage of the student rate to join the association. I went on to attend two more Graduate Student Workshops (with formal authorization) and several of the early Summer Institutes (which have morphed into the Early Career Workshop now held at the same time as the GSW, immediately preceding our annual meeting). In these respects, I may be the first LSA president who is so definitively a product of the association's sustained investment in young scholars. So, if you don't like what I have to say today, you have only yourselves to blame!

I have been honored to serve this association as a trustee in the late 1990s, then as treasurer a decade ago, and now as president for these two years. As many of you know, in these various roles, I have been a squeaky wheel about issues of racial diversity in LSA, as well as issues related to the substantive place of race in law and society scholarship. I continue that tradition today.

LSA's founding generation included no people of color and only three White women—at least partly a reflection of the gender

¹ Austin Sarat both captured and compounded my sense of dread when he wrote the following in his own presidential address: "From my reading of prior Law and Society Presidential Addresses, it seems that to be 'presidential' an address (and the article from which it is taken) has to be bigger, grander, more significant than just any ordinary talk. It has to connect seamlessly with the theme of the annual meeting at which it is delivered. It has to comment on the state of the field, all the while evoking what law and society scholars have in common. Finally, it has to respect and honor the traditions of the field, yet point the way toward new directions for scholarship" (Sarat 2000: 7 (n. 8)).

and racial makeup of the professoriat at that time.² Today, I remain the only person of color ever to have served on the association's executive committee (a subset of the board of trustees that includes officers and one member of each trustee class who gets the most votes), though that number will double when Jeannine Bell assumes the office of treasurer in September 2011. More members of racial minority groups have served as general trustees—about 10 percent per class since 1991, the first year in which any people of color served on the board.³

In the late 1990s, I served a three-year term as trustee, overlapping at various times with Tracey Meares (Yale Law School), Margaret Montoya (University of New Mexico School of Law) and Alfonso Morales (Urban Planning, University of Wisconsin, Madison). Due to this critical mass of people of color, as well as the support of White allies on the board, we made significant progress on diversity issues during this era. These initiatives included creating a standing committee on diversity in 1999 (Erlanger 2005: 4), as well as the trustees' endorsement of a statement on racial diversity in 2000.⁴ In 2002, the LSA Executive Committee for the first time voted to sign on to an *amicus curiae* brief to the U.S. Supreme Court. It is notable that the committee took this unprecedented step on a matter of racial justice—voting to join the brief of the American Sociological Association, the Association of Black Sociologists, Sociologists for Women in Society, and the Society for the Study of Social Problems, which collectively supported the minority student interveners in the University of Michigan affirmative action cases.⁵ Around the same time, LSA trustees voted to accept the diversity committee's recommendation to begin collecting data on the racial self-identification of LSA

² In his 2005 presidential address, Howie Erlanger identified as "founders" 39 scholars on the 1967 membership roster; three were White women, and none were people of color (Erlanger 2005: 2).

³ For an early discussion of the problem of too few White women and people of color in the association, see Felice Levine's (1990) presidential address. Levine was LSA's first female president.

⁴ The statement, enacted by the board of trustees on May 31, 2000, reads as follows: "The Law and Society Association has long emphasized the value of racial diversity and endeavored to increase that of its membership and activities. Nevertheless, it remains a largely white organization. We believe it is time for more systematic and sustained efforts to increase minority participation. This applies not just to the Trustees (only one or two of whom have been racial minorities at any one time) but also to the content of meetings and publications and the membership of committees and groups that set our intellectual agendas, especially those shaping the Review, annual conference program, Graduate Student Workshop, and Summer Institute. If the Association is to attract and retain scholars of color, it must welcome the different intellectual agendas they may bring. We strongly believe that openness to new approaches, problems and methods of research and presentation will enrich the intellectual content of the Association. To make this happen, the leadership of core activities must be racially diverse" (<http://www.lawandsociety.org>; accessed on 11 Jan 2012).

⁵ The brief appears at <http://www.asanet.org> (accessed on 11 Jan 2012).

members (Mather 2003: 271 (n. 12)); this data showed that racial minorities comprised only 5 percent of the association's members in 2004 (Erlanger 2005: 4), and I would bet that percentage remains about the same today.⁶

Over the past 15 years, we have also made strides in what I call the substantive effort—as opposed to diversity initiatives related to inclusion—to make the study of race more central in law and society scholarship. These movements started in that same late-1990s era with thematic sessions of the Summer Institute that drew heavily on critical race theory.⁷ In 2000, when, in connection with the annual meeting held in Miami, the association first invited the formation of collaborative research networks (CRNs) under its auspices, several of us formed the CRN on Critical Research on Race and the Law. Over the course of the past decade, in particular, an increasing number of themes, plenary sessions, and regular panels at the association's annual meeting have highlighted racial inequality and/or critical race theory.

These trends blossomed under Carroll Seron's editorship of the *Law & Society Review (LSR)* from 2007 to 2010. *LSR*, published by the association, is one the leading peer-reviewed journals in the field. Carroll began her editorship with the intention of changing the content of the *Review* as well as the makeup of the editorial board. At a time when calls for color blindness and postracialism were the rage in both jurisprudence and politics (including academic politics, I might add), she enlisted four of us as associate editors, including two African-American women and a Latina. In addition to doing the regular work of the journal, we set out to create a special issue of the *Review* that would showcase scholarship on racial inequality. Carroll implemented her vision in three stages: in the first year, the associate editors met with her to brainstorm about a conference and special issue of the journal; in the second year, we convened two dozen scholars and a larger audience of scholars at the University of California, Irvine; and, in the third year, the *Review* published a special double issue featuring ten articles on race, six reviews of books on race and the law, and Rick Lempert's 2009 presidential address on racial inequality (Seron 2010; see *LSR*, Vol. 44, issues 3–4, 2010).

Over the past several years, the association also has, in partnership with the American Bar Foundation and the National Science Foundation (NSF), annually funded two predoctoral fellowships to

⁶ During virtually the same time period, the association has succeeded in increasing the presence of international scholars (now at about 35 percent of all members).

⁷ In July 2000, Margaret Montoya chaired the LSA Summer Institute at SUNY Buffalo on the topic "Race and the Law: Critical Discourses Exploring Law and Society Methods and Traditions."

graduate students researching issues of inequality and the law.⁸ This fellowship was modeled on a race-specific proposal to the NSF written by Laurie Edelman, Felice Levine, Lynn Mather, and me that was provisionally approved and then denied for political reasons (Erlanger 2005: 4). Laura Beth Neilsen and Bob Nelson later revised the original proposal to be race neutral and to focus on inequality scholarship, and we have just named our fourth cohort of fellows and applied for a five-year extension of funding from NSF.

Earlier in this luncheon we honored legal scholar and sociologist Osagie Obasogie as the inaugural recipient of the John Hope Franklin Prize for the best law and society article that explores race, racism, and the law (for more about the prize, see <http://www.lawandsociety.org>). This award comes only one year after the trustees approved the creation of this new prize, named for a prodigious African-American scholar of history and law. The trustees' hope is that this award will signal the growing importance of race and racism in the field and serve as a beacon to scholars of color who would consider becoming members of the association.

While we have made positive strides both in attracting scholars of color to the field and in fostering a sustained intellectual focus—by scholars of all races—on racial inequality and the legal system, we still have a long way to go. In this address, I contend that we need to do much more to incorporate race and racism into the core of what we think and write about as law and society scholars.⁹

The convergence of four developments suggests that the United States may be in the midst of unprecedented transition in race relations. Thus, it is an especially auspicious time for us, as students of legal processes and legal institutions, to recalibrate our research in order to take account of race and racial inequality.

First, among social scientists and many scholars in other scientific areas, there has been a coalescence of the powerful idea that race is socially constructed, yet there is little sense of how that insight should affect research design. (I will say more about this below.) Second, the full impact of the post-1965 lifting of racial restrictions on immigration to the United States has been realized over the past two generations. The result has been an increasingly diverse non-White population that includes rapidly expanding numbers of Latinos and Asian Americans, in addition to African Americans and

⁸ <http://www.lawandsociety.org/fellowship> (accessed on 11 Jan 2012).

⁹ For a similar call, see Dianne Pinderhughes's recent presidential address to the American Political Science Association. She urges political scientists to "begin to consider race in a complex way, in the same ways we consider the American founding, international relations, and the way we address the importance of constitutional issues" (Pinderhughes 2009: 4).

Native Americans.¹⁰ Models of racism, racial identity, and racialization based on White subordination of African Americans may be ill suited to describe or to explain the current racial reality. Third, we are in the midst of a political retrenchment from antidiscrimination laws and policies enacted as a result of the civil rights movement of the mid-20th century.¹¹ Since this retrenchment is occurring in all facets of the legal system, it is incumbent upon sociolegal scholars to grapple with it in a meaningful way. Finally, since the election of President Obama in 2008 we have increasingly heard calls for postracialism, both as a description of the new racial reality and as a social ideal.¹² Instead, we might well see Obama's election and the subsequent racial dynamics as entirely consistent with how analysis of how contemporary "color-blind racism" produces *both* post-civil rights minority politicians *and* racial subordination (Bonilla-Silva 2010: 233; see also Haney López 2010, 2011).

Given the convergence of these trends, it is an opportune moment for scholars of race, racism, and the law, and in that spirit I offer some ideas for how we might more robustly incorporate race and racism into our research agendas. I make three arguments. First, law and society scholars have not made race a central concern. Second, advances in the social sciences and critical race theory related to reconceptualizing race as socially constructed have important implications for how we should conduct sociolegal research on race. In the third and final section of the paper, I suggest how sociolegal scholars might more fruitfully approach research on race and racism.

While these modest proposals are targeted at all of us—as researchers who make decisions about what topics to study, with whom to collaborate, and how we design future research projects—I want to say at the outset that my remarks are particularly aimed at those of us who are in the business of producing and evaluating scholarship, which is to say, all of us. Even if you will not be the person who, after listening to my speech today, takes to heart one or more of my ideas and engages them in your next research project,

¹⁰ Nearly five decades after the passage of the Civil Rights Act of 1964, the racial makeup of the United States has changed dramatically. In 1960, Whites were 85 percent of the population, whereas at the turn of the century Whites were 64 percent of the population, with Latinos being 16 percent, non-Hispanic Blacks being 12 percent, Asian Americans being 5 percent, and 3 percent being Native Americans and self-designated mixed-race people. By 2050, the percentage of Whites is projected to drop to less than 50 percent of the U.S. population. See <http://www.pewhispanic.org/files/reports/85.pdf>; <http://www.pewhispanic.org/2011/03/24/appendix-additional-charts-and-tables>; and <http://www.pewhispanic.org/2009/02/11/us-population-projections-2005-2050>.

¹¹ For a sampling of work that makes this point, see Crenshaw (1988); Harris (2000); Johnson (2002).

¹² See Barnes (2009); Bell (2010); Carbado (2010); Bobo et al. (1997); Lempert (2010: 440–441).

you will be a journal editor, a peer reviewer of journals or grant applications, and a reviewer of scholarship at the hiring and promotion stages. In these ways, we are all gatekeepers to academia, and my talk is intended to awaken all of us to the need for both more and more rigorous research on race and racism and the law.

Law and Society Scholars Have Not Made Race a Central Concern

By and large, law and society scholars have not made race, racism, and/or racial inequality a central concern. This is counter-intuitive given the field's origins as deeply committed to a scholarly agenda that promotes social justice and the amelioration of inequality (Gómez 2004: 455).¹³ In a recent review essay, Rick Abel reports that early issues of the *Law & Society Review* focus on condemning racial discrimination. For example, a 1968 issue of the *Review* is dedicated to Arnold M. Rose, who assembled the social-science appendix cited by the U.S. Supreme Court in *Brown v. Board of Education* and who collaborated with Gunnar Myrdal on the seminal work *An American Dilemma* (Abel 2010). Volume 2 (1967) of the *Review* features a collection of eight case studies from northern cities presented together with the editor's special introduction, "Affirmative School Integration: Efforts to Overcome De Facto Segregation in Urban Schools" (O'Barr & Layish 1997: 634 (note 4); Abel 2010: 3, 5).

In one review of the field, Carroll Seron and Susan Silbey likewise note that research on inequality and legal processes has been central in the law and society canon, which they divide into six subcategories of law and society research: courts, disputing, legal profession, juries, policing, and administration law and regulation (Seron & Silbey 2004: 30, 36). Their review of the literature shows the more general trend: while law and society scholars tend to be deeply concerned with inequality in a general sense (such as the contest between the haves and the have-nots and the powerful versus the powerless that characterize many studies of the law in action), they have not been centrally concerned with *racial* inequality.¹⁴ For example, reflecting the state of the field they survey, Seron

¹³ In their presidential addresses to the association, several past presidents have noted that a central goal of the law and society project is to promote social justice (Handler 1992; Merry 1995; Engel 1999; Munger 2001; Calavita 2002; Erlanger 2005; Feeley 2007; see also Abel 2010: 19; Garth & Sterling 1998).

¹⁴ This is not to say that law and society scholars have been particularly concerned with class-based or gender-based inequality either, but those two topics have been more prominent in the literature than race-based inequality. At least one review suggests that none of these three topics were particularly compelling ones for authors who published in *LSR*

and Silbey directly reference race in only one sentence of their 29-page article (2004: 46).

Several analyses of the leading sociolegal journals bear out this pattern. Based on a 1997 content analysis of the first 30 volumes of the *Law & Society Review*, O'Barr and Layish found that race or gender is a central theme in articles an average of only zero to once per entire journal *issue* (1997: 634). Finding a small number of journal issues in which either race or gender receives more attention, they conclude that these instances were the results of an editor's decision to devote special attention to these topics or related themes (1997: 634). They conclude that, after the already-mentioned 1967 and 1968 issues that feature school desegregation, there was "a 30-year lull" on race in *LSR*—a silence they say was not broken until 1992 under Frank Munger's editorship (O'Barr and Layish 1997: 634 (note 5)). Similarly, gender does not appear as a significant topic in the pages of *LSR* until the 1990s (1997: 634). O'Barr and Layish conclude that "substantial treatment [of race or gender in the *Review*] resulted only when someone made a concerted, affirmative effort to organize and administer a special issue to examine them" (1997: 635).

In a more recent content analysis that includes the era in which critical race theory blossomed in the legal academy, I found a parallel pattern when I reviewed a decade's worth of issues of *LSR* and *Law and Social Inquiry* (1990–2000): only 9 articles in 40 issues of *LSR* and 15 articles in *LSI* feature race over the course of the entire decade (Gómez 2004: 456) (though I do note that *LSI* includes seven articles in a special issue devoted to affirmative action in 2000). Osagie Obasogie conducted an analysis comparing *LSR* to the leading U.S. law reviews in terms of their publication of articles about race and/or racism (2007). He looked at nearly two decades of publication data beginning in 1985, when critical race theory first emerged. *LSR* published fewer articles on race than all but two of the top 20 law journals (Chicago and Northwestern). As a percentage of articles published, less than 5 percent of the *LSR* articles concern race, compared to an average of two percentage points higher for the top 20 law reviews, and compared to an average double that for three California journals (Stanford, Berkeley, and UCLA), whose race articles comprise 9 to 11 percent of their total published articles for that period.

Aside from the two special issues of the *Review* published in 2010 by Carroll Seron, more recent publication data suggests that the field's engagement with race is not improving. For example, my review of the first five volumes of the *Annual Review of Law and*

(O'Barr & Layish 1997: 635 (noting, however, that they may not have effectively measured class-based inequality as a central focus of authors)).

Social Science (2005–2009) found that, of 16 to 19 review essays in each volume, at most one or two articles raise race in a central way (judging by essay titles, keywords, and content). Only in the most recent volume, 2010, does this pattern vary, with 6 of 31 review essays dealing with race or racial discrimination. In his review of more than 600 articles published in *LSR* in its first 13 years (1966–1979) and most recent 13 years (1996–2009), Rick Abel concludes that race is addressed relatively rarely and mostly in the context of analyses of bias in the criminal justice system (2010: 5, 14). Given who we are and what we say we do, it is surprising and disconcerting that race has not been featured more centrally in sociological research.

The Social Constructionist Turn in Race Scholarship

A second, distinct problem is that, when they have taken up race, law and society scholars have tended to conceptualize race narrowly as phenotype and have tended to measure race rather crudely via subject self-identification (Obasogie 2007: 459).¹⁵ I have previously argued that, too often, law and society scholars have somewhat carelessly incorporated race into their research by treating it as “a readily measurable, dichotomous (black/white) variable that affects law at various points,” rather than in a more complex way (Gómez 2004: 453; see also Gómez 2010: 488). In their study of a sample of more than 1,000 articles published in the *American Sociological Review* between 1937 and 1999, Martin and Yeung confirmed the same pattern: as quantitative analyses increased in sociology (regression methods in particular), race was increasingly used as a control variable, but usually with little effort by researchers to justify why or to articulate a particular conception of race (2003). They conclude,

The decreased costs [methodologically] of taking race into account may have helped legitimate a standard procedure in which race tended to be examined, thus increasing the propensity to take race into account even further . . . [but to] simply add race as a control variable in a regression model . . . implies that, while race makes a difference, it is not a profound one, in that race does

¹⁵ Not that law and society scholars are alone in this regard. Many fields and subfields of social science scholarship have been similarly criticized as having one or both of these deficits (see Gravlee & Sweet 2008 [medical anthropology]; Harrison 1999 [cultural anthropology]; Helms 2007 [psychology]; Jones et al. 1991 [epidemiology]; Lee, C. 2009 [biomedical research]; Lee, T. 2009 [political science]; Martin & Yeung 2003 [sociology]; Morris 2007 [sociology]; Mukhopadhyay & Moses 1997 [cultural anthropology]; Saperstein 2008 [demography]).

not affect the relationships between other variables (Martin & Yeung 2003: 532).

Consider, in our own field, the body of work on racial bias and the criminal justice system (including prosecution, sentencing, policing, death penalty sentences, and so on). In these usually quantitative studies, race is studied as an independent variable that shapes a particular legal outcome (e.g., arrest, incarceration, or death sentence as the dependent variable). These types of studies have played an important role by contributing to a critique of liberalism by revealing large cracks in law's veneer of neutrality and fairness. These articles also have been important because they have been some of the most relentless law and society studies to seek to influence policymakers. But, as Murakawa and Beckett have recently noted, they have also helped obscure how "the [contemporary] policies and practices of criminal justice expand in ever-more race-laden ways" even as such policies and their implementation are facially race neutral (2010: 696).

Looking at these studies as a group (my criticism is not directed at particular studies, but at the broader subfield), they have had several unintended consequences. For one thing, by measuring race as a dichotomous variable (Black or White; White or non-White), usually based on either bureaucratic assignment (racial assignment by someone collecting government data, such as a prison intake clerk) or self-identification from a limited list of options, these studies have contributed to the idea, accreted over time, that race is fixed (Murakawa & Beckett 2010: 698). For example, scholarship on health disparities often fails to operationalize race in a complex way, such that researchers tend to reflexively use race as a proxy "for some unspecified combination of environmental, behavioral, and genetic factors," which has the negative effects of both obscuring the actual cause of health outcomes and promoting the falsehood that racial differences are genetic and innate (Gravlee & Sweet 2008: 49). The idea that race is fixed, in turn, leads to the erroneous idea that it is easily measurable in scientific research.¹⁶

This common approach contradicts two tenets of critical race theory.¹⁷ Notably, critical race theory itself builds on understand-

¹⁶ In this respect, scholars' frequent but unremarked upon use of race (especially as an independent variable) mimics the social phenomenon of "being repeatedly asked to report our race," as sociologist Ann Morning has noted: it implicitly "casts race as a permanent and individual characteristic: something that is embedded within us and [that] does not change over time" (2011: 3-4).

¹⁷ Critical race theory emerged in the legal academy in the mid-1980s. Whereas antidiscrimination law scholars conceive of racism and racial discrimination as individualized, aberrational, and largely capable of redress via legal interventions, critical race scholars view racism as institutionalized and endemic, and therefore as frequently immune

ings of race developed by sociologists and anthropologists in recent decades, and particularly on the groundbreaking book *Racial Formation in the United States* by Michael Omi and Howard Winant (1994). One of the central moves that critical race theory scholars have made is to study race as the object of study—the dependent variable—and law as the independent variable. I have argued elsewhere that it is fruitful instead to see various dimensions of race and various dimensions of law as mutually constitutive (Gómez 2010; see also Haney López 2007: xviii). In other words, race itself is made meaningful by law, and law writ large is a reflection of racial-classification systems, racial ideology, and racial inequality. If the only way race enters the analysis is as an independent variable, much of the complexity and power of race is lost.

A second claim from critical race theory is that race is socially constructed and therefore contingent and dynamic, rather than fixed. To say that race is socially constructed is to acknowledge that we use phenotype or other visible characteristics to sort people into social groups, that we impute qualities of good and bad to these groups, and that the resulting racial order structurally and ideologically supports a system of racial stratification that is socially contingent and historically rooted (Omi & Winant 1994; see also Gómez 2004: 490 (summarizing the critical race theory literature on the social construction of race)).¹⁸

The Significance of Viewing Race as Socially Constructed

The claim that race is socially constructed has relevance at various levels of analysis. For example, in my research on Mexican Americans in the 19th century I have examined how a racial group is sorted into the Anglo-American racial order at the macro level and how law as both structure and ideology positioned Mexican Americans as legally White and, simultaneously, as socially non-White and racially subordinate (Gómez 2007). The social constructionist argument is important at the micro level as well, in that it acknowledges that race is dynamic over the life course and that it varies situationally.

Consider a study by Aliya Saperstein and Andrew Penner using a national, random sample of almost 13,000 Americans (the National Longitudinal Survey of Youth) to explore whether racial percep-

to antidiscrimination law and policy (Gómez 2004, 2010: 488; for a review of critical race theory, see Gómez 2004).

¹⁸ Omi and Winant define race as follows: “race is a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies. Although the concept of race invokes biologically based human characteristics (so-called ‘phenotypes’), selection of these particular human features for purposes of racial signification is always and necessarily a social and historical process” (1994: 55).

tions were, in fact, fixed or fluid (Penner & Saperstien 2008; see also Saperstein & Penner 2010). Respondents were interviewed annually over two decades. In 1979, when they were between 14 and 22 years of age, and again in 2002, when federal demographic standards changed, they were asked to self-identify their races (2008: 19630). Penner and Saperstein used these responses to code the subjects as “White,” “Black,” or “Other” (2008: 19630). In addition to this measure of racial self-identification in the data set, over the course of 19 annual interviews, interviewers were instructed to classify the subjects’ race at the end of the interview session, using the categories “White,” “Black,” or “Other” (2008: 19629–19630). If race were fixed and rooted in objectively understood phenotypes, we would expect little change in the interviewer-ascribed races of the 13,000 respondents. Instead, 20 percent of individuals experienced at least one change in how interviewers classified them (19628).¹⁹

My initial reaction to the results was to speculate that the substantial variation in racial assignment might be attributable to the data set’s problematic racial options—White, Black, and Other. Specifically, we could expect that there would be significant change, between 1979 and 1990, in how Latinos, Native Americans, and Asian Americans would be classified by largely White interviewers (84 percent of the interviewers self-identified as White). While this explains some variation, the more interesting findings relate to respondents whose interviewer-assigned races alternated only between White and Black (whereas my hypothesis focuses on those moving in and out of the “Other” race category). Penner and Saperstein found that, even when controlling for a wide array of possible factors, three characteristics of the respondent stood out as statistically significant predictors of the interviewer’s change from White to Black racial classification: incarceration, unemployment, and income below the poverty line.

At one level, this shouldn’t be at all surprising: we know that African Americans are overrepresented among those incarcerated, unemployed, and poor, relative to their numbers in the population.²⁰ Moreover, we know that endemic and enduring social

¹⁹ Penner and Saperstein ruled out coding mistakes by comparing the 6 percent annual change in interviewers’ racial classifications compared to the 0.027 percent annual change in coding for gender.

²⁰ In his 2009 LSA presidential address, Rick Lempert noted that the household income gap between Whites and Blacks has increased since 2000 (2010: 443); that the White-Black wealth gap was persistent despite changes in antidiscrimination law and policy (2010: 445–446); that in 2007 Black males were six times as likely as White males to be entangled in the criminal justice system despite the fact that two-thirds of those arrested for crimes in 2007 were White (2010: 447); and that from 1972 to 2007, Blacks had an unemployment rate at least twice that of Whites (2010: 448). Comparable data for Latinos is not readily available given the challenges with collecting data on the group due to differences over time and across data sets in how Latinos are defined and counted. In

stereotypes and media images culturally associate Black status with incarceration, unemployment, and poverty. But let's understand precisely what the statistics tell us: they show that knowing one of those facts (about incarceration history, unemployment status, or poverty status) changed how an interviewer classified the study participant's race as White or Black. Therefore, they reveal that racial assignment is not fixed, but instead a product of a complex interaction among situational factors. This finding has tremendous implications for how social scientists and other researchers typically measure "race." Rather than being easy to measure, race is quite the opposite; it is not so easily captured by the typical measures we use in social-science research. This is so because racial status is dynamic and situational: rather than being fixed at birth, life has any number of feedback loops that can change one's race at the level of individual interactions, at the level of how organizations and communities operate, and at the level of society-wide structure and ideology.

The view that race is socially constructed has become the dominant approach in the social sciences (American Anthropological Association 1998; Almaguer & Jung 1999; American Sociological Association 2003), and the idea has gained traction in many other fields and even in popular discourse.²¹ Indeed, proponents of a color-blind perspective have embraced the constructionist view of race in both law and popular culture. According to this color-blind worldview, the fact that race is socially constructed means that race is not "real," and therefore that race should never be the basis of government policy, such as affirmative action. This position is based on a deep misunderstanding of one of the basic premises of sociology and anthropology: the fact that how we collectively understand the world powerfully shapes how we interact in it and therefore reality as we know and experience it (Berger & Luckmann 1967). In her LSA presidential address, Laurie Edelman put it this way:

addition, such aggregate data should be questioned because it almost always includes Cuban Americans, who, though a small proportion of Latinos overall, are an exceptionally high-income, high-wealth national origin group (see "Cubans in the United States," 2006: 4 [stating that Cuban Americans have a higher income and higher wealth than non-Hispanic Whites]). Lempert's data do not reflect the current recession, which has disproportionately penalized Blacks and Latinos: since 2005, inflation-adjusted median wealth has fallen by 66 percent for Latino households, by 53 percent for Black households, and by 16 percent for White households (Fry et al. 2011).

²¹ In her study of how college students conceptualize race, sociologist Ann Morning found that a social constructivist approach to race was one of three dominant approaches (the other two being a biological conception of race and a cultural conception of race) (2009: 1171). At the same time, Morning's later scholarship contends that, among scientists, the social constructionist conception of race has by no means completely displaced essentialist views of race rooted in biology; an essentialist view of race as rooted in biology remains alive and well in many contexts (2011: 6, 38–47, 221).

Ideas, norms, and rituals evolve at the group or societal level and help to constitute individual identities, needs, preferences, and behavior. Individual action cannot be understood apart from the social environment that gives meaning to that action. Both “preferences” and market behavior are governed by taken-for-granted notions of what is natural, right, and rational (Edelman 2004: 186).

With respect to race, enduring notions about the biological basis for race support and interact with other racial ideas to create this taken-for-granted, natural world in which racial identity and racial categories persist, in which we routinely (and often, but by no means always, without thinking) classify people whom we encounter into racial categories, and in which we make a host of decisions (conscious and unconscious) based on those categorizations. The fact that biology—or what we often use as proxies for biology, such as ancestry, phenotype, and genes—is seen as related to race and even, in many people’s contemporary understandings of race, what produces racial difference, is indeed an important part of the social meaning of race.

Yet biology is no less socially constructed, as sociologist Troy Duster has noted, emphasizing that the social meanings of race and racial interactions themselves have “feedback loops” into the biochemical, neurophysiological, and cellular aspects of bodies that can just as readily be studied scientifically (Duster 2003, 2004). In other words, when human beings define situations as real, those situations can and often do have real social and biological consequences, which can be translated into social facts that we as researchers can attempt to study and understand. Thus, it is notable that saying race is socially constructed is not the same as saying that biology is irrelevant to race. From a constructivist perspective, however, the focus should be on how biology matters—on how biological factors interact with social and cultural context (see Gravlee 2009).

Suggestions for Law and Society Research on Race and Racism

I hope I have persuaded you that conceptualizing race as socially constructed is descriptively compelling and theoretically rich. The agenda for the next generation of empirical research on race, racism, and the law should be to grapple with the gap between how race is theorized and how we operationalize race in empirical research. Our ultimate goal should be to measure race better and to do so in ways that reflect our theoretical understanding of race and racial dynamics as complex and rooted in historical and social processes. In this section, I try to answer a straightforward ques-

tion: how would it shape our research as sociolegal scholars if we were to take seriously the claim that race is socially constructed?

My ideas in this section draw liberally from the collective synergy of two ongoing intellectual collaborations in which I currently participate. One is Osagie Obasogie and Joan Williams's Working Group on Critical Race Theory and Empirical Methods, which has met twice at the UC Hastings School of Law and which will meet again in April 2012 at UC Irvine. The group has brought together scholars from critical race theory based in the legal academy, social scientists who study race, and some scholars with a foot in each group to discuss how these boundaries could fruitfully be crossed to produce better scholarship.

The other is my multiyear collaboration with University of New Mexico sociologist Nancy López, with whom I founded the Institute for the Study of "Race" and Social Justice, housed in the Robert Wood Johnson Foundation Center for Health Policy at UNM (see the institute's Web site at <http://healthpolicy.unm.edu/node/486>). We have convened several forums and workshops to explore how to most effectively address the gap between the conceptualization of race as socially constructed and the tendency to operationalize it as biologically rooted and fixed (see the above Web site for our working group's "Trans-disciplinary Guidelines for Researching 'Race,'" August 2010). In all of our efforts we have strenuously sought to cross disciplinary, scientific, and methodological lines, including our April 2011 workshop supported by the National Institutes of Health: Mapping "Race" and Inequality: Best Practices for Theorizing and Operationalizing "Race" in Health Policy Research.²²

The growing consensus among social scientists 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.²³ By failing to conduct more robust research on race during a period in which racial dynamics appear to be shifting immensely, we risk ignoring the scientific opportunity to capture how race is changing—perhaps in different ways for different racial groups (Lee, T. 2009: 119). In that spirit, I offer some modest suggestions to help shape a research agenda focused on race in the field. These suggestions come under

²² Selected papers from the workshop will be published by Rutgers University Press in 2013 in a volume tentatively entitled *Mapping "Race": Critical Approaches to Health Disparities Research*, edited by Nancy López and me.

²³ I am mindful of overstating the level of consensus given Ann Morning's recently reported findings about the continuing adherence to essentialist conceptions of race among biologists teaching in colleges and universities (2011: 104). Additionally, a host of recent studies of the turn to race in genetics, biomedicine, and pharmacology suggests that we may be in a moment when race is being reinscribed as biologically (or genetically) fixed (see Abu El-Haj 2007; Duster 2003, 2004; Kahn 2004; Montoya 2011; Roberts 2011).

three general headings: (1) study race as process, rather than as outcome; (2) embrace the comparative study of race and racism (understanding *comparative* in multiple senses); and (3) avoid merely using race as a control variable in favor of a more nuanced approach.

Study Race and Racism as Process

We should study race as process, not merely as outcome. For example, more research should focus on examining, understanding, and reaching generalizations about processes of racism, racial discrimination, and/or racialization. Racialization refers to the social process by which a racial group comes to exist and to understand its position in the racial hierarchy as superior or inferior, and by which others in society come to understand that racial hierarchy as natural (Gómez 2007: 2). The idea here is that we take for granted too many assumptions about race without really understanding the social *processes* that we often label, in shorthand fashion, as “race.”

For example, how does the current anti-immigrant climate shape how Mexican Americans see themselves in racial terms and in the American racial hierarchy? Does that climate affect first-generation Mexican and Central American immigrants in the same way that it affects Mexican Americans who have been in the United States for multiple generations? How does the larger context of anti-immigrant rhetoric and reality (almost always fomented against undocumented Mexican immigration) shape how non-Latino racial groups see Latinos and see themselves in the American racial hierarchy? How will the large number of anti-immigrant state and local laws be implemented by police and courts, and how will those legal processes affect Latinos’ racialization? These kinds of questions take on new urgency with the passage of S.B. 1070 in Arizona in 2010 and the 2011 opinion in *Chamber of Commerce v. Whiting*, in which the U.S. Supreme Court upheld a 2007 Arizona law that imposed hiring restrictions that deviated from federal law.

Moreover, we should not fear acknowledging the social-justice dimensions of our work: many of us are interested in race because we are antiracist and seek a just society in which racism plays a lesser role. Ultimately, this means that we must more frequently study *racism* rather than race and develop ways to study racism as process. Epidemiologist Camara Jones counsels that “it is vitally important that we develop a detailed understanding of the characteristics and manifestations of racism,” including institutionalized racism, personally mediated racism, and internalized racism (Jones 2001; see also Feagin 1999: 203, calling for reconceptualizing racism as

“white racial domination”). In recent decades cultural anthropologists have produced some of the richest research in this regard (see Harrison 1995; Mukhopadhyay & Moses 1997; Mullings 2005).

Let me mention two excellent examples of law and society studies that approach race as process rather than as outcome. Sociologist and legal scholar Osagie Obasogie’s 2010 article in the *Law & Society Review* draws on art history and visual culture to frame an inquiry about how social interactions produce racial categories and racial recognitions. He proposes that social practices give rise to particular kinds of understandings about race, such as the idea that race is based on visual cues. He interviewed samples of blind and sighted people to explore how they, literally, see race. Instead of taking it for granted that race (and racism) are rooted in *seeing* visual cues like skin color and facial features, he asks, Do blind people see race? In his book *Racism on Trial: The Chicano Fight for Justice*, legal scholar Ian Haney López explores how “common sense racism” comes to exist as ideology and practice in the context of California superior court judges’ assembly of grand juries in the 1970s (2003). Haney López provides a rich theoretical framework and applies it to a particular empirical case, but his work warrants empirical testing in other instances of racialization and race-ideology making, particularly as they involve the state’s powerful role in producing race and racial subordination (see also Almaguer & Jung 1999: 214–215).

Conduct Comparative Research on Race

A second recommendation is to do more comparative research on race.²⁴ I invoke the word *comparative* in three distinct senses: comparisons across racial groups, comparisons exploring heterogeneity within a racial group, and cross-national comparisons. First, we should design more studies that deliberately compare race, racism, and racialization dynamics across racial groups (including Whites and subgroups of Whites). I illustrate the point with two examples from recent books in law and society (see also Goodman 2008). In her recent book on 19th-century British Columbia, sociologist Renisa Mawani explores coexisting “state racisms” directed at different non-White groups (including mixed-race people), as well as how these distinct racisms work in a coordinated fashion to support White supremacy (Mawani 2009). Kehaulani Kauanui’s book *Hawaiian Blood* looks at the early-20th-century Hawaiian racial order that included Whites, Native

²⁴ The usual cautions about high-quality research that avoids superficial comparisons applies. In particular, historically-grounded comparative research is needed.

Hawaiians, Asian immigrants, and a large racially mixed population (2008). In 1921 Congress enacted the Hawaiian Homes Commission Act, mandating a 50 percent blood quantum rule that made only those Native Hawaiians with half or more Native Hawaiian ancestry eligible for homesteads. While the redistribution law certainly helped some Native Hawaiians, overall, it left a great deal of land in the public domain and thus available to be leased by sugar plantation owners and other elites (Kauanui 2008). Our understanding of race, racism, and the state is considerably altered and deeply enriched because these scholars deliberately studied multiple racial groups (including multiple non-White groups) in a particular time and place.

A second type of comparative orientation would be research that explores within-group heterogeneity. We should not assume homogeneity within a racial group, but rather test for it. To illustrate, let me take you to southeastern Puerto Rico, where a team led by anthropologist Lance Gravlee set out to explore the connections between hypertension and race and, specifically, the claim that Blacks are more likely than Whites to experience high blood pressure and associated health problems (see Gravlee & Dressler 2005; Gravlee et al. 2005). They engaged in a three-stage, multimethod research design. First, using ethnographic methods, they assessed social norms about color and race in Puerto Rico. Second, using interviews and surveys, they measured those ideas in the subject sample. And third, using reflectometry, they objectively measured subjects' skin pigments.

Gravlee and his colleagues conclude that “both self-rated and culturally ascribed color—but not skin pigmentation—were associated with blood pressure through an interaction with income and education” (2009: 54). In other words, middle- and high-income people perceived by others as Black were more likely than those with objectively darker skin tone (as measured by the reflectometry test)—or those who were perceived as Black but who had low incomes—to have hypertension. The findings suggest many public-health questions about how we ought to think about identifying those at risk for high blood pressure and treating the disease. They also suggest that much more research needs to be done to explore the dynamics of race-based micro-aggressions and structural racism that affect the mental and physical well-being of people of color in ways that we are only beginning to understand. In this respect, the burgeoning legal consciousness literature in law and society is one place where these kinds of issues could be richly pursued. The Puerto Rico study provides a powerful illustration of the idea that racial dynamics should not be presumed to be the same for a single racial group—however we might define that group or assign members to it in a particular study. Instead, the complex,

situational nature of race means that researchers should build intragroup difference into their models and explore them accordingly.²⁵

Third, we should do comparative research in the more traditional sense as well: comparing how race and racism operate in different national legal systems. In his presidential address a decade ago, Frank Munger noted the global turn in law and society scholarship and predicted that it would coincide with a renewed interest in “power, class, race, ethnicity, and religion” (Munger 2001). While the tendency has been to see research on race as a parochial, U.S. concern, recent scholarship suggests that racism and racial conflict are global phenomena that are themselves increasingly transnational in nature (see Candelario 2007; Cobas et al. 2009; Levin 2008; Winant 2005).

Avoid Using Race as a Proxy in Favor of More Complex Approaches

Let me now turn to some comments about how we might more effectively operationalize race in empirical research. While it may seem that I am singling out quantitative research in this section of my remarks, I am thinking about how we operationalize “race” in terms of the full range of methodological traditions. The problem of measurement is by no means limited to quantitative analysis. Sociologist Edward Morris argues for “greater transparency in how race is measured in qualitative studies and increased reflection on this concept as it is socially situated” (2007: 411). It is not enough, he contends, simply to declare that race is a social construction; he urges scholars to go further by expressly acknowledging “how they choose to identify race as well as recognizing the limitations of this choice and being attentive to the enactment of race in a particular context” (Morris 2007: 422).

In other words, scholars who include race as a facet of their studies (whether a major or minor facet) should deliberately conceptualize race and also consider how race was conceptualized (expressly or implicitly) by researchers who created the data set they are using, as applicable. We should not assume that what “race” means is obvious or that there is consensus about a particular conception of race. In fact, we should make the opposite assumption: what “race” means is highly contested in popular culture, politics, law, and science. As already noted, Ann Morning’s research found three dominant popular conceptions that include a biological notion

²⁵ Two recent, important studies, for example, look, respectively, at differences due to skin color and generation of immigration (or ancestors’ generation of immigration) among Mexican Americans. (See Hersch 2011; Telles & Ortiz 2008.)

of race and a culture-based notion of race, as well as the idea that race is socially constructed (Morning 2009). Moreover, she found that people did not hold one conception of race to the exclusion of others, but instead moved back and forth among the three conceptions in order to explain different situations in which they encountered race. In a similar way, many scholars have noted that the U.S. Supreme Court and other sources of law move back and forth among several conceptions of race, even within a particular time period or doctrinal area (see Gotanda 1991; Haney López 1996; Pascoe 2009).

Without making a conscious effort to do so, scholars are no more able to put aside folk notions of race than are laypeople. As Morning contends, “Despite the special authority that scientists enjoy, their beliefs are by no means independent of the broader society in which they train and practice. If lay people are influenced by what ‘experts’ say about race, the reverse is true too: scientific notions of race are informed by the broader political and social currents of their times” (Morning 2011: 4; see also Almaguer & Jung 1999: 234). In the context of the contemporary assault on race-conscious law and policy and the entrenchment of color-blind ideology in law and politics, it becomes all the more important for scholars to make clear the conception of race that they employ. Research that fails to expressly define race implicitly endorses a notion of race as a micro-level characteristic that is both fixed and biologically rooted—a position that fits uncomfortably with a full-bodied conception of race as socially constructed.

While such problems certainly transcend methodological orientations, there do appear to be particular limitations with the tendency, in quantitative research, to use race as a control variable or as a crude proxy for some other social fact or process. Political scientist Taeku Lee has characterized the fundamental problem succinctly: “Although we acknowledge that race, like ethnicity, is a social construct marked by fluidity, multiplicity, and contingency, we continue to measure racial and ethnic identities as fixed, categorical variables” (Lee, T. 2009: 113). He has been most critical of his own brand of quantitative political science—“multivariate statistical models in which some political variable of interest is explained by including a dummy variable for a given racial/ethnic category” (Lee 2008: 462)—because it presents three methodological problems. First, this logic implies that racial self-identification (typically how race is operationalized in such studies) influences the dependent variable, without any explanation or justification (Lee 2008: 462). Second, it assumes that racial self-identification does not covary with other independent variables considered (Lee 2008: 462). This assumption is frequently unwarranted because race often affects multiple independent variables in complex ways. For instance, consider the relationship between race and educational attainment or

race and measures of social class such as income. Third, such research typically fails to consider how the race variable could be unreliable and invalid because of such factors as how the subject's racial self-identification might vary depending on the race of the person asking the question (same or other race as subject), the place where the question was asked (home, work, or school), the language of the question, and other such circumstances (Lee 2008: 463).

The lesson here is that researchers of all methodological stripes must be attentive to how they conceptualize race and then transparent about how that conceptualization is or is not reflected in terms of how race is measured, whether in a qualitative, quantitative, or mixed-methods context.

Conclusion

The title of my address—"Looking for Race in All the Wrong Places"—invokes one of those sad country songs not unlike those I regularly hear on the radio in New Mexico. I'll resist the temptation to sing to you, and instead just read one verse of the lyrics.

I was looking for love in all the wrong places,
 Looking for love in too many faces
 Searching your eyes, looking for traces
 Of what I'm dreaming of
 Hoping to find a friend and a lover²⁶

Despite this wistful refrain, the song ends on a happy note, with the searching singer finding the friend and lover he had dreamed about. I'm afraid I cannot promise you that you will find a friend and a lover, in the event that you try out some of the suggestions I have made here today.

But I hope that I have convinced you of a few things. I have argued that law and society scholars have not sufficiently studied race and racism, and I have urged you to help change our course. The first step should be to take seriously what it means to conceptualize race as socially constructed, with all the complexity and messiness that entails. We should then take that conception of race seriously in our research, adjusting what we study when we study "race" and adjusting how we study race empirically.

Akin to the protagonist in the song, perhaps we law and society scholars have been looking, not so much in the wrong places for

²⁶ The song was written by Wanda Mallette, Bob Morrison, and Patti Ryan and was popularized in the 1977 movie *Urban Cowboy*. It was performed for the movie by country singer Johnny Lee and released in 1980 as a single, when it reached the number 1 spot on the country charts (<http://wikipedia/lookinforlove>).

race, but looking in the wrong way for race in sociolegal research. I have used this occasion to share these ideas because I have tremendous faith in our collective intelligence, energy, and commitment both to scholarly research and to social justice. Together, I think we can find our way to a richer understanding of race, racism, and the law that eventually moves us closer to the antiracist society that we hope to build for future generations.

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