Law & Society REVIEW

Foreword

Carroll Seron, Editor, *Law & Society Review*

When I was asked to serve as editor of *Law & Society Review* (*LSR*), I proposed to the search committee and the Law & Society Association (LSA) that I would organize a Special Issue around the theme of law, race, ethnicity, and inequality in the United States. I proposed this topic because I feel that it is important for LSA to "check in," as it were, with a theme of sociolegal scholarship that guided the formation of LSA (also see Moran's article in this issue). While LSA members often collaborate with colleagues on global developments in law and society, I felt it appropriate to take a moment to focus on the local.

I asked Associate Editors Jeannine Bell, Laura Gómez, Ruth Peterson, and Jonathan Simon to join me in this project. In the first year of my editorship, Bell, Gómez, Peterson, and Simon joined me for a day at the University of California-Irvine (UCI, May 2007) where we met with colleagues and graduate students for a lively brainstorming session to develop a set of questions and themes to shape a call for a conference. That call led to an exciting conference at UCI in May 2008 entitled "The Paradoxes of Race, Law and Inequality in the United States."[1] Following the conference, we invited panelists to submit their articles for peer review and publication and issued another open call for manuscripts. The articles that appear in this Special Issue are the result of these efforts.

The articles in this issue address various aspects of the race/ethnicity-law-inequality conundrum in the United States during the first decade of the twenty-first century. When we began this effort, the election of our first African American president seemed

[1] I would like to thank the School of Social Ecology; the Center for Law, Society, and Culture; the Department of Criminology, Law & Society; the Department of Sociology; the School of Social Sciences; the School of Humanities; and the Office of Research at the University of California, Irvine and the Law & Society Association for providing support for the conference.

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the dimmest of possibilities (see Richard Lempert's Presidential Address herein for more on this theme). We could not escape America's growing economic inequalities and their ties to race and ethnicity given a past and present marked by institutionalized racism, ethnic tensions, and discrimination. Each article in this issue sheds a unique light on this fundamental challenge facing the United States. Yet the whole is greater than the sum of its parts, and together the articles identify the complexities sociolegal scholars face, the issues that may motivate others to continue to pursue research on these questions, and the challenges before us. As a group, the articles make clear that explaining the race/ethnicity-law-inequality conundrum in the United States, whether in the workplace, the justice system, schools, or everyday encounters, must remain a high priority of sociolegal scholars.

The theme of the Special Issue is captured in Lempert's Presidential Address, "A Personal Odyssey Toward a Theme: Race and Equality in the United States: 1948–2009." Lempert's address begins with the personal, reflecting on the life experiences that shaped both his commitment to racial equality and his career as a social scientist. From there, it expands to the structural changes, both positive and negative, he has witnessed in areas such as education, employment, voting and elections, and crime, and calls for more engaged research by sociolegal scholars on the pressing questions that remain unanswered. The articles in this issue touch on themes developed in Lempert's address. For example, Lempert's reflections on his deeply gratifying experience as an expert witness in the landmark case *Grutter v. Bollinger* (2003) may be understood through the lens Rachel Moran elaborates in her discussion of the role of social science evidence in public law litigation in the post-*Brown* decades. Osagie Obasogie presents a brilliant analysis of how people perceive and understand race, color, and color blindness, a theme that resonates with Lempert's recollections of his childhood in a largely homogeneous New Jersey community. It is a testament to the breadth and depth of Lempert's address that he anchors so many of the themes that are explored in the articles in this issue. I urge you to read the thoughtful and provocative comments by Richard Banks, Mario Barnes, Jeannine Bell, Kitty Calavita, and Malcolm Feeley, who each take up different themes that Lempert poses in his address.

Reflecting the tone of many of the articles in this Issue, we begin with a cautionary tale. In "What Counts as Knowledge? A Reflection on Race, Social Science, and the Law," Moran walks us through familiar territory for sociolegal scholars, but with a twist that raises new questions. She plots her point of departure in *Brown v. Board of Education* (1954), which, among many other things, placed social science evidence at the forefront of legal procedure.

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Interestingly, debate arose among the lawyers themselves about whether to incorporate psychological evidence showing the harms of segregation. The debate persisted in the aftermath of *Brown:* whereas Jack Greenberg, a key lawyer in the Legal Defense Fund, argued that it was inevitable that social science evidence would become a part of public law litigation, Alfred Kelly, a historian who also worked on the *Brown* case, argued that inevitably historical evidence, and by implication evidence from other social science disciplines, would be perverted by both liberal and conservative judges. Recent history certainly provides evidence to support Kelly's concern.

Moran suggests that this perversion of social science evidence by the courts in subsequent cases should, at one level, surprise no one. Drawing upon the work of Haack (2003), Moran argues that law and social science begin from two different, if not antagonistic, premises about the nature and role of knowledge, research, and practice. The "culture of law" is adversarial and committed to solving specific disputes. By contrast, the social sciences are probabilistic, tentative, and speculative. Whereas the law frames solutions to problems in terms of precedent, social science frames solutions as tentative and partial claims. When the courts turn to social science for evidence, they inevitably want more than the disciplines can deliver.

While the courts continue to draw upon social science evidence in often unpredictable and questionable ways, lively debate across very different intellectual camps flourishes within the academy. These more recent movements range from law and economics to Critical Legal Studies and its progeny to the emergence of empirical legal studies and narrative studies. After tracing the contours of these more recent debates and the diverse, committed politics they embody, Moran provocatively concludes that "a value-laden, highly polarized politics of race has led to loss of faith in social science as a source of knowledge for self-correction" (p. 546, this issue). We would do well, Moran argues, to try and do better.

The Special Issue's focus on the paradoxes of race, law, and inequality in the United States flows from Moran's concern: We, as sociolegal scholars, have taken our eyes off a pivotal issue that motivated the formation of the LSA. Lempert's discussion of the number of articles that deal with race either directly or indirectly in past volumes of *LSR* underscores this point. We would be naïve to think that this one Special Issue can right the balance; nonetheless, we hope that the provocative and thoughtful articles that follow from Moran's introduction demonstrate the ways of interrogating the race/ethnicity-law-inequality nexus and identifying the questions that await study.

Lempert's address reminds us that, when backed up by enforcement, the law has been a successful instrument for

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ameliorating the effects of racial discrimination. Affirmative action has been demonstrably effective in opening the pipeline for Hispanics and African Americans at elite sites of education, including the law. Yet affirmative action policy remains controversial, thanks largely to the myth of American meritocracy. Sander's recent articles on African American lawyers' career trajectories in large law firms gave renewed legitimacy to the myth of meritocracy (2004, 2006). Sander claims to have demonstrated that African American graduates of elite law schools were significantly less likely to stay the course and achieve partnership in large firms because they did not bring the same meritocratic achievements as measured by grades, or human capital, as their white counterparts and, hence, they decided to leave. Articles appeared in *The New York Times* and *The Wall Street Journal;* there were reports on National Public Radio. While many legal scholars, including members of LSA, went to great lengths to demonstrate the questionable basis of Sander's conclusions, the damage was done.

Fortunately, Monique Payne-Pikus, John Hagan, and Robert Nelson have crafted an article that has the potential to rekindle debate over affirmative action's role in employment. They ask: Does merit actually explain the satisfaction and persistence of young African American and Hispanic lawyers, as Sander argues? Or, do firms, like all organizations, develop their own institutional patterns of socialization through mentoring and work allocation that independently and significantly affect satisfaction and plans to persist? The need for affirmative action does not stop at a law firm's front door, Payne-Pikus and her coauthors point out, but extends into its organizational structure, both formally and informally.

To address this question, Payne-Pikus et al. take on the unglamorous but fundamental scientific task of replication. First, they retest a human capital–based theory that focuses on meritocratic variables. Then they add an institutional discrimination–based theory, which concentrates on the informal processes of mentoring and partner contact that qualitative studies have shown to act as the "royal jelly" that builds the social skills required for success in large firms, if not in all walks of professional life. Using the same dataset as Sander, the authors demonstrate that his allegation about the merit-based criteria shaping the career decisions of African Americans at work cannot be substantiated when weighed in the context of their more proximate experiences of access to mentoring and contact with senior colleagues. In other words, African Americans are not significantly more likely to be dissatisfied or to plan to leave their large firms because they believe that they are not as "good" as their white counterparts, but rather because they fail to receive the kind of support they know success in these work sites requires. The theoretical and policy message of this article is clear. Theoretically,

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scholars must continue to chip away at the simplistic notion that "merit" solely determines success in American society when vast bodies of research demonstrate that social networks and skills play the trump card. As policy, these findings demonstrate that a commitment to affirmative action must extend to the office suites where the informal "jelly" passes from one generation to the next.

Osagie Obasogie asks, "Do blind people see race?" Drawing from qualitative interviews with sighted and blind persons, Obasogie concludes, "Put simply, blind people experience race just like everyone else: visually" (p. 587, this issue). He then asks how this can be. Conceptually, Obasogie places his question in dialogue with constructivist and Critical Race theorists' contribution to understanding race and racism. Obasogie adds to these theorists, who have demonstrated the ways in which race institutionalizes from the top down, by examining how people create race from the "group up," in daily life through everyday practices, phrases, and cues—that is, through "social practices that make certain approaches to race thinkable, coherent, and common-sensical on an individual level" (p. 589, this issue). His tantalizing findings reveal that blind people understand and experience race in visual terms, just like their sighted counterparts, yet elaborated by tips and talk about voices and odors. The irony pointed out by this article, Obasagie notes, "is that sighted people are, in a sense, blinded by their sight; their vision prevents them from 'seeing' or appreciating the social factors that make their visual understandings of race seem real, tangible, and coherent" (p. 602, this issue). Such theoretical and empirical contributions are timely and prescient. At the same time, he scrutinizes Americans' complex romance with the goals of achieving a "color-blind" society, particularly at a time when the words of Dr. Martin Luther King Jr. suffer distortion by television pundits and no less than the Chief Justice of the United States. Whereas the popular and populist rhetoric of the "color-blind" ideal begins and ends with the premise that color is somehow limited to an "ocular" problem, Obasogie demonstrates that one learns how to visualize color through the small, taken-for-granted rituals of everyday life. Obasogie's article belongs on the reading list of the Justices of the U. S. Supreme Court.

It is 2010, and that means that the U.S. Census is collecting data to develop a demographic profile of the country, including its racial and ethnic composition. Today, counting racial and ethnic profiles extends far beyond the Census; the government even requires that industry and government monitor their own hiring by race and ethnicity. Much of this counting was institutionalized in the wake of the civil rights movement and grew out of the federal government's desire to insure racial equality in the workplace and voting booth, among other institutions. In light of the fraught and

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complex history that surrounds the practice of identifying racial and ethnic differences, in making these demands the government has made explicit that the categories "are not anthropologically or scientifically based" (Lee & Skrentny, p. 629, this issue) but "instead reflect political interests and understandings of minorityhood" (Lee & Skrentny, p. 629, this issue).

Catherine Lee and John Skrentny bring fresh insight to the contested terrain of counting by racial and ethnic category in their article, "Race Categorization and the Regulation of Business and Science." Using a "method of difference" approach, they examine the effects of racial and ethnic categories developed to regulate employment discrimination as required by the Civil Rights Act of 1964, when these categories were imposed on the regulation of drug applications by the U.S. Food and Drug Administration (FDA). In their analysis, they argue that the reception of regulations depends upon whether and to what extent the targeted population regards those guidelines as legitimate or welcome. Furthermore, institutions interpret regulations from the standpoint of their own cultural logics and thus respond differently from one another. Whereas the logic of business rests on "economic rationality" to insure profit, science embraces a logic of "technical rationality" that is above politics.

What happens when the FDA, an agency that is itself framed by a logic of science, seeks to impose nonscientific regulations on the pharmaceutical industry, which constantly negotiates the sometimes messy logics between business and science? After Lee and Skrentny explain why there was an absence of resistance by business to the Civil Rights Act's requirements and health care's similar response to National Institutes of Health (NIH) requirements to report health outcomes by race, ethnicity, and gender, they turn to the fraught resistance by the pharmaceutical industry to FDA requirements to report counts by race and ethnicity. The NIH differs from the FDA in these efforts because of the nature of the enterprises they each regulate: The FDA monitors a scientific and a commercial enterprise. In a fascinating tale, Lee and Skrentny describe how the drug industry deployed the "symbolic and discursive power of science to legitimately resist regulatory action" (p. 633, this issue), often citing the government's own claims that racial and ethnic categories are not scientific. The boundary around scientific legitimacy, they show, is tough to breach; in the end the industry lifted its siege and began to report applications for drugs showing ethnic and racial impacts. Ironically, the industry may have turned this defeat into victory because it now develops drugs with racial/ethnic "niche appeal." The authors' careful work provides a fascinating lesson in how the law actively constructs what race and ethnicity mean.

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In their article, "Legal Mobilization in Schools: The Paradox of Rights and Race Among Youth," Morrill, Arum, Edelman, and Tyson turn our attention to disputes in U.S. high schools. American society has invested symbolically, financially, and politically in educational reform to ameliorate the nation's history of racism and discrimination; countless studies have investigated whether and to what extent the investment has paid off. The authors bring a novel perspective to this question by explaining how high school students respond to perceived rights violations, whether they seek to mobilize the law, and what steps they take to do so. To explore how white, African American, Latino/a, and Asian youth construct their rights and mobilize when they perceive an injustice, Morrill et al. elaborate the concept of legal mobilization as a multidimensional process shaped by a youth's ethnoracial identity, perceptions of rights violations, and the steps they take to mobilize law, or not, when those rights are violated. They develop a series of hypotheses that analyze, according to ethnoracial category, how frequently youth will perceive a rights violation and to what level they will likely mobilize the law.

Morrill et al. draw upon surveys of youth in public and private high schools in three states (California, New York, and North Carolina) and in-depth interviews with a subsample of students, teachers, and administrators. Their findings paint an insightful picture of how the next generation experiences rights violations and what course of action they choose. Consistent with findings for adults, African American and Latino/a youth are significantly more likely to perceive rights violations than their white or Asian counterparts and, when confronted with rights violations, their likely course of action is extralegal or to do nothing. The in-depth conversations in the article put flesh on these multivariate findings, providing suggestive paths to understanding the "resignation," "fear," and "frustration" that youth of color experience. The pattern of these findings demonstrates the ways in which schools function as "sites of ethnoracial inequality with respect to access to law" (p. 685, this issue). The story may be familiar, but it is equally important to note that young people's identity is deeply anchored in the understanding they have of their rights, and that this factor maps onto a "'legal grid' of discrimination, sexual harassment, freedom of expression, and discipline [that] speaks to the moral force of rights" (p. 685, this issue).

It is difficult to speak of the criminal justice system without speaking of race and ethnicity. The four articles in this volume on criminal justice bring bold, new insights to our understanding of that system.

Naomi Murakawa and Katherine Beckett's provocative essay, "The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment," calls upon scholars to rethink

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the fundamental categories and contexts that guide the study of the criminal justice system, from arrest, conviction, and sentencing to post-incarceration. Their call for a fundamental retooling of our scholarly enterprise begins with the unpacking of two trends in antidiscrimination law: the post–civil rights era demands a demonstration of (1) intent to discriminate against an individual and of (2) causation by a particular individual in a particular dispute. If these standards are not met, then, presumably, racism did not exist in that instance. The trend in punishment moves the argument in the opposite direction, rendering it much more difficult to pin down intent and causation. The authors demonstrate how police, prosecutors, probation officers, and prison wardens exercise increasing discretionary authority in various guises with ramifications for the axis of punishment. For example, a perhaps unintended effect of sentencing guidelines has granted prosecutors much greater discretionary power that has become "impervious to oversight." Consequently, it became much more difficult over time to pin down the racial intent of these state actors. This is just one of multiple examples the authors use to illustrate how the expansion of the entry and exit points of the criminal justice system undermines endeavors to trace the antidiscrimination standard of intent and causation.

Murakawa and Beckett indict scholars as well. Sociolegal researchers have adapted to the antidiscrimination standard by studying intent and causation in discrete segments decontextualized from the larger interconnected and complex apparatus of social control. Because the studies are often site-specific and the standard eschews social, group, and institutional effects, the system is often found racially innocent, even while race and ethnicity permeate every nook and cranny of a panopticon that would defy even Bentham's imagination. Murakawa and Beckett's call to rethink the assumptions we make and the questions we ask in studying punishment bears wider implications for scholars of all segments of the judiciary—civil and criminal, federal, state, and local.

In "Mass Incarceration and the Paradox of Prison Conditions Litigation," Heather Schoenfeld examines the serendipitous effect of the federal case, *Costello vs. Wainwright* (1977), on laying the groundwork for the growth in the prison population in Florida and, consequently, the perpetuation of disproportionate imprisonment of African Americans and other minorities. Schoenfeld begins with the concept of "legal translation" that scholars created to explain how legal reformers stake moral and political claims in order to cast legal arguments at the "front end" of litigation. To this concept, she adds a complementary "back end" analysis that focuses on how the substance of court decisions coupled with their timing and context encourage outcomes that may be opposite to reformers' original goals. To make her case, Schoenfeld relies on

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archival materials, newspapers, and interviews with stakeholders to trace the timing of key events and the contextual factors that shape the steps taken by state actors, including governors and legislatures. The story of *Costello* begins in 1972, when a public interest lawyer took up a case and challenged the quality of medical treatment in a Florida state prison. After many twists and turns, including a change in the lead attorney and the judge, the court issued its final judgment in 1993. While the issue of health care delivery was part of the final judgment, perhaps the more critical issue turned on overcrowding. As the case moved into the legislative and executive arena of state politics, where political concerns focused on the impact of the War on Drugs of the 1980s, movements to secure victims' rights, and media attention to sensational crimes, *Costello* had the "un-intended and un-anticipated" effect of laying the groundwork for the legislature to pass laws allowing for an unprecedented increase in the number of prisoners. In her detailed and careful analysis of the multiple, contradictory, and intricate "gaps" between the making of "law on the books" and implementing "law in action," Schoenfeld gives renewed and powerful conceptual thought to a fundamental question in sociolegal scholarship.

In a similar vein, Elizabeth Brown interprets the past to explain the present state of policing in "Race, Urban Governance, and Crime Control: Creating Model Cities." The Model Cities Program, a part of Johnson's Great Society initiative, began with the optimistic premise that through democratic participation, local residents could shape their communities and, in the process, head off problems of urban blight, rising crime rates, and poverty. But, as Brown shows, through its implementation and emphasis on "spatial governmentality," Model Cities helped lay the foundation for a turn toward a politics of law and order that emphasized "geographically based policing tactics . . . . [such as] broken windows, opportunity reduction, and order maintenance" (p. 772, this issue). Brown turns to the archives to understand how the demands of Seattle residents resulted in two Model Cities initiatives, Consumer Protection and Community Service Officers. These new initiatives created opportunities for more democratically oriented policing but instead reinvigorated an emphasis on containment and crime control. In her analysis, Brown conceptualizes the ways in which space and geography are deployed, both metaphorically and spatially, to unpack the underlying power relations that shaped the longer term, if unanticipated, outcome of these Model Cities initiatives. The idea for a Community Service Officer arose from a residential request that a representative drive with police officers as they patrolled Seattle's central area. Similarly, the Consumer Protection program arose from residents' concern that local

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merchants engaged in unfair practices such as "price gouging and false advertising" (p. 790, this issue). Brown tracks the development of these grassroots initiatives and their potential to make policing more responsive to local concerns. In both instances, residents met with resistance from government, including the police department, the mayor's office, and the civil service commission, if for different reasons, where officials inevitably claimed to "understand the needs and requirements of Model neighborhood residents better than them" (p. 795, this issue). Despite the failure of Model Cities to fulfill its promise, Brown's close reading of this case provides a poignant reminder of an optimistic moment that might have turned out differently.

I write this the day after President Obama signed the health care reform act into law. Already states are lining up to sue the federal government—one more reminder that American social policy is intimately entangled in our robust and often obfuscating federalist tradition. Lisa Miller's article, "The Invisible Black Victim: How American Federalism Perpetuates Racial Inequality in Criminal Justice," reminds us that federalism affects criminal justice policy in two distinct ways. As a general matter, Congress possesses very limited authority to write legislation affecting domestic welfare policies, including criminal justice, and the "porousness" of federalism, with its "multiple centers of power," makes it difficult for marginalized populations to mobilize and be heard around issues that are of direct relevance to their lives. Miller illustrates federalism's paradoxical impact through two empirical examinations. First, she analyzes Congressional hearings on crime-related policies from 1971 to 2000 and asks: What are the topics of the hearings, and who testifies? Second, she explores this same question at the local level, focusing on two cities, Pittsburgh and Philadelphia. At the federal level, she finds, hearings tend to focus on issues that do not go to the heart of the criminal justice system's racialized structure. Reflecting this trend, committees rarely hear from lobbyists identified with minority communities. The picture at the local level is quite different: Here Miller finds that hearings address issues affecting both minority constituents and criminal justice, including gun violence, issues affecting children and young people, police brutality, and so forth. In this venue, local activists and civic groups can make their voices heard—though these sites rarely have the resources to implement effective reforms. One of the many ironies of our federalist tradition, Miller argues, is that policy development tends to "de-couple" crime and punishment from broader social issues. This stratification "exacerbate[s] the classic obstacles to collective action by balkanizing" groups that must wage the same battles on multiple fronts with limited resources (p. 835, this issue). Echoing themes developed by

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Schoenfeld and Brown, Miller's article underscores the political obstacles that lie in the road to meaningful reform of the criminal justice system.

Lest one doubt the power of the colorblind metaphor in American political and legal discourse, Courtenay Daum and Eric Ishiwata demonstrate its renewed resonance in their article, "From the Myth of Formal Equality to the Politics of Social Justice: Race and the Legal Attack on Native Entitlements." Daum and Ishiwata compare the context, legal mobilization, and legal reasoning of two Supreme Court decisions, *Morton v. Mancari*, decided in 1974 at the height of the rights revolution, and *Rice v. Cayetano*, decided in 2000 as a conservative backlash peaked. In mapping the arc of each case, Daum and Ishiwata remind scholars that institutionalized racism has long cast a deep and resilient shadow on the lives of Native Americans and Native Hawaiians, the subject of these cases. Whereas *Morton* refracts the meanings attached to a movement emboldened to commit to substantive equal rights, *Rice* brings us back to reality and reminds us that we have (re)turned to an era when the Court tends to frame decisions around a metaphor of formal equality at the expense of considering sociopolitical context and history. "This critical distance," Daum and Ishiwata note, "endows the Court with an understanding of equal rights that is self-standing, universal, and beyond the influence of socially specific prejudices or self-interested claims of power" (p. 864–5, this issue).

But they do not end their story here. In juxtaposing the framing, mobilizing, and decisionmaking processes that have organized around substantive and formal equality, Daum and Ishiwata speculate on how cases like *Rice* and its progeny "will act as a catalyst for those interested in defending native [and others] rights" (p. 865, this issue) to develop rhetorical strategies organized around social justice. Social justice appeals, they argue, to claims that "real and tangible inequities that pervade American society by acknowledging how historical developments worked to privilege some and marginalize others and devising solutions that work to resolve power inequities" (p. 870, this issue). Whether a rhetoric of social justice has the resonance, appeal, and power to transform legal mobilization and discourse remains an open, and hopeful, question that they invite colleagues to study analytically and empirically.

Thus, Daum and Ishiwata invite readers to conclude on a somewhat more optimistic note, reminding us that the legal, rhetorical, and metaphorical images of equality matter—and, change.

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