Introduction

On the Necessity and Challenges of Race Scholarship

This chapter introduces an anthology of exemplary race scholarship from the law and society tradition. In the first part of the introduction I briefly make the case that, now more than ever, scholars committed to fathoming the relationship between society and law must seriously engage with racial studies. In the second part, I catalogue some of the most important challenges confronting students of race. I do not lay out an exhaustive list of racial topics, nor do I purport to define a scholarly agenda. Instead, I attempt to specify a set of political, substantive and methodological concerns that I believe race scholars should consider as they grapple with this vitally important subject.

Before turning to those parts, though, let me say a bit more about this anthology. I was charged by the publisher with compiling 'the best essays on race and racial discrimination' in the law and society field – but was limited to including only previously published essays, told that I should avoid book chapters and previously anthologized pieces, and restricted to roughly 500 pages, or about 20 essays averaging around 25 pages in length. Beyond that, I was given little guidance, not least regarding what counted as law and society literature - an issue of no small moment to me as an outsider to the genre. From the outset, the severe page and source restrictions, compounded by my own inexpertise, ensured that this collection was unlikely to actually represent 'the best' of anything. Accepting this as a sort of freedom, I chose not to attempt a compilation of the most renowned race essays, instead opting to pull together those pieces that exemplified how I thought the study of race, law and society should be conducted. In other words, I attempted not a list of greatest hits but a how-to manual, a guide for scholars seeking templates for their own work in this important but also tricky area. In addition, I did not overly concern myself with selecting essays that were securely within the law and society corpus, but instead set the parameters a bit more broadly, looking for work that approached race and law from a social science perspective. As a result, this is closer to an anthology on race, law and society than one on law and society and race. I offer this as an anthology that, in my opinion, pulls together leading exemplars of the sorts of social science scholarship on race, society and law that will be essential to racial progress in the United States as it begins its voyage through the twenty-first century.

Our Colour-blind Racial Future

There is a spreading certainty in the US public, and indeed among many scholars, that the country is leaving race and racism behind. This reflects more than the modest belief that, at least if measured since 1954, race relations have improved. It is a belief instead that race and racism will soon disappear altogether – that they have little power in the lives of average Americans, and soon will have none. Some give credit to *Brown* v. *Board of Education* and the

civil rights era, when laws and lawyers helped a broad social movement turn the nation away from segregation and towards equality. Others point to changing demographics, emphasizing the rising number of mixed-race marriages and the increasing Asian and Hispanic populations that are eroding the historic black—white divide.

My sense of our racial future differs. Not only do I fear that race will continue to fundamentally skew US society over the next decades, I worry that the belief in the diminished salience of race makes this more, rather than less, likely. Relatedly, I suspect that law no longer contributes to ending inequality but instead increasingly promotes the idea that we have nearly transcended race, thus impeding racial justice. Indeed, my sense is that colour blindness, which first emerged as a legal doctrine, now threatens to become the dominant manner by which Americans explain and excuse persistent racial inequality as simply life.

Invoking a formal anti-racism, colour blindness eschews all notions of racial rankings and instead calls for a principled refusal to recognize race in public life. During Reconstruction and under Jim Crow, the call for colour blindness was racially radical: for the state to cease taking race into account would have utterly transformed race relations in the United States. Indeed, as late as the mid-1960s, colour blindness remained racially progressive insofar as it challenged the remnants of *de jure* discrimination. As explicitly race-based subordination came to an end, however, colour blindness lost its efficacy as a tool for moving society towards racial equality. Just the opposite, as civil rights activists increasingly recognized the need for state and private actors to intervene along racial lines to dismantle entrenched inequalities, calls for colour blindness began to take on a racially conservative cast. Increasingly, the demand for colour blindness came not from those seeking racial progress, but from those opposing it. The language of colour blindness, enshrouded with the moral raiment of the civil rights movement, provided cover for those who had lost the battle over the legitimacy of white supremacy yet continued to fight the war for white dominance.

Because the reactionary colour blindness that pervades contemporary discussions of race arose as a rhetoric of racial containment in response to the demands of the civil rights movement, this new racial ideology is deeply rooted in legal reasoning. The term itself is often traced back to Justice Harlan's dissent in Plessy v. Ferguson, and claims regarding the moral legitimacy of colour blindness are very often expressed as affirmations of fundamental constitutional values. Today's colour blindness advocates fashionable moralistic, originalist arguments against any racial classification for any reason by invoking a fictitious legacy of the 'color-blind Constitution'. Andrew Kull, as one example, refers to the Constitution that enshrined not only self-governance for some but slavery for others as a 'glorious liberty document' imbued 'from the outset . . . [with a] pristine color blindness'. \(^1\) Meanwhile, colour blindness has been doctrinally devastating: the courts now condone most racial discrimination, which today rarely involves the express invocation of race, even as they impede racial justice by forbidding race-conscious efforts to redress structural inequality. McCleskey v. Kemp insists - even recognizing that Georgia sentences to death blacks who murder whites at twenty-two times the rate it orders death for blacks who kill blacks - that there is no constitutional harm absent the identification of a particular biased actor.² Meanwhile, Richmond v. Croson tells us that, when

¹ Andrew Kull (1992), *The Color-Blind Constitution*, Cambridge, MA: Harvard University Press, pp. 20–21.

² McCleskey v. Kemp (1986), 481 US, pp. 279, 327.

the former capital of the confederacy adopts an affirmative action programme to steer some of its construction dollars to minority-owned firms, this is impermissible discrimination – even when, without the programme, less than two-thirds of 1 per cent of construction contracts went to minorities in a city of over 50 per cent African-Americans.³ Colour blindness has converted our vaunted constitutional commitment to racial equality into a tool for preserving the racial status quo.

Perhaps more important than the immediate doctrinal impact, however, has been the success achieved by promoters of colour blindness in gaining widespread public acceptance of this new ideology. Colour blindness is no longer simply a facet of legal argument; it is now perhaps the dominant way of thinking about race in the United States.⁴ There is a spreading etiquette of racelessness, in which one expresses one's commitment to racial neutrality by refusing to discuss race publicly. Under this standard, the person who mentions race first is, by default, the racist. Those who insist on the relevance of race, even or perhaps especially if they seek to focus attention on racial injustice, are 'playing the race card'. In this way, colour blindness protects a racial status quo marked by continued white dominance.⁵ Rejecting all debate regarding race and racism protects these phenomena from public critique, contributes to the increasingly widespread belief that the US has triumphed over racially pernicious practices and adds to the sense that the racial status quo reflects a natural ordering rather than a structured hierarchy. Colour blindness clears ideological space for the replacement of explicit white supremacy by an unspoken certainty regarding the naturalness of white dominance, explained (when necessary) in cultural terms.⁶

³ City of Richmond v. Croson (1989), 488 US, pp. 469, 534.

⁴ Eduardo Bonilla-Silva (2003), *Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in the United States*, MD: Rowman and Littlefield Publishers, Inc.

Persistent racial inequality can be measured along many indices. In 2003, the real median income for non-Hispanic whites was \$48,000, but only \$30,000 for African-Americans. See Robert Cleveland (2005), US Bureau of the Census: Alternative Income Estimates in the United States, 2003, Current Population Reports, http://www.hrw.org/reports/2000/usa, p. 6. The total poverty rate among African-Americans was 24 per cent, compared to 8 per cent for whites and 22 per cent for Hispanics. See Joe Dalaker (2005), US Bureau of the Census: Alternative Poverty Estimates in the United States, 2003, Current Population Reports, June, p.7. That same year, 20 per cent of African-Americans and 33 per cent of Hispanics had no health insurance, while 11 per cent of whites were uninsured. Carmen DeNavas-Walt, Bernadette Proctor and Robert Mills (2004), US Bureau of the Census: Income, Poverty, and Health Insurance Coverage in the United States, 2003, Current Population Reports, August, p. 18. Discrepancies in incarceration rates are particularly staggering. There is currently a 28.5 per cent chance that an African-American man will spend some time in a state or federal prison during his lifetime, while the comparable figure for whites is 2.5 per cent. There are 12 states in which between 10 and 15 per cent of African-American adult men are incarcerated, while in ten states Latino men are thrown behind bars at rates five to nine times greater than white men. See Human Rights Watch, Race and Incarceration in the United States, http://www.hrw.org/backgrounder/usa/race. See generally Human Rights Watch (2000), Punishment and Prejudice: Racial Disparities in the War on Drugs, June, Washington, DC: US Government Printing Office; Marc Mauer (1999), Race to Incarcerate, New York: The New Press.

⁶ Sam Huntington's recent attack on Latino immigration embodies this double move, at once rejecting the old ideas of white racial superiority and at the same time aggressively promoting the notion of a superior Anglo-Protestant culture. Sam Huntington (2004), *Who Are We? The Challenges to America's National Identity*, New York: Simon & Schuster. Lawrence Bobo labels theories that lay

For scholars concerned with law and society, the emergence of colour blindness gives a particular poignancy to the continuing need for research on race and racism. Unfortunately, efforts to stifle not just the discussion but also the study of race are accelerating, for instance with Nathan Glazer calling for an end to the census collection of most racial data, and Ward Connerly orchestrating efforts to pass voter initiatives in California and Michigan forbidding the compilation of most racial statistics by the states and their entities. It is the rise of colour blindness, with its roots in the interaction between law and society and its increasingly stringent calls for an end to race talk, that make studies of race, law and society more necessary now than ever.

Recurrent Problems in Racial Scholarship

This section elaborates on some of the core issues facing race scholars. My intention is neither to provide a research agenda nor to list important topics, though I admit to occasionally shading in those directions. Rather, my goal is to set out recurrent problems in racial scholarship – foundational questions to be considered in the study of racial dynamics, irrespective of the particular aspect studied. For instance, I suggest attention to issues of subordination and racial ideology partly as topics in their own right, but more importantly as queries to be considered whether the narrower subject is anti-discrimination law, the penal system, school reform, the rise of Jim Crow or the War on Terror. These axes of inquiry raise central issues and offer a conversational connection between race students focused on otherwise discrete topics. I group these basic concerns into four overarching categories: the continued salience of race; the legal construction of race; racism as practice and as ideology; and methodological challenges. As with most taxonomic efforts, my aim is to show how various items both differ and relate to others, not to assert that these intellectual problems are fundamentally independent. Needless to say, this list is neither exhaustive nor without internal tensions (I note below some of the more apparent conflicts).

The Continued Salience of Race

Perhaps the foremost task confronting scholars is to document the continued salience of race. Colour blindness urges a see-no-evil, hear-no-evil, speak-no-evil charade. In the face of colour blindness, the necessity for scholarly documentation of the continued social impact of race has increased rather than diminished. The continued vitality of race must be demonstrated along a number of different axes:

minority failure at the feet of culture 'laissez-faire racism', using this term to highlight the way in which whites attribute their superior social position to a supposed special affinity for the values, orientations, and work ethic needed by the liberal individual in a capitalist society. Bobo, J. Kluegel and R. Smith (1997), 'Laissez Faire Racism', in Steven A. Tuch and Jack K. Martin (eds), *Racial Attitudes in the 1990s*, Westport, CT: Praeger Publishers.

See Nathan Glazer (2002), 'Do We Need the Census Race Question?', *Public Interest*, **21**, p. 23; Richa Amar (2005), 'Unequal Protection and the Racial Privacy Initiative', *UCLA Law Review*, **52**, p. 1279

Racial Disparities

At its most basic, the job of social scientists concerned with race is to demonstrate the extent to which lives in our society continue to be skewed in racial terms. This means measuring the impact of race on everything from wealth to healthcare, schools to jobs, neighbourhoods to prison populations.⁸

Subordination

Part of measuring racial disparities entails showing convincingly that race continues to play a prominent role in socially subordinating whole groups of persons. Such oppression occurs along numerous fronts, from the material to the symbolic.⁹

Superordination

Simultaneously, scholars must attend to the manner in which race materially privileges significant population groups and individuals. There is an unfortunate tendency in race scholarship to treat the living conditions of whites as a baseline against which to measure the harms inflicted on non-whites. But the material advantages enjoyed by whites have been achieved to a significant degree through racial conflict. Any serious effort to comprehend the salience of race must grapple not just with how race disadvantages but with how it privileges (see Kenneth Mack, Chapter 1).

Race as Nexus

Colour blindness asserts that race only operates when explicitly invoked; absent that, racially correlated disparities allegedly reflect only the vagaries of social life. Race scholars must demonstrate that race serves as the nexus connecting social processes to group harms. Often, this will require analyses that discount other possible influences, such as class or educational level, in an attempt to isolate the impact of race (see 'Racism and Other Social Hierarchies', below). The more power race has in explaining an outcome, the more likely one can specify the operation of racial bias (see Devah Pager, Chapter 7).

Race beyond Black and White

The overwhelming majority of race scholars proceed as if the only racial questions of importance concern the white oppression of blacks through slavery and since, and in doing so ignore both the past and the future: the dispossession of Native Americans, the US conquest

⁸ See, for example, Michael Radelet and Glenn Pierce (1985), 'Race and Prosecutorial Discretion in Homicide Cases', *Law & Society Review*, **19**, p. 587; Paul Burstein and Mark Evan Edwards (1994), 'The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues', *Law & Society Review*, **28**, p. 79.

⁹ See Claude S. Fischer et al. (1996), Inequality by Design: Cracking the Bell Curve Myth, Princeton, NJ: Princeton University Press; Douglas S. Massey and Nancy A. Denton (1993), American Apartheid: Segregation and the Making of the Underclass, Cambridge, MA: Harvard University Press.

of Mexico's northern half, the seizure of territories in the Atlantic and Pacific, the exclusion of Asians and the new demographics of surging Asian, Hispanic and mixed-race populations. Problematizing the focus on blacks may entail various steps: more critically examining the assumption that the black experience represents the quintessential expression of race in the US; broadening work to examine other racial groups, or focusing on such groups exclusively; and studying comparative racial dynamics.¹⁰

Again, in the face of an ascendant regime of colour blindness, demonstrating the continued impact of race may be the single most important job confronting law and society race scholars. That said, it is important to recognize that inquiries into disparities alone leave unexplored important questions about how race and racism operate.

Race as a Legal Construction

It is not enough to document the continued impact of race or the likely influence of racial bias; law and society scholars must also address the nature of race and racism as ideological systems. This section focuses on questions concerning the social and legal construction of race, while the next focuses on racism. Race and racism though, form an imbricated pattern that ultimately must be assessed as a whole, rather than disaggregated and considered narrowly in terms of the individual inquiries identified here.

The Social Construction of Race

Viewing race as a construction means understanding race as a set of functional, materially-grounded systems of meaning that attach to aspects of morphology and ancestry. 11 From this perspective, inquiries into the social and legal construction of race must examine how race operates on four principal levels: as an assortment of physical (and increasingly, genetic) differences onto which racial divisions are built; as an agglomeration of historically contingent but ever-evolving social beliefs; as a collection of material distortions in our society that both reflect past racial thinking and seemingly confirm notions of innate racial difference; and as a web of functional beliefs and practices that advantage some and disadvantage others in contests over power and prestige. 12

The Formal Legal Construction of Race

For centuries, legislation and litigation have formally defined and legitimized racial categories and their characteristics. Scholarship on the formal construction of race has been largely

See, for example, Juan Perea (1997), 'The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought', *California Law Review*, **85**, p. 1213; Rachel F. Moran (1995), 'Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond', *La Raza Law Journal*, **8**, pp. 1–24.

See generally Michael Omi and Howard Winant (1994), *Racial Formation in the United States:* From the 1960s to the 1990s, New York, NY: Routledge.

¹² See generally Ian Haney López (1994), 'The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice', *Harvard Civil Rights – Civil Liberties Law Review*, **29**, p. 1.

historical in nature, tracing the statutes, doctrines, and decisions that made race operational (see Michael Elliot, Chapter 11). Less work has been done on the contemporary formal legal construction of race, most evident in the efforts of the Office of Management and Budget and the Census Bureau. 4

The Informal Legal Construction of Race

Legal practices and institutions also informally construct race, primarily by shaping understandings of the attributes of racial groups and/or by making race seem a self-evident part of daily life. Immigration law has had a pronounced effect on racializing groups in the United States, whether as perpetual foreigners or as illegal aliens (see Mae Ngai, Chapter 13). The police and the prison system, although they have always patrolled the line between white and non-white, in the past few decades, have aggressively redefined what it means to be black and brown versus white (see Loïc Wacquant, Chapter 10; Ian Haney López, Chapter 14). The purported War on Terror clothes a xenophobic deployment of state violence with the mantle of 'law enforcement', legitimizing and promoting nativist views regarding the suspected racial character of Muslims and others (see Leti Volpp, Chapter 15).

Racial Proxies

In a closely related vein, law increasingly constructs race by elaborating informal racial proxies: illegal aliens, criminals and terrorists. These become alternative identities by which non-white groups can be socially defined and attacked. These categories are both under- and over-inclusive when compared to the minority groups they stand in for; indeed, this lack of exact fit is key in defending policies towards, say, welfare recipients or crack users, from

¹³ See, for example, Ian Haney López (1996), White By Law: The Legal Construction of Race, New York, NY: New York University Press; Adrienne Davis (1998), 'The Private Law of Race and Sex: An Antebellum Perspective', Stanford Law Review, 51, p. 221; Ariela Gross (1998), 'Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South', Yale Law Journal, 108, p. 109; F. James Davis (1991), Who is Black? One Nation's Definition, University Park, PA: The Pennsylvania State University Press; Raymond Diamond and Robert Cottrol (1983), 'Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment', Loyola Law Review, 29, p. 255; Laura E. Gómez (2001), 'Race Mattered: Racial Formation and the Politics of Crime in Territorial New Mexico', UCLA Law Review, 49, p. 1395.

But see Ian Haney López (2005), 'How the Census Counts Latinos', *Daedalus*, **134**, p. 42; Vicky Hattam (2003), 'Ethnicity and the Boundaries of Race: Rereading Directive 15', *Daedalus*, **134**, p. 61; Naomi Mezey, 'Erasure and Recognition: The Census, Race, and the National Imagination', *Northwestern University Law Review*, **97**, p. 1701; Christopher Ford (1994), 'Administering Identity: The Determination of "Race" in Race-Conscious Law', *California Law Review*, **82**, p. 1231.

See, for example, Ian Haney López (2003), *Racism on Trial: The Chicano Fight for Justice*, Cambridge, MA: Harvard University Press; Ann Marie Plane (1998), 'Legitimacies, Indian Identities, and the Law: The Politics of Sex and the Creation of History in Colonial New England', *Law and Social Inquiry*, **23**, p. 55; Richard Brooks (2002), 'Covenants and Conventions', *Institute for Policy Research Working Paper WP-02-03*, available at http://www.law.berkeley.edu/institutes/csls/events.html.

See, for example, Devon Carbado (2001), '[E]racing the Fourth Amendment', *Michigan Law Review*, **100**, p. 946.

charges of racial bias. Nevertheless, racial ideas provide the fundamental social prejudices that underlie these pernicious policies.

From Race to Law

Law not only constructs race, but race constructs law: racial conflicts distort the drafting and implementation of laws; skew the development, character and mission of legal bureaucracies; alter how various communities, including whites, understand and interact with legal institutions; and twist the self-conception of legal actors, from law-makers to lawyers, cops to judges (see Doris Marie Provine, Chapter 8; Risa Goluboff, Chapter 4).¹⁷ Race's role in shaping the perception of law by outsiders and insiders would seem particularly amenable to study (see Kristin Bumiller, Chapter 5).

Racism as Practice and as Ideology

The Nature of Racism

Law and society scholars should draw more fully on research on racism from fields such as sociology, psychology, history, anthropology and cultural studies, while at the same time shaping these competing theories to fit legal concerns. Racism is principally conceptualized as: rational;¹⁸ irrational in a Freudian sense;¹⁹ normal insofar as it reflects standard cognitive biases;²⁰ rooted in status conflicts and stigma;²¹ historically determined;²² or institutionally produced.²³ There is considerable space for law and society scholars to empirically test and

¹⁷ See, for example, Trish Oberweis and Michael Musheno (1999), 'Policing Identities: Cop Decision Making and the Constitution of Citizens', *Law and Social Inquiry*, **24**, p. 897.

See, for example, Gary Becker (1971), *The Economics of Discrimination* (2nd edn), Chicago: University of Chicago Press, p. 14; Kenneth J. Arrow (1973), 'The Theory of Discrimination', in Orley Ashenfelter and Albert Rees (eds), *Discrimination in Labor Markets*, Vol. 3, pp. 6, 24; Richard Posner (1998), *Economic Analysis of Law* (5th edn), Aspen Law and Business, p. 715.

See, for example, Charles Lawrence (1986), 'The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism', *Stanford Law Review*, **39**, p. 317; Joel Kovel (1970), *White Racism: A Psychohistory*, New York, NY: Pantheon Books.

See, for example, Linda Hamilton Krieger (1994), 'The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity', *Stanford Law Review*, **47**, p. 1161; Gary Blasi (2002), 'Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology', *UCLA Law Review*, **49**, p. 1241.

See for example, Reva Siegel (1997), 'Why Equal Protection No Longer Protects: The Evolving Forms of Status Enforcing State Action', *Stanford Law Review*, **49**, p. 1111; J.M. Balkin (1997), 'The Constitution of Status', *Yale Law Journal*, **106**, p. 2313.

See, for example, George Fredrickson (1981), White Supremacy: A Comparative Study in American and South African History, New York: Oxford University Press; David Theo Goldberg (1993), Racist Culture: Philosophy and the Politics of Meaning, Oxford: Blackwell.

See, for example, Robert Blauner (1973), *Racial Oppression in America*, New York, NY: Harper & Row; Stokely Carmichael and Charles Hamilton (1967), *Black Power: The Politics of Liberation*

refine theories regarding racism (see Gary Blasi, Chapter 6). At the same time, even if not focused on racism directly, all race scholars must be self-conscious regarding their conception of racism.

Race and Racism

For the most part, inquiries into the operation of racism proceed as if race is a fixed and unproblematic concept – as if, for instance, in studying white discrimination against blacks, the categories of white and black exist independent of the discrimination being studied. This is warranted less often than might be thought. It is not possible to understand how racial prejudice operates – the advantages it offers, why it persists, how it spreads – without simultaneously exploring the relationship between racism and race, between mistreatment and ideologies of group difference (see 'Race as a legal construction', p. xviii).

Racism and Other Social Hierarchies

Studies of racism also mostly proceed as if the goal is to isolate the impact of race from that of other dynamics, such as class, gender or educational level. This approach misses a key insight promoted in the legal academy by critical race theorists: social hierarchies are mutually constitutive, rather than isolated and distinct phenomena (on the relationship between critical race theory and law and society scholarship, see Laura Gómez, Chapter 17). Class and race, or race and gender, or race and citizenship, all work to shape and define each other (see Dorothy Roberts, Chapter 9).²⁴ Rather than attempt to isolate the impact of individual forms of social hierarchy, law and society scholars should explore the mutually reinforcing, integrative dynamics that tie numerous forms of status competition together in a web of social sub- and superordination.

Racism and Colourism

Special attention should be paid to the relationship between racial and colour discrimination. On the one hand, colour distinctions clearly arise out of racial ideology. On the other, colour has always had a partially autonomous operation, allowing both internal and external group members to enforce intragroup hierarchies.²⁵ This dynamic is likely to gain rapidly in social importance. Greater study should be done on both the historical and contemporary relationship between race and colour.

in America, New York, NY: Vintage Books. See also Ian Haney López (2000), 'Institutional Racism: Judicial Racism and a New Theory of Racial Discrimination', *Yale Law Journal*, **109**, p. 1717.

See for example, Frances Ansley (1988), 'Stirring the Ashes: Race, Class, and the Future of Civil Rights Scholarship', *Cornell Law Review*, **74**, p. 993; Kimberle Crenshaw (1989), 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', *University of Chicago Legal Forum*, p. 139; Angela Harris (1989), 'Race and Essentialism in Feminist Legal Theory', *Stanford Law Review*, **42**, p. 581.

Taunya Banks (2000), 'Colorism: A Darker Shade of Pale', *UCLA Law Review*, **47**, p. 1705; Trina Jones (2000), 'Shades of Brown: The Law of Skin Color', *Duke Law Journal*, **49**, p. 1487.

Racism as a symbolic term

Charges of racism carry the heavy weight of social opprobrium. In addition, however, there is a developing tendency to stigmatize almost all charges of racism as unwarranted, irresponsible, divisive and oppressive; this tendency renders public conversations about racism as a persistent form of social subordination increasingly rare. ²⁶ Law and society scholars should examine the social and legal dynamics surrounding 'racism' not just as a practice or ideology, but also as a symbolic and political term.

Colour Blindness and Other Legal Ideologies of Race

As the foremost racial ideology of our time, colour blindness deserves extensive study. Important questions come immediately to mind: did it originate among judges, academics, or think-tank scholars, and in what order and by what engine? How widely does the public accept colour blindness and its constituent claims? How widespread is this ideology among the judiciary? More generally, law and society scholars should critically examine the range of ways in which legal doctrine has historically defined racism, examining not only the politics behind these competing conceptions, but also the sources upon which courts and other legal actors have relied (see Peggy Pascoe, Chapter 12).²⁷ Along these lines, scholars should also examine under what circumstances lawyers and litigation have produced racial progress (see Mary Dudziak, Chapter 2; Gerald Rosenberg, Chapter 3).²⁸

Methodological Concerns

The study of race, law, and society raises all of the usual methodological problems, but also a set of challenges that inhere whenever researchers attempt to fathom deeply divisive social hierarchies in which they are personally implicated.²⁹

²⁶ See, Stephen Steinberg (1995), *Turning Back: The Retreat from Racial Justice in American Thought and Policy*, Boston, MA: Beacon Press.

See, for example, Lawrence Friedman (1997), 'Brown in Context', in Austin Sarat (ed.), *Race, Law and Culture: Reflections on Brown v. Board of Education*, New York: Oxford University, pp. 49–73; Herbert Hovenkamp (1985), 'Social Science and Segregation Before Brown', *Duke Law Journal*, p. 624; Francesca Polletta (2000), 'The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961–1966', *Law & Society Review*, **34**, p. 367; Paul Lombardo (1988), 'Miscegenation, Eugenics, and Racism: Historical Footnotes to *Loving v. Virginia*', *University of California Davis Law Review*, **21**, p. 421.

See, for example, Derrick Bell (1979), 'Brown v. Board of Education and the Interest-Convergence Dilemma', Harvard Law Review, 93, p. 518; Francine Sanders Romero (2000), 'The Supreme Court and the Protection of Minority Rights: An Empirical Examination of Racial Discrimination Cases', Law & Society Review, 34, p. 291; Michael Klarman (1994), 'How Brown Changed Race Relations: The Backlash Thesis', Journal of American History, 81, p. 81.

²⁹ See Angela Harris (1994), 'The Jurisprudence of Reconstruction', *California Law Review*, **82**, p. 741.

Groups of People

Races are vibrant groups of people and minorities are complex individuals – though you might not know it from reading most social science literature on race and law, where persons of colour figure predominantly as statistics or, at best, case studies. The tendency to reduce minorities to numbers surely reflects disciplinary tendencies; but it also tracks the racial divide that can arise between white researchers and non-white objects of study. In writing on race, law and society scholars should use disciplinary methods that render their subjects in human terms (see Osagie Obasogie, Chapter 16). In addition, they should make efforts to bridge racial divides on a more personal level (see 'Scholars as racial actors', p. xxiii, immediately below). One important benefit might be an increased tendency to see minority communities as heterogeneous and internally divided, rather than as homogenous and monolithic (see Regina Austin, Chapter 18).³⁰

Scholars as Racial Actors

Every person reared or long-resident in the United States has a sense of self powerfully influenced by racial ideas. It is incumbent on students of race to first study themselves, seeking some self-awareness regarding how race shapes their self-conception, world-view, social contacts and professional networks, and in turn how these have influenced their research questions and methodologies. *It is not enough to self-identify as politically progressive*. An overwhelming body of work now conclusively demonstrates that race operates perhaps most powerfully on the non-conscious level, through psychological processes, taken-for-granted cultural norms and institutional routines. No one understands the influence of race who has not thought long and hard about the role of race in shaping who they are, where they came from, and why they're doing what they're doing.³¹

Race as Politics

All scholarship is politics, but some is more political – and work on race falls on the most politically charged end of the spectrum. For law and society scholars working on race, this raises issues ranging from increased scrutiny and possible charges of racial insensitivity to concerns over professional recognition and advancement, especially for minority scholars.³² Race scholarship also has broader political ramifications – such work often intervenes in contentious society-wide debates about race relations and/or racial characteristics. To be absolutely clear, no research question should be off-limits. But racial studies must be conducted, circulated and debated more cautiously than other forms of work, lest they inadvertently cause great harm.

³⁰ See also Regina Austin (1992), "The Black Community", It's Lawbreakers and a Politics of Identification', *Southern California Law Review*, **65**, p. 1769.

³¹ See, for example, Barbara Flagg (1992), 'Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent', *Michigan Law Review*, **91**, p. 953.

See Devon Carbado and Mitu Gulati (2003), 'Tenure', *Journal Legal Education*, **53**, p. 157.

Conclusion

Race, Law, and Society pulls together first-rate scholarship on race and racism from the law and society tradition, broadly conceived. These essays wrestle successfully with the central axes of inquiry I have outlined above, pushing our thinking forward on some of the most central racial dynamics. I did not assemble these particular essays on the theory that they represent the best work of the past (though many do). Instead, I chose them because I think their collection in one place will aid future scholarship on race. Whatever our racial tomorrow, it is critical that we continue to study race, law and society as a necessary step towards racial justice.