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# Foreword Critical Race Theory and Empirical Methods

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# Foreword: Critical Race Theory and Empirical Methods

Osagie K. Obasogie\*

Legal scholarship has engaged interdisciplinarity for over 100 years. “Legal Realism.” “Sociological Jurisprudence.” “Law and Society.” “Critical Legal Studies.” These are just a few of the labels applied to approaches that attempt to move beyond presumptions that legal doctrine and decision making are coherent and consistent in and of themselves or that they exist anterior to other social, political, and economic developments. In one form or another, these efforts use the knowledge and methods gleaned from other disciplines to understand the dynamic and interpenetrative relationship between law and society.

Critical race theory (CRT) is an important part of this line of legal scholarship and has made several serious challenges to the doctrinal orthodoxy concerning race and the law since its development in the 1980s. The story of critical race theory as an intellectual movement has been well told elsewhere.<sup>1</sup> But, in order to appreciate the work pursued by this symposium issue on critical race theory and empirical methods, it is important to situate critical race theory as providing an account of race and the law that opposes traditional narratives that treat race and racism as unfortunate yet ancillary aspects of human relations that have been largely transcended in modern times. This opposition entails a systematic articulation of the persistence of White racial dominance that occurs not only *in spite of* social and legal developments that attempt to facilitate greater equality, but *specifically because* these developments contain residual privileges and limitations that nonetheless continue to structurally benefit Whites and subordinate people of color and other marginalized communities.

Critical race theory can be seen as somewhat irreverent of standard legal

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1. See generally Kimberlé Crenshaw et al., *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995); RICHARD DELGADO, *CRITICAL RACE THEORY: THE CUTTING EDGE* (1999); Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1255 (2011).

narratives that describe the trajectory of American race relations as historically strained, yet steadily improving over time through specific legal reforms to yield a more equitable society. It openly acknowledges the important work and progress made during previous generations' pursuit of racial justice. Yet, it is stridently committed to uncovering the complicated ways in which White racial privilege and the oppression of marginalized groups are substantively preserved *at the very moment* that traditional indicia and legal mechanisms of racial progress—laws prohibiting discrimination, a Black President, etc.—are used to prematurely profess the declining significance of race and racism. In this regard, critical race theory is a next generation project of human liberation that continues the substantive work of advocating racial justice. Yet it does this through a critical and self-reflective lens that acknowledges the shortcomings of mainstream legal advocacy so as to realize a future of true human equality.

But, the evolution in race scholarship cannot stop here. The work leading up to this symposium issue starts from the observation that there seems to be an unacknowledged schism between critical race scholarship and the social sciences. To be sure, individual scholars have examined particular areas of race scholarship—most notably, the social psychology of implicit bias—through a lens that uses social science methods to measure these dynamics and critical race perspectives to frame their legal significance.<sup>2</sup> However, there has not been a sustained conversation beyond this literature concerning the importance of building bridges between these two communities to tease out the opportunities and challenges associated with extending a joint critical race and empirical effort to other areas of race scholarship, whether it be health disparities, gaps in educational achievement, or issues pertaining to criminal justice.

Why is this important? Both critical race theory and empirical research on race are at crossroads. On one hand, critical race theory has been around now for a few decades and it has made important contributions. Of particular importance, it has provided a conceptual and theoretical basis from which to understand the extent to which race is not only socially but legally constructed, how racial subordination is not merely aberrational but a structured part of social relations, and how legal rules and doctrines—even those designed for antidiscrimination purposes—often produce outcomes that systemically disfavor racial minorities. While these insights are profound, the methods used to substantiate them have often not been as robust as they could be. Critical race theory has often focused on internal inconsistencies in legal doctrine or historical and theoretical critiques that, while important, often do not offer a measureable basis from which to understand the depth of these on-the-ground trends and social dynamics. On the

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2. See, e.g., Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 464 (2010); Linda Krieger & Anthony Greenwald, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006).

other hand, social scientists have been developing quantitative and qualitative tools to measure the social world for several decades. They have refined statistical measures and qualitative analyses that are able to tease out the subtle human dynamics that shape everyday life. While theory is an important aspect of all social science research, the theories social scientists draw upon often serve overly descriptive ends in cataloguing the social world as it currently exists rather than embracing a normative orientation towards racial justice that questions inequalities produced by social and legal structures.

Linking social science methods with critical race theory provides a remarkable opportunity to pursue race scholarship that is both theoretically sophisticated and empirically robust. That is to say, it is an opportunity to think about and measure race in new and exciting ways that builds upon the strengths of multiple disciplines to assess, document, and theoretically extrapolate the hidden ways in which not only law and society construct race, but the way that race constructs law and society. This is not the first attempt to encourage race scholarship along these lines; Laura Gómez,<sup>3</sup> Gregory Parks,<sup>4</sup> Devon Carbado,<sup>5</sup> and I<sup>6</sup> (among others) have each discussed the important opportunities for expanding race scholarship in this direction. Rather, this symposium issue marks what many of us hope will be the beginning of a sustained effort to build a new literature based upon methods that, as Carbado notes, “constitute an empirical intervention into CRT *and* a CRT intervention into empirical studies.”<sup>7</sup>

The project leading up to this symposium issue began with two working group meetings that Joan C. Williams and I hosted in December 2010 and August 2011 at the University of California, Hastings College of the Law. (The Lawrence M. Nagin Faculty Enrichment Fund provided generous support.) These two working group meetings were designed to identify the challenges and opportunities associated with rethinking race scholarship in a manner that reflected the theoretical orientation put forward by critical race scholarship and also embraced the methodological contributions of social science research. With over two dozen leading race scholars from diverse fields—law, business, sociology, anthropology, etc.—these meetings were remarkably productive; participants reflected upon contributions made by critical race theory and empirical methods, flagged tensions, challenged assumptions, and pushed the

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3. Laura Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY (Austin Sarat ed., 2008); Laura Gómez, *Looking for Race in All the Wrong Places*, 46 LAW & SOC'Y REV. 221 (2012); Laura Gómez, *Understanding Law and Race as Mutually Constitutive: An Innovation to Explore an Emerging Field*, 6 ANN. REV. LAW & SOC. SCI. 487 (2010).

4. Gregory Parks, *Toward a Critical Race Realism*, 17 CORNELL J.L. & PUB. POL'Y 683 (2008).

5. Devon Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1610–11, 1619–23 (2010).

6. Osagie K. Obasogie, *Race in Law and Society: A Critique*, in RACE, LAW AND SOCIETY (Ian Haney Lopez ed., 2006).

7. Carbado, *supra* note 5, at 1638.

envelope in a manner that provided greater mutual understanding of this endeavor.

The articles in this symposium issue reflect the type of research coming out of this ongoing collaboration of scholars and highlight the shift in race scholarship that we seek to motivate—a shift toward merging empirical methods and critical race perspectives to deepen our racial sensibilities. Victor Quintanilla’s article leverages social psychology literature to examine the racial impact of changing pleading standards under the Federal Rules of Civil Procedure.<sup>8</sup> Gregory Parks and Rashawn Ray engage a qualitative assessment of poems that describe the hazing experience in Black fraternities and sororities to probe their evidentiary value in court proceedings.<sup>9</sup> Ange-Marie Hancock takes a look at two competing framings of intersectionality—one as a testable theory, the other as a paradigm for conducting empirical legal analysis—to understand the costs and benefits of each approach with regards to maintaining intersectionality’s conceptual integrity and its promise as a litigation strategy.<sup>10</sup> Kaaryn Gustafson links the shared interpretivist sensibilities in critical race theory and sociological perspectives on degradation ceremonies to paint a richer description of the symbolic function of policies that adversely target low income women of color.<sup>11</sup> Ming Hsu Chen and Taeku Lee draw upon survey data concerning Asian Americans’ voting behaviors and political perspectives to critically assess their uneasy “fit” with legal standards developed to foster voting equality.<sup>12</sup> Andrea Freeman offers a discussion on how racial oppression can manifest itself as food oppression, particularly when U.S. food policy is not fully attentive to the nutritional needs of minority populations.<sup>13</sup>

The goal of this and future efforts is not to simply “improve” critical race theory by incorporating empirical methods, nor is it to simply “improve” social science research through integrating critical race perspectives. Instead, we seek to rethink and change the premise of race scholarship in general by eschewing theoretical and methodological silos in pursuit of deepening our understanding of race and racism to advance racial justice. The papers presented in this symposium issue are the first in what will hopefully be a long series of articles stemming from these ongoing collaborations. Readers should stay tuned.

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8. Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187 (2013).

9. Gregory S. Parks & Rashawn Ray, *Poetry as Evidence*, 3 U.C. IRVINE L. REV. 217 (2013).

10. Ange-Marie Hancock, *Empirical Intersectionality: A Tale of Two Approaches*, 3 U.C. IRVINE L. REV. 259 (2013).

11. Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297 (2013).

12. Ming Hsu Chen & Taeku Lee, *Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act*, 3 U.C. IRVINE L. REV. 359 (2013).

13. Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. (forthcoming December 2013).