
Racial Paradox in a Law and Society Odyssey

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It is tedious to tell again tales already plainly told.

(Homer, *The Odyssey*)

I read with significant anticipation Professor Richard Lempert's 2009 Presidential Address. For a number of reasons—personal and professional—portions of the speech had great appeal to me. As a scholar of color who locates his intellectual home within the law and society community, I was heartened that a multifaceted consideration of race was the focus of the outgoing president's address. Moreover, as a legal scholar who has discussed the use of narrative methodology as a site of synergy between Critical Race Theory (CRT) and sociolegal theory (Barnes 2006), I was even more pleased that Professor Lempert's personal stories figured prominently within the address. Finally, I must confess a deep affection for the author, both of his empirical work on affirmative action (Lempert et al. 2000) and the personal kindness he extended to me while he was the president of the Law & Society Association (LSA).¹ Even with significant appreciation and anticipation in place, however, my reactions to the address were somewhat ambivalent.

My first response to the piece was to question if there still is any value in this particular form of discourse for anyone other than those who already support race-conscious methods for achieving racial equality. In the general sense, the election of President Barack Obama has coincided with a rise in the belief that our society is now “post-race”—that race is no longer salient, that discrimination is practiced by only an aberrant few, and hence, racial considerations in law and society are no longer needed (see Barnes et al. 2010; Cho 2009). At the level of the specific, many understand that

¹ I have a vivid memory of being more than a bit starstruck when I recognized Rick Lempert sitting in the audience of my talk at the 2007 LSA meeting in Berlin and being extremely flattered when he asked me to co-chair a committee.

personal experiences with race and racism, like personal stories more generally, can take on greater sociological importance (see McCann & March 1996). These types of race stories, however, have been significantly chronicled and analyzed within a number of disciplines, including by critical legal scholars and social scientists, for a number of years. Moreover, there is a claim that in the practice of law, unlike within legal scholarship and studies within other disciplines, we have not truly embraced the use of stories or otherwise made the “narrative turn” (Brooks 2006:3). Are there then any new insights to be gleaned from the form and content of the stories constituting Professor Lempert’s racial odyssey? It was this question and my conflicted preliminary reaction to it that brought to mind the quote from Homer’s *The Odyssey*, which begins this comment. However, the longer I sat with Professor Lempert’s words—both those describing his personal journey toward racial understanding, and the data and studies he references as proof of the continuing significance of race within our society—the more I came to conclude that where race discourses are concerned, Homer’s declaration should be reframed as a question rather than a statement. I came to this conclusion because Professor Lempert’s stories and his assessment of race and equality in the latter half of the twentieth century—like most provocative writings on race—together constitute a story we have heard before and one that is unfortunately more relevant than ever. This tension of simultaneously experiencing racial fatigue and seeing the need for more and better legal and empirical considerations of race provides one of the many contradictions present in racial discourses.

Due to the conflicted nature of discussions of race, some elements of the address were as disturbing as others were satisfying. Perhaps this is to be expected when anyone commits to writing about the nearly always-touchy subject of race. More perplexing, however, were the portions of the address for which I simultaneously had a somewhat positive response, but with some degree of trepidation. Most of the tension, however, originated from Professor Lempert’s choice to include stories that describe his personal experiences with race within the address. For example, I found a number of the personal revelations in the piece to be at once brave—for the manner in which a nonracial minority spoke frankly about race—and vexing, in that I was equally convinced that having not labored under the burden of a minority racial identity, the author may have failed within each racialized encounter to sufficiently appreciate the insights (see Houh 2006:489–90) or potential insults that were present. Consequently, one can understand the tension as arising out of the nature of storytelling, which allows multiple insights and meanings to be derived from the writer’s work, based upon the reader’s different perspectives and experiences.

In this response, I find myself primarily focused upon Professor Lempert's use of race-related stories and confounded by the paradox that is race, a concept whose exploration by its very nature is bound to leave you wanting, even if you are pleased with some of the ways that the effects of the racial enterprise have been unclouded. This being said, I am convinced that I can do no more here than explain that which satisfied, if only fleetingly, and that which produced discomfort, if only slightly. This is done in an effort to advance a cause at the heart of Professor Lempert's address: race becoming a subject of more meaningful exploration within sociolegal studies. And while there may be some tedium involved in retelling race stories in order to make the case for the improved sociolegal study of racial equality, it is a case that should be made. I only hope linking past personal journeys to the current data on the disparate life circumstances experienced along racial lines helps illuminate the scholarly spaces where there is still fertile ground left to plow.

Personal Stories of Race: Who May Speak?

As a scholar who has considered questions of race in all his published writings, one might imagine that I would not be so disturbed by the messiness that the exploration of racial narratives produces. Which stories are told, however, by whom, in what venue, and to what effect, has a significant ability to shape our societal conversations about race relations. In addition, while race is largely a social construction (Haney López 1994; Omi & Winant 1994), it is one thing to speak of race with "I" statements—as the first-person critic and subject of a disadvantaging system of spoils—and quite another to read about race in a manner that causes the reader to assume the position of object or the role of "they."² This is so even where the writer is knowledgeable of, and sympathetic to, the negative consequences racial categorization can create, especially in the lives of minorities. Hence, in reading the address, I was confronted with assessing whether Professor Lempert's odyssey was amply sensitive to the racialized subject's concern about full belonging, that racial dialogues consider the marginalized "within the law," not just "subject to" it (Harris 1994:762).

A commitment to the importance of subject-position produced a reaction to the address that chiefly manifested itself in the form of

² In the former instance, race allows for group or self-identification, as an imperfect but necessary tool for ordering one's self in the social world, or as Winant has asserted, that even if race is not "true" in any real sense, it provides a means of rendering the social world intelligible (1997:90). The latter use of race is as the product of a process of social construction, where neither the process nor narratives that reference the product appear to require the input of persons disfigured by the resulting social categories.

the question: At this point in the development of interracial analyses of race, should there still be concerns about who is speaking?³ With regard to the deployment of these particular race stories, my apprehension centered on three issues. First, within CRT, feminist legal theory, Latina/o Critical (LATCRIT) legal theory, and other progressive scholarly movements, stories are often used deliberately to articulate an outsider consciousness or voice.⁴ This transgressive perspective is not obviously evident in the stories that detail Professor Lempert's experiences with race. Much of his early life was segregated. For example, within his personal stories he spoke of growing up in a nonintegrated neighborhood and to only coming into contact with two black people before he went to college. While the content of Professor Lempert's race stories seems unobjectionable when considered as one reflection within a larger body of narratives about race, the danger that attaches here is related to scarcity. If these stories must stand alone, the concern arises as to whether they are sufficiently representative of the range of experiences with race. In the broadest sense, interracial race stories may lose a bit of salience where they do not include the perspective of someone who has experienced the full breadth of harm that race can impart.⁵ In the very least, the value of the stories would be easier to discern if Professor Lempert had identified how his race mattered within each story.

While there is some fear that Professor Lempert may speak about race, both literally and figuratively, in a different voice from the very folks on whose behalf he appears to be advocating,⁶ the second issue is that the Crits have been severely criticized within legal academia for their uses of personal narrative.⁷ One use of

³ In the early years of the debate on the efficacy and propriety of CRT, Richard Delgado, a founding figure within the movement, criticized the fact that the central domains of civil rights scholarship were occupied by a group of white men—who predominantly cited to each other—to the exclusion of minority scholars (Delgado 1984, 1992).

⁴ At least within legal academia, the use of allegory, autobiography, and personal narratives as methods have been employed by critical race theorists, feminist legal theorists, and others engaging in outsider jurisprudence (see, e.g., Bell 1985; Culp 1991; Delgado 1989, 1990; Moran 2003; and Williams 1991).

⁵ The idea that being devalued through a process of racialization provides a unique perspective is at the heart of sociologist W. E. B. Dubois's theory of double consciousness, which claimed that American blacks experience a double-vision arising out of being forced to see themselves through the negative gaze of society (1996).

⁶ While no direct reference to Carol Gilligan, *In a Different Voice* (1993), is intended, I do mean to suggest that outsiders may speak differently or uniquely about their experiences with subordination. One of the prominent claims for minority scholars using narrative was that "legal storytelling has the virtue of presenting the lived experience of marginalized groups or individuals in a way that traditional legal reasoning doesn't" (Brooks 2006:2).

⁷ The use of stories and autobiography within legal scholarship has been a source of significant and acrimonious critique (see Coughlin 1995; Farber & Sherry 1993; Kennedy 1990; Posner 1995, 1997; and Subotnik 2005).

Professor Lempert's race stories—as a background to suggest the origins of his thinking on race and equality—is consistent with at least one way that a number of Critics have deployed the device.⁸ Are stories less susceptible to criticism about their typicality, relevance, objectivity (see Posner 1997:744) when offered by persons not associated with particular progressive intellectual or political movements? Are Professor Lempert's stories more credible because he is not speaking as the victim of marginalization? These questions—although different from questions related to voice—further implicate how the identity of the speaker informs if and how the claims embedded within their stories are interrogated. While the attacks alleging the dangers of narrative methodology never struck me as particularly convincing, part of the original critique of the use of stories in legal scholarship was clearly an indictment that was linked, in part, to the minority identities (or at least claims of oppositional voice) of the speakers (Kennedy 1990). Professor Lempert's address and its reliance on stories, in effect, could signify that majority scholars may enjoy the privilege of leveraging the value of their experiences with race within their scholarship in a way that minority scholars, ironically, may not.

Finally, given that neither legal storytelling nor race-focused scholarship routinely appear on the pages of the *Law & Society Review (LSR)*, the question of who speaks is germane in at least one more way. I wonder whether this presidential address signals the dawn of a new era, one where we see multiple scholarly uses for personal stories, where we commit ourselves to the improved qualitative and quantitative study of race, and where the work of scholars of color constitutes more of what is published in refereed interdisciplinary journals. Or does the esteem of the author and tradition of the presidential address make space for only Professor Lempert to share his race stories? I have no answers to these questions, just an uneasiness, derived from lived experience, which suggests I should be concerned with who speaks and who is heard.

The cognitive dissonance produced in the reading of the address was somewhat surprising because it has ostensibly been my belief that given the seemingly intractable nature of the consequences of individual and structural racism (see Bell 1993), I would

⁸ At different points in the address he speaks of his belief that the personal is political and that his stories have a value beyond what they “say about [him].” To be fair, Professor Lempert may simply imagine his use of narrative to be more rooted in the experience of sociological rather than legal study, and there may be multiple uses of Professor Lempert's stories. Other scholars have previously asserted that narratives may enter scholarly research in myriad ways, including as the object of inquiry, a method of studying social life, or through stories the researchers themselves tell (Ewick & Silbey 1995:201–3). Professor Lempert, himself, attempts to use his experiences with race to suggest the factors that must be in place for those who are the product of a racist social hierarchy to resist succumbing to the trappings of racial prejudice.

always be interested in any meaningful exploration of the subject, no matter who was speaking. As much as good scholarship—including good race-centered scholarship—can be produced by anyone, identity does matter when race stories are invoked. To take a recent example: The arrest last summer of black Harvard Professor Henry Louis Gates Jr. by a white officer at his on-campus home has been the centerpiece of a popular racial dialogue. Anyone with knowledge of the incident, including the witness who first reported Gates's appearance at his home to the police and Officer Crowley, the arresting officer, could tell a story about the encounter. The function that identity would perform in these stories, however, would be informed by their beliefs about the salience of race. As recently asserted by Professor Frank Rudy Cooper, a person with postracial commitments is likely to construct a story that minimizes the importance of race in the encounter and potentially vilifies Gates's conduct (2010:53–4). I would imagine, however, that only Gates, or a person similarly marked by a disadvantaged identity vis-à-vis the police, would be inclined to communicate how and why he perceived racial overtones in the encounter. Such an interpretation could be based, in part, on a general sense that race played a role in the person's treatment (e.g., the pervasiveness of police profiling) or their past personal experiences with police and racism.⁹ Either way, subject-position affects the interpretation of the racial narrative of the parties to the experience and also how those who merely hear the story interpret it.

Although I was keenly aware of the speaker's identity and its shaping effect throughout my reading of Professor Lempert's stories, ultimately I concluded that multiple viewpoints must be welcomed. They are necessary to illuminate the complexity of race and racialization processes, and the ways in which we are all implicated in those processes (within and across racial groups). In addition, to conclude otherwise would be to invest in the ghettoization of race scholarship, which would become further marginalized if it were viewed as unimportant for study and comment by other than persons of color.¹⁰ De-emphasizing the importance of the identity of who is telling a certain type of race-focused story is important for at least two other reasons. When persons of color use personal stories to critique race, they are subject to the criticism that the story is

⁹ During the encounter, Gates commented as he was being arrested, "This is what happens to black men in America!" (Cooper 2010:4). Certainly, other black male academics have perceived racial elements to their encounters with police and used the experiences within their scholarship (see Butler 1997; Carbado 2000).

¹⁰ Prominent CRT scholars have rejected this territorial approach to race studies (Delgado & Stefancic 1997). Moreover, elsewhere I have complained about judges—since at least the majority in *Plessy v. Ferguson* (1896)—acting as if the concept of race is unimportant because it only matters to minorities (Barnes et al. 2010).

either admittedly narrow (nonrepresentative of a larger phenomenon within the group) or overbroad/essentialist (erroneously attempting to define for a group some essential quality or experience that binds all within the group). In addition, this criticism displaces any focus on those who enjoy the privilege of largely ignoring race. Whites speaking of race encourages a group often treated as raceless not just to consider the consequences racialization creates in the lives of those arbitrarily marked by color, but to see themselves as not outside the process of racialization. Perhaps, then, interracial race discourses encourage whites to see themselves as beneficiaries of the structural privileging of whiteness (see Delgado & Stefancic 1998). Finally, while he is not a racial minority, as someone who is Jewish, Professor Lempert personally understands how discrimination against “the other” works.¹¹ While he claims to have no personal experiences with discrimination, he speaks at length about how anti-Semitism led to the Jewish community supporting the cause of black civil rights. In terms of his personal motives, his Jewish heritage and the commonalities between racial and ethnic bias clearly shaped his attitudes about equality and influenced his call for more carefully divining the empirical significance of difference.

Of What Should We Speak When We Speak of Race?

The Tales That Were Told

Beyond the question of who was speaking, a bit of my conflicted reaction to the address centered on the content of the stories Professor Lempert shared in the address. For each story presented in the address I found myself in an extended consideration of how race mattered to the story and how the story fit into Professor Lempert’s odyssey. While I am certain it was not the writer’s intent to evoke this response, portions of each story detailing his formative experiences with race and racism were at least somewhat troubling to me.

In one story, Professor Lempert described how as a five-year-old he used the “N” word as part of a childhood game of “eeny, meeny, minee, mo,” even without understanding the word’s meaning. To have anyone admit they have ever freely uttered the “N” word, even where it was not used against a particular object of derision, seems unusual in our new postracial world. For him, the word was a place holder for a non-raced “bogeyman.” Still, it was

¹¹ Within the address, Professor Lempert relayed how an experience with discrimination based on his family being Jewish affected their prospects, if not his personal understanding of discrimination. He also remarked that the presidency of the United States—rendered beyond claims of racism by the election of Barack Obama—might still be held captive by anti-Semitism (this issue).

troubling to read the “N” word, a word I hesitate to refer to except by this kinder abbreviation, fully spelled out within his piece. This story produced three responses. Did he use the word and retell the story because he did not find using the word within an academic article to be troubling? Did the use of the word involve him grappling with the considerations of how loaded it still can be, even when referring to a historical incident? Finally, I was interested to know whether he was so willing to use the word because the use took place within a story where a child uttered it without it being directed toward a black person. While the decision to share or include the story commanded the greatest portion of my attention, it also reinforced one of the reasons we care about who is speaking when race is spoken about—depending on the speaker we may infer a benign rather than offensive context; depending on the context, the benefit of the doubt may be extended to the speaker. One way to read this story is to see it as evidence that people can deploy racist rhetoric without intending to oppress or themselves being racist; this appears to be Professor Lempert’s view. Another interpretation is to read this story as expressive of white privilege—the privilege to be naïve about the continuing danger of this word. Either way, persons offended by the epithet may be upset or harmed by encountering the word in this setting, even if the speaker meant no harm. In addition, for some, the story will resonate because while Professor Lempert was able to escape racial indoctrination, others in his all-white community who spoke the word—initially without directing it toward anyone—likely learned to deploy the word in the demeaning fashion in which it is typically used.

In a separate story, Professor Lempert describes his coming to terms with the comparative disadvantage of the black child-care provider and housekeeper, whom his family referred to as “Mame.” In the story, he speaks fondly of the housekeeper who could only attend her son’s birthday party by agreeing to take young Richard Lempert with her. In a single sentence assessing the housekeeper’s circumstance, he concluded, only in retrospect, that his housekeeper had left her children on a daily basis to care for the children within his household. Why, I thought to myself, was this critically important determination only latently comprehended—especially when it would have been “the point” of the story for many scholars? Post-slavery, during the period of Jim Crow and beyond, housekeeping and child-rearing for white families was one of the few jobs black women could obtain. The jobs were, of course, needed, but they also represented race and class struggles that are not fully explicated in Professor Lempert’s story. To emphasize that point, I will take this lone opportunity to share my own personal story.

In the 1970s, my paternal grandmother was a “day worker,” doing house cleaning for a number of white families in San Diego,

California. On a single occasion when I was nine years old, I accompanied her to work. I cannot recall whether my going with her was precipitated by her agreeing to provide day care for my parents or because I loved to be around her. I have two vivid but juxtaposed memories of the experience: the arduous nature of the work she performed, and the ostensibly loving attitude of the family for whom she worked. One by one, I met her employer's family members, each professing their love for "Sweetie" or "Ms. Willie."¹² At the end of the day I remember sitting at a bus stop with my grandmother being very upset about how tired she looked and how hard she had worked. I am not sure at the time I appreciated that she was in her 60s and suffering from diabetes, but I did understand that this brand of physically demanding labor was not good for her. In addition, it was at that moment that I started to take solace in the fact that my family referred to my diminutive grandmother as "big mama." The name both conveyed respect for our matriarch and assured that for us, she could never be "Sweetie"—a put-upon, if not much-adored, servant.

In a way, my story is offered in the same vein of Professor Lempert's story, to infer how the personal is political and to provide a glimpse of a formative experience in my racial odyssey. I agree with him that "our deepest values are often shaped by childhood and growing-up experiences" (p. 437, this issue).¹³ Our scholarship and invoking of narrative, however, are shaped by much of what we have learned since childhood. Therefore, there is no reason that Professor Lempert's story could not have centered upon how the lives of generations of untended black children were affected by the absence of their hard-working but low-paid mothers. This story also illuminates a potential disjuncture that I have previously alluded to—the space that may exist between what the speaker intends to convey and how the tale is received. His use of the story appears intended to demonstrate his family's lack of racism and only a latently realized identification of race and class difference. For me, the comparative disparity between the lives of the Lemperts and their housekeeper was *the* story. The difference was troubling because a version of this dynamic—a woman who leaves her needy children and family to care for those less disadvantaged than she—is still prevalent within contemporary society.¹⁴ Unfortunately, more often than not, the housekeeper is

¹² My grandmother's name was Willie Mae.

¹³ In addition, Professor Lempert and other law and society scholars have suggested that each of our personal stories inform, in part, the subjects we choose to study (see Sarat 1990).

¹⁴ Mary Romero, who herself did day work with her mother and sister (2002:34–5), has done rich work in the area of race and class struggle in and around domestic work. In describing her encounters with students, faculty, and administrators on college campuses

still apt to be a poor woman of color. Today, however, the housekeeper is at least as likely to be an immigrant (Romero 2002:1–3). Race stories such as these are confounding because one person's hopeful narrative becomes to another evidence of raced and gendered intergenerational poverty. While the continued relevance of Professor Lempert's story does confirm the need to engage in meaningful studies of race, to my mind the reasons are far more complicated than his stated use of the story infers.

Finally, another of Professor Lempert's stories centers on his experience while teaching at the University of Michigan Law School.¹⁵ In the years immediately after Michigan instituted affirmative action, Professor Lempert wrote of black students who performed miserably on exams, even where they were in the top 10 percent of students based on class performance. The story involved his struggle to grade these students given the disparate elements of their performance. Over time, he indicated that even the poorest exams gave him little concern over the students' fitness to practice law, but he still saw a disparity between the written work and class performance for black students. In some ways the sting of his observation was reduced by the findings of his own study, showing that black students and other beneficiaries of affirmative action at the University of Michigan were as successful in their careers as the school's white students (despite lower law school grades) (Lempert et al. 2000).

Professor Lempert's commitment to racial equality is unquestionably strong.¹⁶ His research and his testimony in the *Grutter v. Bollinger* (2003) case evince his commitment to equal opportunity. Yet reading his description of black student performance produced anxious moments. He seemed to be describing students that were simultaneously deserving of opportunity but ill-prepared for it. My less-than-rational response is that I would have preferred a story that spoke of black student success in spite of race rather than one that also included a discussion of a performance gap along racial lines. I have a fear that in our *Bell Curve*-influenced world (Herrnstein & Murray 1996), the former fact is ignored while the latter is

who were the adult children of domestic workers, Romero recounted their "recollection of the physically hard work of domestic service, the low pay and, and the impact the occupation had on their families. Their stories raise the question: Who takes care of the maid's children when she is taking care of the mistress's children?" (2002:21).

¹⁵ A fourth story of a black exchange student who visited at his family's home in his youth is discussed in Professor Lempert's address but not analyzed in this response.

¹⁶ Professor Lempert describes his commitment to racial equality as explained by four factors: "my parents' lack of racism, growing up when and where I did, my experiences at Oberlin, and growing up Jewish" (p. 435, this issue). With regard to affirmative action, Professor Lempert chaired the University of Michigan Law School committee that rewrote the affirmative action policy in the 1990s and testified for both the University and the student interveners in *Grutter v. Bollinger* (2003).

what is taken from his story. I am not suggesting that Professor Lempert should have omitted the story. I am suggesting a different point for consideration: that for those who have suffered because of their race, racial narratives almost always involve elements of threat and pain. The pain comes from personal and perhaps first-hand understanding of the circumstance he describes. The threats are multiple. Beyond the concern that such stories become the centerpiece of generalized backlash efforts, these types of stories create a form of “no-win” personal anxiety for some scholars of color, who find that race has always subjected us to concerns about our merits, whether, in fact, we were like Professor Lempert’s former students or not.

Each of the three stories mentioned produces varying types of disquiet. Professor Lempert is correct to suggest in the “N” word story that we should be mindful to separate racial rhetoric from racial animus, to the extent it is possible. We must also be careful, however, not to sign on to claims that some people do not worry about the effect of their word choices, even where racially offensive words are involved, because they do not “see” race. Bonilla-Silva describes this as the form of colorblindness claim that produces “racism without racists” (2006). There is also the separate question of whether those who engage in racial slights should only be criticized where they intend to demean. It is not clear to me that this should be the preferred baseline. To a greater extent than Professor Lempert, I believe that the “situations we might deplore”—like all-white neighborhoods where epithets can be uttered without sanction—are likely to produce “attitudes we deplore” as well (p. 437, this issue).

The story of the housekeeper cautions that tales that signify individual racial acceptance may also mask forms of structural racial domination. In addition, racial disparities, even when they appear in stories of self-discovery, still involve elements of economic, physical, and emotional distress. Finally, the third story is troubling because it reminds us that sometimes race matters in ways that those disadvantaged by it wish it did not. Even where a story seeks to minimize the importance of the disadvantage, it also produces fodder for those who wish to characterize racial minorities as unworthy or undeserving of the efforts society has engaged in to overcome our history of racially disparate treatment. I would be less concerned with this variety of story if I believed that a significant number of readers would focus on the forces that produced the disparity or law’s complicity in maintaining it. None of my reactions were likely foreseeable or intended by Professor Lempert. They result from the interpretation the narrative method invites and the paradoxical nature of racial discourse. Consequently, most race stories, especially those with interracial

elements, will always include the potential to offend as much they inform, no matter who tells them.

The Untold Stories

If part of the problem pertains to what we speak of, there is also an issue related to what is left unaddressed in Professor Lempert's speech. While he freely admits this limitation, it must be noted that he describes a racial odyssey of 60 years that primarily focuses on blacks. The tendency to focus racial discourses on a black-white binary—which to this point this comment is equally guilty of—has been roundly criticized within legal scholarship (see Delgado & Stefancic 1998; Perea 1997). Such a tendency largely omits the experiences of Latinas/os and other racial minorities and ethnic groups in the United States. Focus on the binary is part of what gave rise to LATCRIT legal theory and the associated movement. Although it is assumed, greater emphasis should be placed on the study of race within law and society research, to include the stories and experiences of myriad racial and ethnic populations.¹⁷

Professor Lempert also leaves nearly completely unaddressed beliefs about how race has begun to lose its salience in the United States. One need not only look to the presidential election of 2008 and the dawn of the Barack Obama postracial moment to make this claim. Long before President Obama, at least as far back as Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* (1896), we have wrestled with articulating an appropriate context for color blindness. Justice Harlan used color blindness to advocate that considerations of race should not be used to punish minorities. The modern iteration, perhaps born anew in *Brown v. Board of Education* (1954), claimed that everybody should be treated equally. *Brown* was used to undo separate but equal, but divorcing *Brown* from its historical moorings allows it to be spoken of as a call for the abstractly universal treatment of all racial groups rather than the substantively and practically equal treatment of all groups (Barnes et al. 2010; Gotanda 1991). In a fully realized postracial world, any social scientific studies of race, like the concept of race itself, would be viewed with deep skepticism. In addition, the first person to claim race as a significant factor to be considered would be susceptible of being labeled a racist (see Haney López 2010).

Professor Lempert does not appear to subscribe to color blindness or a postrace perspective. Neither his personal experiences nor the mountain of racially disparate data he presents support these vantage points. He says, however, very little about what

¹⁷ Professor Lempert makes this very point at the end of his address, but the greatest portion of the speech focuses on the experiences of blacks.

political perspective should inform our legal, if not social, understandings of race.¹⁸ It is important because data alone will not convince those who have “moved beyond” race that race still matters.

From Stories to Studies: How Should We Account for Race?

The most compelling portions of the address look at the many ways race still matters based on statistics detailing significantly different life circumstance along racial lines. He looks at data on income, wealth accumulation, education, crime/prison rates, and success in electing political officials over a 60-year period. The statistics both serve as proof of the lingering effects of slavery and de jure segregation and also evince why race should remain a salient construct and subject for study. Here, Professor Lempert does an excellent job of chronicling how race still matters in most areas of social life in the United States. While these statistics were compelling, as Supreme Court Justice Lewis Powell famously opined in *McCleskey v. Kemp* (1987), mere correlation between race and negative consequences does not prove causation. Professor Lempert, however, also pieces together a causation narrative by reviewing a set of behavioral studies in employment, housing, and the provision of medical treatment, as well as studies of implicit bias, which indicate that race in fact is the factor at work in decisions that produce disparate results for blacks. Ultimately, this section of the address demonstrates the unequal nature of our raced world and effectively sets the table for sociolegal scholars to identify the ways law is used to maintain unequal arrangements of power.

The bad news represented in the studies and statistics Professor Lempert considers is tempered by his claims that even though race still matters, throughout the twentieth century there have been gains in the areas of employment, education, and, especially, the ability to elect representative public officials. Further, he cites to cases like *Brown* and *Loving v. Virginia* (1967) and the integration of the armed forces to suggest that attitudes about race have improved.¹⁹ With regard to future gains, he looks at the recent hesitancy of the federal courts to uphold affirmative action or enforce

¹⁸ In his single comment on color blindness in the concluding pages of the address, he queries: “How has the concept of the color-blind Constitution, which too often means a Constitution blind to discrimination, achieved the power it seems today to have?” (p. 457, this issue).

¹⁹ With regard to the military, however, I have argued elsewhere that the organization receives too much credit for its integration success story, especially where the services do a poor job of tracking opportunities for individuals whose identities exist along multiple axes of subordination (Barnes 2007).

integration, and he argues that social science is needed now more than ever to bear out the truth of discrimination.

I commend the insights in this portion of the address, but I still have some concerns. First, Professor Lempert looks to social science as a bit of a panacea or at least a neutral instrument that can be used to address prejudice and discrimination. He does not acknowledge that various disciplines—such as criminology, psychology, law, and economics—have in the past been used to justify race discrimination and segregation. Second, it is not clear to me whether Professor Lempert's preferred method of considering race moving forward will yield actionable results. I am not precisely certain what a renewed focus on race in law and society scholarship might look like. He does not appear to be championing the greater turn toward narrative, although he deploys the device to interesting effect in the address. He also does not advise that we seek to compose additional studies, articulating further the significant and sustained negative effects of structural racism. His charge to us is that the LSA community should “critically examin[e] the modern jurisprudence on race” (p. 457, this issue). He then asks a series of questions about the conditions that have produced the discarding of progressive readings of Fourteenth Amendment equality doctrines. Beyond that, however, he merely restates how his values—despite a past that could be expected to produce racial animus—have informed his personal and political commitments to fighting enduring forms of prejudice and discrimination.

I would have liked a more explicit pronouncement of how he believes race should be studied within law and society scholarship. Also, is he encouraging a broader embrace of various strands of critical theories, or does he believe quantitative studies will be of greater value? For example, he mentions the danger of unconscious bias, without mentioning the significance of CRT luminary Charles Lawrence's germinal work in this area, which also extensively explores the nexus between social science and racism (1987).²⁰ Or how would our approaches to empirical studies of equal protection doctrines change if we adopted Bell's theory of interest convergence (1980)? On this question, current LSA President Laura Gómez has previously asserted that there needs to be a more meaningful engagement between critical theories and the social sciences and that there is little to be gained from treating race as “an easily measured independent variable” within an empirical study (2004:455).

Finally, Professor Lempert uses a survey of two 10-year periods of *LSR* volumes to bolster his claims that a larger number of race-

²⁰ Others have more specifically suggested that critical theories would benefit from a broader engagement with other disciplines (Carbado & Gulati 2003; Parks et al. 2008).

related studies are needed. He is certainly correct to raise a red flag over the point that discussions of the social and legal implications of race have not often been a primary subject of inquiry within the *LSR*. However, he misses the opportunity to question why through engaging the work of scholars of color who have used empirical studies and normative analysis to make this very point within (Houh 2006) and outside of the *LSR* (Obasogie 2007). One of the more troubling elements of the address is that in fact, he says very little about the treatment of scholars of color within LSA. I do not mean to imply that scholars of color should be the preferred publishers of race-centered work. My issue, rather, is that in his extended address on race and law and society, he completely omits the question of what commitment the Association owes to scholars of color.²¹ This may seem an odd criticism when the Association is currently headed by an incredibly talented Latina scholar and long-term LSA member. Despite that circumstance, at least since my affiliation with the organization in the late 1990s, there have historically been very few scholars of color among the senior leadership. In addition, at the critical theory/antibordination-focused conferences I have routinely attended since joining LSA, there have been recurring conversations about the uneasy relationship of outsider scholars to the Association. While I have no empirical proof that there are widespread concerns, a version of the inclusion question is wonderfully addressed in Houh's provocative *LSR* review essay (2006). Moreover, a number of scholars of color who at least periodically attend the annual meetings do not join the Association,²² and I have been told by two senior scholars of color who were once active in LSA that I am now taking "my turn" as a visible minority within the organization. While this particular portion of my LSA odyssey may not be representative, it is a part of my story. If we are going to have a full conversation about race and narratives within law and society, we must be willing to fix an internal gaze on these troubling anecdotes as well.

References

- Barnes, Mario L. (2006) "Black Women's Stories and the Criminal Law: Restating the Power of Narrative," 39 *U.C. Davis Law Rev.* 941–89.
- (2007) "'But Some of Them Are Brave': Race, Identity Performance and the Dangers of an Integration Success Story," 14 *Duke J. of Gender Law and Policy* 693–748.

²¹ Clearly there is some organizational commitment to inclusion. Evidence of such is seen in the standing Diversity Committee and the efforts the Association expended to create inequality-focused dissertation fellowships.

²² This produces the problem of rendering them ineligible to be elected to office and hence perpetuates a lack of diversity among the leadership.

- Barnes, Mario L., et al. (2010) "A Post-Race Equal Protection?" 94 *Georgetown Law J.* 967–1004.
- Bell, Derrick (1980) "Brown v. Board of Education and the Interest Convergence Dilemma," 93 *Harvard Law Rev.* 518–33.
- (1985) "The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles," 99 *Harvard Law Rev.* 4–83.
- (1993) *Faces at the Bottom of the Well: The Permanence of Racism*. New York: Basic Books.
- Bonilla-Silva, Eduardo (2006) *Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in the United States*, 2d ed. New York: Rowman & Littlefield.
- Brooks, Peter (2006) "Narrative Transactions—Does the Law Need a Narratology?" 18 *Yale J. of Law & the Humanities* 1–28.
- Butler, Paul (1997) "Walking While Black: Encounters With the Police on My Street," *Legal Times*, 10 November, p. 23.
- Carbado, Devon (2000) "(E)Racing the Fourth Amendment," 100 *Michigan Law Rev.* 946–1044.
- Carbado, Devon, & Mitu Gulati (2003) "The Law and Economics of Critical Race Theory," 112 *Yale Law J.* 1757–828.
- Cooper, Frank R. (2010) "When Machismo Meets Post-Racialism: The Gates Controversy." *Nevada Law J.* (forthcoming).
- Cho, Sumi (2009) "Post-Racialism," 94 *Iowa Law Rev.* 1589–649.
- Coughlin, Anne (1995) "Regulating the Self: Autobiographical Performances in Outsider Scholarship," 81 *Virginia Law Rev.* 1229–340.
- Culp, Jerome M., Jr. (1991) "Autobiography and Legal Scholarship and Teaching: Finding Me in the Legal Academy," 77 *Virginia Law Rev.* 539–59.
- Delgado, Richard (1984) "The Imperial Scholar: Reflections on a Review of Civil Rights Literature," 132 *Pennsylvania Law Rev.* 561–78.
- (1989) "Storytelling for Oppositionists and Others: A Plea for Narrative," 87 *Michigan Law Rev.* 2411–41.
- (1990) "When a Story Is a Story Does a Voice Really Matter?" 76 *Virginia Law Rev.* 95–111.
- (1992) "The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later," 140 *Pennsylvania Law Rev.* 1349–72.
- Delgado, Richard, & Jean Stefancic (1997) *Critical White Studies: Looking Behind the Mirrors*. Philadelphia: Temple Univ. Press.
- (1998) *The Latino/a Condition: A Critical Reader*. New York: New York Univ. Press.
- Dubois, W. E. B. (1996/1903) *The Souls of Black Folk*. New York: Penguin Books.
- Ewick, Patricia, & Susan Silbey (1995) "Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative," 29 *Law & Society Rev.* 197–223.
- Farber, Daniel, & Suzanna Sherry (1993) "Telling Stories Out of School: An Essay on Legal Narratives," 45 *Stanford Law Rev.* 807–55.
- Gilligan, Carol (1993) *In a Different Voice: Psychological Theory and Women's Development*, 6th ed. Cambridge, MA: Harvard Univ. Press.
- Gómez, Laura (2004) "A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory," in A. Sarat, ed., *The Blackwell Companion to Law and Society*. Malden, MA: Blackwell Publishing.
- Gotanda, Neil (1991) "A Critique of Our Constitution Is Color-Blind," 44 *Stanford Law Rev.* 1–68.
- Haney López, Ian F. (1994) "The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice," 29 *Harvard Civil Rights-Civil Liberties Law Rev.* 1–62.
- (2010) "Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama," 97 *California Law Rev.* (forthcoming).

- Harris, Angela P. (1994) "Foreword: The Jurisprudence of Reconstruction," 82 *California Law Rev.* 741–85.
- Herrnstein, Richard, & Charles Murray (1996) *The Bell Curve: Intelligence and Class Structure in American Life*. New York: Free Press.
- Houh, Emily (2006) "Still, At the Margins," 40 *Law & Society Rev.* 481–92.
- Kennedy, Randall (1990) "Racial Critiques in Legal Academia," 102 *Harvard Law Rev.* 1745–819.
- Lawrence, Charles III (1987) "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," 37 *Stanford Law Rev.* 317–88.
- Lempert, Richard, et al. (2000) "'From the Trenches and Towers': Law School Affirmative Action: An Empirical Study of Michigan's Graduates in Practice: The River Runs through Law School," 25 *Law & Social Inquiry* 395–505.
- McCann, Michael W., & Tracey March (1996) "Law and Everyday Forms of Resistance," 15 *Studies of Law, Policy and Society* 207–36.
- Moran, Rachel (2003) "The Elusive Nature of Discrimination," 55 *Stanford Law Rev.* 2361–418.
- Obasogie, Osagie K. (2007) "Race in Law and Society: A Critique," in I. Haney López, ed., *Race, Law, and Society*. Burlington, VT: Ashgate Publishing.
- Omi, Michael, & Howard Winant (1994) *Racial Formation in the United States: 1960s to the 1990s*, 2d ed. New York: Routledge.
- Parks, Gregory, et al. (2008) *Critical Race Realism: Intersections of Psychology, Race, and Law*. New York: The New Press.
- Perea, Juan F. (1997) "The Black/White Binary Paradigm of Race: The 'Normal Science' of American Racial Thought," 85 *California Law Rev.* 1213–58.
- Posner, Richard A. (1997) "Legal Narratology," 64 *University of Chicago Law Rev.* 737–47.
- (1995) *Overcoming Law*. Cambridge, MA: Harvard Univ. Press.
- Romero, Mary (2002) *Maid in the U.S.A.: Tenth Anniversary Edition*, 2d ed. New York: Routledge.
- Sarat, Austin (1990) "... 'The Law Is All Over': Power and Resistance in the Legal Consciousness of the Welfare Poor," 2 *Yale J. of Law & Humanities* 343–80.
- Subotnik, Dan (2005) *Toxic Diversity: Race, Gender and Law Talk*. New York: New York Univ. Press.
- Williams, Patricia (1991) *The Alchemy of Race and Rights: A Diary of a Law Professor*. Cambridge, MA: Harvard Univ. Press.
- Winant, Howard (1997) "Racial Dualism at Century's End," in W. Lubiano, ed., *The House that Race Built*. New York: Vintage Books.

Cases Cited

- Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
- Grutter v. Bollinger*, 539 U.S. 306 (2003).
- Loving v. Virginia*, 388 U.S. 1 (1967).
- McCleskey v. Kemp*, 481 U.S. 279 (1987).
- Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

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