TOWARD A CRITICAL RACE REALISM*

*Gregory Scott Parks***

> Like men we'll face the murderous, cowardly pack,
> Pressed to the wall, dying, but fighting back!
>
> —Claude McKay[1]

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[1] Claude McKay, *If We Must Die*, *in* AFRO-AMERICAN WRITING: AN ANTHOLOGY OF PROSE AND POETRY 344, 344 (Richard A. Long & Eugenia W. Collier eds., 2d ed. 1985). In his poem, McKay encourages doomed resistance, quite the way Critical Race Theorists contend that racism is part of the American psyche, the very fabric of America, yet encourage resistance to such racism. For a critical race theorist's perspective, see Derrick Bell, *Racism Is Here to Stay Now What?*, *in* THE DERRICK BELL READER 85–90 (Richard Delgado & Jean Stefancic eds., 2005). Similarly, I argue within this Note that although racism against black Americans will likely exist, in various forms, into perpetuity, our interests would be best served by marshalling a systematic attack against it. This attack, from the legal standpoint, necessitates the use of (empirical) social science geared towards altering public policies affecting blacks.

INTRODUCTION

A historical account of American law shows a dramatic irony; the law has served as a tool to both oppress and liberate Blacks.[2] In the face of such oppression, a handful of lawyers[3] and law professors[4] have used the law for progressive, social change. Among the latter, Critical Race Theorists have been in the vanguard of providing "a race-based, systematic critique of legal reasoning and legal institutions."[5] In 2002, Temple University Press published *Crossroads, Directions, and a New Critical Race Theory*.[6] The volume is comprised largely of papers and speeches

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[2] *See generally* DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW (4th ed. 2000) (providing a general account of topics dealing with race and the law); JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994) (providing a history of civil rights lawyering); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978) (providing a history of race and law during America's colonial period); A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996) (providing a general history of issues dealing with race and the law); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1977) (providing a history of *Brown v. Board of Education*, 347 U.S. 483 (1954)); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (1987) (providing a historical account of the NAACP's efforts to end school segregation).

[3] *See, e.g.*, GREENBERG, *supra* note 2; KLUGER, *supra* note 2; GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983) (highlighting the efforts of Houston as a civil rights lawyer); TUSHNET, *supra* note 2.

[4] *See, e.g.*, CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2000) (synthesizing key Critical Race Theory writings); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) (synthesizing key Critical Race Theory writings); CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002) [hereinafter CROSSROADS] (providing a future vision of Critical Race Theory).

[5] Delgado & Stefancic, *supra* note 4, at xix.

[6] CROSSROADS, *supra* note 4.

presented in 1997 at the Critical Race Theory Conference held at Yale Law School in commemoration of Critical Race Theory's tenth anniversary.[7] In one of the many commentaries that followed the release of *Crossroads*,[8] Boalt Law Professor Rachel Moran noted that the work captures a discipline at a crossroads, struggling to define its substantive mission, methodological commitments, and connection to the world outside of academia.[9] Almost ten years after the Yale conference and four years after *Crossroads*' publication, Critical Race Theory continues to grapple with these same issues.

Thus, this Note sets forth a particular methodology called Critical Race Realism.[10] Critical Race Realism is a synthesis of Critical Race Theory, empirical social science, and public policy.[11] This methodology has both academic and applied components. Furthermore, its mission is to provide a *systematic*, race-based evaluation and critique of legal doctrine, institutions, and actors—e.g., judges, juries, etc. By employing social science, Critical Race Realism should (1) expose racism where it may be found, (2) identify racism's effects on individuals and institutions, and (3) put forth a concerted attack against racism, in part, via public policy arguments. Part I of this Note provides a backdrop to understand Critical Race Realism. It explores the histories of the various actors who, and movements that, inform our understanding of Critical

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[7] *See id.* at xi.

[8] *See* Ian Ayres, *Is Discrimination Elusive?*, 55 STAN. L. REV. 2419 (2003); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003); Mary Anne Case, *Developing a Taste for Not Being Discriminated Against*, 55 STAN. L. REV. 2273 (2003); Jerome M Culp, Jr. et al., *Subject Unrest*, 55 STAN. L. REV. 2435 (2003); Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121 (2003); Clark Freshman, *Foreword: Revisioning the Constellations of Critical Race Theory, Law and Economics, and Empirical Scholarship*, 55 STAN. L. REV. 2267 (2003) [hereinafter Freshman, *Foreward: Revisioning the Constellations*]; Clark Freshman, *Prevention Perspectives on "Different" Kinds of Discrimination: From Attacking Different "Isms" to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research*, 55 STAN. L. REV. 2293 (2003) [hereinafter Freshman, *Prevention Perspectives*]; Kevin Haynes, *Taking Measures*, 55 STAN. L. REV. 2349 (2003).

[9] Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2365–67 (2003).

[10] *See* Emily M. S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455, 457 (2005) (arguing that "critical race realism encompasses not only the goals and methodologies of the broader critical race . . . projects, but also some of the shared goals and methodologies of legal realism."); *see also* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 363–64 (1992) ("Black people need reform in our civil rights strategies as badly as those in the law needed a new way to consider American jurisprudence prior to the advent of the Legal Realists. . . . Racial Realism . . . is a legal and social mechanism on which blacks can rely to have their voice and outrage heard.").

[11] I do not propose that this piece is the first attempt to synthesize Critical Race Theory, empirical social science, and public policy. Recent Critical Race Theorists have put forth an effort to address issues at the intersection of Critical Race Theory and social science. *See, e.g.*, Delgado & Stefancic, *supra* note 4, at 129–79.

Race Realism. Part II defines Critical Race Realism by example and elaborates on those elements that comprise it.

I. CRITICAL RACE REALISM: AN INTELLECTUAL HISTORY OF CONSTITUENT FEATURES

This section highlights the many movements and individuals that inform us about what constitutes Critical Race Realism today and its potential in the future. Subpart A explores how early American legal education came to tolerate interdisciplinary studies. Subpart B highlights the contributions of Supreme Court Justices Holmes, Brandeis, and Cardozo and Harvard Law School Dean Roscoe Pound toward the acceptance of social science within American jurisprudence, the study of law in action, and the use of law to advance public policy. Subpart C explores the work of academics at both Columbia and Yale Law Schools and their efforts toward extending a new way of looking at the law—one that is functional in its approach, debunks commonly held legal ideologies, and integrates social science with the law, and law with public policy. Subpart D investigates the development of the law "and" movement, its progeny, and how they extended our understanding of law and social science. The Subpart also provides critiques of legal doctrine, institutions, and actors.

A. INTERDISCIPLINARITY IN EARLY AMERICAN LEGAL EDUCATION

Since its inception in the early 1700s, American legal education has evolved considerably; one such evolution is its interdisciplinary growth. At its beginning, there were two avenues to joining the bar: young "men" could go to England and acquire legal training at the Inns of Court,[12] or they could read law in the office of an established practitioner.[13] The latter model, ultimately the more popular, consisted of an apprenticeship coupled with a formal examination.[14] These apprenticeships gave birth to early, freestanding American law schools.[15] The oldest, largest, and most influential was Connecticut's Litchfield Law School, founded in 1784.[16] By the early 1820s, many such proprietary law schools merged

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[12] MARIAN C. MCKENNA, TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL 1 (1986); HISTORY OF THE YALE LAW SCHOOL: THE TERCENTENNIAL LECTURES 19 (Anthony T. Kronman ed., 2004) [hereinafter YALE LAW SCHOOL].

[13] MCKENNA, *supra* note 12, at 1; ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 3 (1983).

[14] YALE LAW SCHOOL, *supra* note 12, at 19–20; STEVENS, *supra* note 13, at 3.

[15] MCKENNA, *supra* note 12, at 60; STEVENS, *supra* note 13, at 5. Colleges such as Columbia successfully mounted a take-over bid for a proprietary school operated at Hamilton College, and Harvard subsumed the Northampton Law School. *See* YALE LAW SCHOOL, *supra* note 12, at 23.

[16] MCKENNA, *supra* note 12, at 17.

with local, established colleges.[17] These mergers gave private law schools prestige and the ability to grant degrees and also possibly provided colleges with greater influence among local lawyers, who were part of a powerful elite.[18] Thirty years later, such institutionalized, eastern law schools like those at Columbia University, New York University, and the University of Pennsylvania were founded.[19]

Harvard is credited with establishing the first modern, American law school.[20] From 1870 to 1895, Christopher Columbus Langdell served as its dean.[21] During his deanship, Harvard Law School shaped the early "structure and content" of other American law schools.[22] Langdell shifted legal education from the undergraduate level to an eighteen-month, and then three-year, post-baccalaureate degree program.[23] He also hired the first career law professor,[24] instituted rigorous examinations, required a college-degree for admission,[25] and developed a system of teaching that focused on appellate case analysis[26] and Socratic questioning.[27] In 1873, James Barr Ames was appointed assistant professor of law at Harvard Law School, and it was Ames who turned the case method into "a faith."[28] By then, Harvard's curriculum was largely professionally oriented and based on its 1852 curriculum that was adapted during Langdell's time.[29] Harvard's size and influence had a tremendous impact on other university-affiliated law schools.[30] As such, many law schools emulated Harvard's academic approach, and those that did not found it difficult to resist Harvard's growing influence.[31]

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17 STEVENS, *supra* note 13, at 5.

18 *Id.*

19 *Id.* at 21.

20 JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 20 (1978).

21 *Id.* at 20.

22 STEVENS, *supra* note 13, at 35.

23 SELIGMAN, *supra* note 20; STEVENS, *supra* note 13, at 36.

24 SELIGMAN, *supra* note 20.

25 *Id.*

26 *Id.*; STEVENS, *supra* note 13, at 36.

27 SELIGMAN, *supra* note 20.

28 STEVENS, *supra* note 13, at 38.

29 ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF THE CONDITIONS IN ENGLAND AND CANADA 458 (1921). By 1852, the curriculum consisted of Blackstone and Kent, Property, Equity, Contracts, Bailments and Corporations, Partnership and Agency, Shipping and Constitutional Law, Pleading and Evidence, Insurance and Sales, Conflicts, Bills and Notes, Criminal Law, Wills, Arbitration, Domestic Relations, and Bankruptcy.

30 *Id.* at 458. After 1870, the following were added: Torts, Jurisprudence, Federal Procedure, Trusts, Mortgages, Suretyship, Quasi-Contracts, Damages, Municipal Corporations, Restraint of Trade. Bailments had become Carriers, and Blackstone and Kent were dropped.

31 STEVENS, *supra* note 13, at 39.

While few law schools deviated from Harvard's approach, the entire legal academic world during the late 1800s was not of one accord. Some believed that the law was insufficient in and of itself to answer legal questions, and thus advocated reaching beyond the strict confines of legal instruction. For example, after 1869, Yale Law School permitted students to enroll in other departmental courses such as political science, economics, English history, and ethics.[32] In addition, from 1874 onward, Yale Law School attempted to develop a broad curriculum that included courses with an interdisciplinary flavor.[33] During the 1880s, the American Bar Association recommended the addition of social science to the legal curriculum.[34] At its founding in the late 1800s,[35] Cornell Law School encouraged its students to take courses in the School of History and Political Science.[36] In the 1890s, Catholic University housed its law school within the School of Social Sciences.[37] Columbian (modern day George Washington) University's President referred to Columbian Law School as the Columbian School of Comparative Jurisprudence.[38] Further, Georgetown Law School offered such interdisciplinary courses as legal ethics, legal philosophy, and legal history.[39]

American legal education continues to resemble the model set forth by Langdell and extended by Ames at Harvard Law School between 1870 and 1910.[40] However, law schools made significant strides in developing a curriculum that reached outside of the law. More than simply being interdisciplinary, social science became a growing part of legal education.[41] Though its presence has vacillated over time, its influence is again on the rise.

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32 John H. Langbein, *Law School in a University: Yale's Distinctive Path in the Later Nineteenth Century*, *in* YALE LAW SCHOOL, *supra* note 12, at 65.

33 REED, *supra* note 29, at 302–03. Specifically, it offered such first-year courses as History of American Law, General Jurisprudence and Common Law, Medical Jurisprudence, and Methods of Study and Mental Discipline.

34 STEVENS, *supra* note 13, at 69 n.49 ("The 1881 [ABA] committee also agreed that ideally there should be more social science in the law school curriculum, to prepare the lawyer for his roles as lawyer, party leader, diplomat, director of finance or education, judge, legislator, and statesman.").

35 *See* Cornell Law School History Page, http://www.lawschool.cornell.edu/about/history.cfm (last visited May 11, 2008); *see also* STEVENS, *supra* note 13, at 74.

36 STEVENS, *supra* note 13, at 74.

37 PETER E. HOGAN, THE CATHOLIC UNIVERSITY OF AMERICA, 1896–1903: THE RECTORSHIP OF THOMAS J. CONATY 51 (1949).

38 JOSEPH T. DURKIN, GEORGETOWN UNIVERSITY: THE MIDDLE YEARS 1840–1900, at 95 (1963).

39 ELMER LOUIS KAYSER, BRICKS WITHOUT STRAW: THE EVOLUTION OF GEORGE WASHINGTON UNIVERSITY 150 (1970).

40 ARTHUR E. SUTHERLAND, THE LAW AT HARVARD: THE HISTORY OF IDEAS AND MEN, 1817–1967 (1967). The deanships of Langdell (1870–1895) and Ames (1895–1910) spanned forty years. *Id.*

41 *See* STEVENS, *supra* note 13, at 131–41.

B. HOLMES, BRANDEIS, CARDOZO, AND POUND

Law schools were not the only forces expanding the conceptual bounds of the law. Four men at the turn of the twentieth century advanced the idea that law is more than what is in books, argued for broader conceptions of law's utility, and reasoned that extra-legal factors enhance our understanding of the law. These men were U.S. Supreme Court Justices Oliver Wendell Holmes, Jr., Louis Brandeis, and Benjamin Cardozo as well as former Harvard Law School Dean Roscoe Pound.[42] Each man served as a forefather of Legal Realism, an area of jurisprudence that dominated the mid-twentieth century.[43]

Like the Realists who followed, Holmes highlighted the real-world aspect of the law when he noted that the "life of the law has not been logic; it has been experience."[44] He also emphasized how extra-legal factors had tremendous bearing on the law. Whether it was the "felt necessities of time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, [or] the prejudices which judges share with their fellow men," law was at least in part governed by factors that fell outside the law.[45] As such, Holmes did not simply contend that social science was important in order to understand the law[46]—he posited that contemporary pupils' focus on black-letter law would give way to a legal field wherein "the man of the future is the man of statistics and the master of economics."[47] Holmes thus articulated a vision of what the law and legal profession would, or should, become.[48]

Brandeis' contribution to the Realists was methodological—as he was the first lawyer to employ social science data in litigation—as part of a strategy aimed towards defending a social policy against constitu-

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42 *See* GARY JAN AICHELE, LEGAL REALISM AND TWENTIETH-CENTURY AMERICAN JURISPRUDENCE: THE CHANGING CONSENSUS, 13–25, 30–43 (1990); ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 22–37 (1982) (placing Holmes and Pound among the founders of Pragmatic Instrumentalism—a variant of Legal Realism); Robbin E. Smith, William O. Douglas and American Legal Realism: Continuity Through Change 53–80 (Jan. 1998) (unpublished Ph.D. dissertation, Boston University) (on file with Mugar Memorial Library, Boston University).

43 *See* AMERICAN LEGAL REALISM 3 (William W. Fisher III et al. eds., 1993); *see also* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 22–23 (1973); Smith, *supra* note 42, at 53–82.

44 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

45 *See id.*

46 Oliver Wendell Holmes, Jr., *The Profession of the Law*, Lecture Before Undergraduates of Harvard Univeristy (Feb. 17, 1886), *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 471, 472 (Sheldon M. Novick ed., 1995).

47 Oliver Wendell Holmes, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167 (1920).

48 JEROME FRANK, LAW AND THE MODERN MIND 270 (1930). Frank, a Realist, stated of Holmes, "[W]hatever clear vision of legal realities we have attained in this country in the past twenty five years is in large measure due to [Holmes]."

tional attack.[49] In his *Muller v. Oregon*[50] brief, Brandeis used statistics to support his claim that long work hours were dangerous to the health of women and, ultimately, to their communities.[51]

Cardozo was also an "eminent pioneer of the 'realist' movement."[52] He was the first to speak to the various modes of judicial thinking that were not wholly consistent with traditional logic.[53] Cardozo theorized that there were four approaches to judicial decisionmaking: philosophy, evolution, tradition, and sociology. The philosophical approach was analogous to adherence to precedent.[54] The evolutionary approach emphasized the historical development of a field of law.[55] The traditional approach referred to community customs.[56] To Cardozo, the sociological approach was a gap-filler[57]—insofar as he believed the judge should employ the law as a means to an end for the "good of the collective body."[58] The latter approach was remarkable given the times in which Cardozo made this pronouncement, and the Realists quickly seized on it.

Pound became the immediate precursor to Realists.[59] Generally, Pound believed in an interdisciplinary approach to understanding the law.[60] In 1905, he called for a philosophy of law founded on social and political science.[61] In 1910, he pled for teachers who could train law students in sociology, economics, and politics to "'fit new generations of lawyers'" to not simply render good service but "'to lead the people.'"[62] That same year, he urged scholars not simply to study "law on the books" but also to study "law in action,"[63] harkening back to Holmes'

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49 Smith, *supra* note 42, at 61.

50 208 U.S. 412 (1908).

51 Brief for the State of Oregon, Muller v. Oregon, 208 U.S. 412 (1908); *see also* Smith, *supra* note 42, at 61.

52 BERYL H. LEVY, CARDOZO AND THE FRONTIERS OF LEGAL THINKING 19 (2000); *see also* Smith, *supra* note 42, at 69–75.

53 *See* BERYL, *supra* note 52, at 19.

54 BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 34 (2d ed. 1949).

55 *Id.* at 52.

56 *Id.* at 63.

57 *Id.* at 69, 71.

58 *Id.* at 72, 102.

59 G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

60 Michael Ray Hill, Roscoe Pound and American Sociology: A Study in Archival Frame Analysis, Sociobiography, and Sociological Jurisprudence 386–576, (May 8, 1989) (unpublished Ph.D. dissertation, University of Nebraska-Lincoln) (on file with Library Depository Retrieval Facility, University of Nebraska-Lincoln).

61 Roscoe Pound, *Do We Need a Philosophy of Law?*, COLUM. L. REV. 339, 344, 351 (1905).

62 JEROLD L. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 82–83 (1976) (quoting Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 611–12 (1907)).

63 Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

thoughts about the life of the law.[64] Thus, Pound called for an analysis of law not only in theory but in practice, as well, in order to ascertain how law impacted people's lives. In the 1911 and 1912 issues of the *Harvard Law Review*, Pound announced and defined a vision of "Sociological Jurisprudence."[65] Among its elements, he argued for the realization of "the backwardness of law in meeting social ends,"[66] insistence upon the social effects of the law,[67] and a belief in "the equitable application of law."[68] Not surprisingly, Pound is described as one who did more than any of his contemporaries in emphasizing the "social effects of law and [ ] relat[ing] legal thinking to the social sciences."[69]

C. IVY LEAGUE ICONOCLASTS AT COLUMBIA AND YALE LAW SCHOOLS

The writings of Holmes, Brandeis, Cardozo, and Pound made way for new thinking in the legal academy. Their ideas—that law should be employed as a means to certain ends, the utility of social science to law, and that law is not logic but real-world experience—resonated with professors at Columbia and Yale law schools. These professors seized upon the ideas of Holmes, Brandeis, Cardozo, and Pound and set about divining a new American jurisprudence through the Realist and Law, Science, and Policy movements as well as the Yale Divisional Studies Program.

1. *Legal Realism*

In 1916, Thomas Swan assumed the deanship at Yale Law School, and by November of that year, he had proposed to Yale's president that the law school should expand into the Yale School of Law and Jurisprudence.[70] The proposal seemingly reflected the views of Arthur Corbin and possibly Karl Llewellyn—professor and student, respectively[71]—who both later became key architects of Legal Realism. Their work, and

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64 *See supra* text accompanying notes 44–48.

65 N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 81–85 (1997); DAVID WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 183–205 (1974); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912) [hereinafter Pound, *Sociological Jurisprudence* (1912)].

66 Pound, *Sociological Jurisprudence* (1912), *supra* note 65, at 510.

67 *Id.* at 514.

68 *Id.* at 515.

69 AUERBACH, *supra* note 62, at 149. *See* generally WILFRED E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS 9–20 (1968) (providing a more in-depth look at Pound's impact on the Realists); *see also* Terry Di Filippo, Roscoe Pound's Jurisprudence: Interest Theory in Legal Philosophy 256–315 (Aug. 1987) (unpublished Ph.D. dissertation, SUNY Buffalo) (on file with Lockwood Library, SUNY Buffalo).

70 STEVENS, *supra* note 13, at 135.

71 *See id.*

the work of others at Columbia and Yale law schools during the early to mid-twentieth century,[72] helped to define a new agenda for legal education and practice.

Legal Realism was not a monolithic school of thought. There were, broadly, three types of Realists: (1) the critical oppositional variant that sought to expose the contradictions in classical legal formalism, (2) the social scientific variant that employed the insights and methods of the empirical sciences, and (3) the practical political variant that designed, made, and enforced reform policies.[73] The Realists' jurisprudence was most appropriately known as functionalism—"an attempt to understand law in terms of its factual context and economic and social consequences."[74] Quite possibly, the major contribution of the Realists was to undermine Langdell's idea that the law was an exact science based on objective, black-letter rules.[75] Harkening back to Pound's distinction between law in books and law in action, the Realists sought to determine what the law actually does to and for people.[76] As a result, they saw law not simply as an end in and of itself but as a means to various ends.[77]

The Realists featured two distinctive methodological approaches. The first approach was debunking[78]—a method that subjected questionable judicial opinions to logical analysis in order to expose their inconsistencies, unsubstantiated premises, and tendency to "pass off contingent judgments as inexorable."[79] Debunking encompassed two methods of attack: rule skepticism and fact skepticism. Rule skeptics argued that case decisions do not necessarily flow from general legal propositions—that logic did not govern judicial thought processes.[80] Other features

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72 *See, e.g.*, LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960, at 67–97 (1986).

73 Patrick Ewick, Robert A. Kagan & Austin Sarat, *Legacies of Legal Realism: Social Science, Social Policy, and the Law*, *in* SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW 1, 30 n.3 (Patrick Ewick, Robert A. Kagan & Austin Sarat eds., 1999).

74 KALMAN, *supra* note 72, at 3.

75 STEVENS, *supra* note 13, at 156.

76 Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1222–24 (1931).

77 *Id.*

78 Later, the Critical Legal Studies scholars revived debunking as deconstruction. G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 821–22 (1986). Debunking is best exemplified by the works of realist Wesley Hohfeld and Karl Llewellyn. *See, e.g.*, Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 YALE L.J. 16 (1913) (applying the debunking technique to trusts and other equitable interests); Llewellyn, *supra* note 76, at 1238–39.

79 White, *supra* note 78, at 821–22.

80 Timothy L. Smith, Formalism, Pragmatism, and Nihilism in Legal Thought 48–49 (1995) (unpublished Ph.D. dissertation, The Johns Hopkins University) (on file with Harvard Law Library). For more about rule skepticism, see RUMBLE, *supra* note 69, at 48–68.

also factored into the equation,[81] such as policy considerations.[82] Fact skeptics either argued that the facts found by the judge or jury are inconsistent with the actual facts[83] or that judges and juries react to facts unpredictably.[84]

The Realists' second methodological approach was empirical social science.[85] Although they were not alone in their attempts to integrate social science and law,[86] the empirical exploits of Realists such as Charles E. Clark,[87] William O. Douglas,[88] and Underhill Moore[89] at Yale and Walter Wheeler Cook and colleagues at Johns Hopkins[90] set them apart from other sociological, jurisprudential scholars. Realists' efforts to integrate law with the social sciences ultimately failed for a number of reasons: Realists did not know how non-legal materials should aid law students.[91] Realists asked the wrong questions of social science and expected too much from the answers.[92] Furthermore, social science was ultimately less helpful to legal scholars than anticipated.[93] Two post-Realist law professors, Harold Lasswell and Myres McDougal, argued that a lack of methodological sophistication in integrative efforts resulted in the Realists' failure.[94] Nonetheless, the Realists made a significant contribution toward integrating social science and the law and toward

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81 Smith, *supra* note 80, at 48–49.

82 *Id.* at 50, 54; Bruce Evans Pencek, The Political Theory of Legal Realism 1 (Jan. 1988) (unpublished Ph.D. dissertation, Cornell University) (on file with Olin Library, Cornell University). Before the Realists, Justice Oliver Wendell Holmes noted that "[t]he felt necessities of time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." HOLMES, *supra* note 44, at 1.

83 RUMBLE, *supra* note 69, at 109–10.

84 *Id.* at 111.

85 White, *supra* note 78, at 823.

86 *See, e.g.*, STEVENS, *supra* note 13, at 159. In 1937, the University of Chicago Law School developed an optional four-year curriculum. Part of the curriculum was reorganized to explore law's social workings. A half-year course called Law and Economic Organization "dealt with the distribution of income and the business cycle, economic theory, statistics, legal aspects of competition, control devises, and bankruptcy and reorganization." *Id.*

87 *See* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 81–114 (1995).

88 *Id.*

89 *See id.* at 115–46.

90 *See id.* at 147–210.

91 KALMAN, *supra* note 72, at 73.

92 *Id.*

93 *See* Brainerd Currie, *The Materials of Law Study, Part III*, 8 J. LEGAL EDUC. 1, 29 (1951).

94 Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 204–05 (1943).

using the law in practical ways. Ultimately, they provided an early integration of law, social science, and public policy.[95]

Most of the canonical Realists, like adherents of other progressive reform movements, avoided the hot racial issues of their day.[96] However, they did tackle race issues in two ways. First, a few realist thinkers directly addressed the race question. Most notably, Karl Llewellyn,[97] Morris Cohen,[98] and Robert Hale[99] attempted to create a "Realist critique of American race relations."[100] Moreover, Llewellyn actively supported the NAACP during the 1920s and 1930s and was a self-proclaimed opponent of racial segregation.[101] The NAACP Board of Directors even asked him, at one point, to lead their Legal Committee.[102]

Second, Charles Hamilton Houston, the architect of the NAACP's strategy to end school segregation, was certainly a Realist. He provided a model for how to employ social science to effectuate change in laws bearing on racial equality.[103] He also articulated a model for how to change racial policy and how both an academic and a practitioner could employ those means.[104] As such, Houston embodied both Realist philosophy and practice.

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95 *Id.*; White, *supra* note 78, at 823. The Realists' involvement in the New Deal Era administration highlights their efforts to advance certain public policies. *See* HULL, *supra* note 65, at 177, 238, 239, 338 (1997); KALMAN, *supra* note 72, at 60, 122, 130–36, 145, 148, 154, 159, 201, 230; RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 131–57 (1995); SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY 54–59, 79, 87, 89 (2005).

96 ROBERT L. ALLEN, RELUCTANT REFORMERS: RACISM AND SOCIAL REFORM MOVEMENTS IN THE UNITED STATES 85 (1974); Roger A. Fairfax, *Wielding the Double-edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17, 34 (1998); Christopher Bracey, Note, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607, 1619 (1995).

97 *See* Karl N. Llewellyn, *Group Prejudice and Social Education*, *in* CIVILIZATION AND GROUP RELATIONSHIPS 11 (R. M. MacIver ed., 1945).

98 *See* Felix S. Cohen, *The Vocabulary of Prejudice*, FELLOWSHIP (1953), *reprinted in* THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 429 (Lucy Kramer Cohen ed., 1970); *see also* Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

99 *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935); Robert L. Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627 (1947).

100 Bracey, *supra* note 96, at 1619.

101 TWINING, *supra* note 43, at 124.

102 HARVARD SITKOFF, A NEW DEAL FOR BLACKS 221 (1978).

103 JOHN P. JACKSON, JR., SOCIAL SCIENTISTS FOR SOCIAL JUSTICE: MAKING THE CASE AGAINST SEGREGATION 80–82 (2001).

104 *See id.*

While attending Harvard Law School, Houston was a student of Realists such as Roscoe Pound and Felix Frankfurter.[105] In fact, Frankfurter was Houston's J.S.D. advisor.[106] Not surprisingly, Houston was well aware of Sociological Jurisprudence and Legal Realism. Houston's jurisprudence made Howard University, like Columbia and Yale, a center of Realist thought and action.[107] Houston believed that a lawyer was "either a social engineer or . . . a parasite on society."[108] He defined a social engineer as a "highly skilled, perceptive, sensitive lawyer" who understands the United States Constitution and knows how to employ it to solve local problems and to better underprivileged citizens' conditions.[109] As noted by Genna Rae McNeil, between 1929 and 1948, Houston further refined his conception of a social engineer.[110] This concept entailed five responsibilities for black lawyers. First, black lawyers had to be "prepared to anticipate, guide and interpret group advancement."[111] Second, they had to be the "mouthpiece of the weak and a sentinel guarding against wrong."[112] Third, they had to ensure that "the course of change is . . . orderly with a minimum of human loss and suffering," and when possible, they had to "guide . . . antagonistic and group forces into channels where they w[ould] not clash."[113] Fourth, black lawyers had to "use . . . the law as an instrument available to [the] minority unable to adopt direct action to achieve its place in the community and nation."[114] Fifth, they had to engage in "a carefully planned [program] to secure decisions, rulings and public opinion on . . . broad principle[s while] arousing and strengthening the local will to struggle."[115]

Dating as far back as the 1947 Supreme Court cases *Hurd v. Hodge*,[116] *Urciolo v. Hodge*,[117] and *Shelley v. Kraemer*,[118] Houston and his colleagues employed sociological and economic research in an effort to advance their cases.[119] They created a viable litigation strategy out of

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105 *Id.*; MCNEIL, *supra* note 3, at 53. For information about how Realists like Pound and Frankfurter trained a number of civil rights lawyers, see Michael J. Klarman, *Civil Rights Litigation and Social Reform*, 115 Yale L.J. Pocket Part 16 (2005), http://yalelawjournal.org/images/pdfs/22.pdf. *See also* Kenneth W. Mack, *The Myth of* Brown*?*, 115 Yale L.J. Pocket Part 12 (2005), http://yalelawjournal.org/images/pdfs/21.pdf.

106 MCNEIL, *supra* note 3, at 53.

107 TUSHNET, *supra* note 2, at 118.

108 MCNEIL, *supra* note 3, at 84.

109 *Id.*

110 *Id.* at 216.

111 *Id.* at 217.

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 334 U.S. 24 (1948).

117 68 S. Ct. 457 (1948).

118 334 U.S. 1 (1948).

119 JACKSON, *supra* note 103, at 80–81; KLUGER, *supra* note 2, at 248, 253–54.

an intellectual movement, which "manifested itself most famously in *Brown* [*v. Board of Education*]."[120] In fact, one of the best ways to understand the Realists and their contribution to *Brown* is to see them as advocates of a policy-oriented or -aware jurisprudence. As such, their jurisprudential thought was informed by developments in the behavioral and social sciences.[121]

2. *The Law Policy Science Movement*

Lasswell and McDougal advanced two elements of Realism—social science and law as well as law and public policy. McDougal was a Yale Law School graduate during the early 1930s and became a faculty member in 1934.[122] While visiting at the University of Chicago, he met political scientist Harold Lasswell.[123] The two became friends, and Lasswell ultimately joined the Yale faculty as a professor of law and social science.[124] As part of the general Realist milieu at Yale, McDougal and Lasswell viewed Realism as a useful tool to debunk the law's "old myths and lame theory," but the two doubted that Realism offered much to take its place.[125] They noted, in fact:

> [T]here is a limit beyond which the laborious demonstration of equivalencies in the language of the courts cannot go: eventually the critic must offer constructive guidance as to what and how courts and other decision-makers should decide the whole range of problems importantly affecting public order.[126]

Thus, they set out to develop an affirmative jurisprudence that would both incorporate law and the social sciences and embody "democratic values."[127] Together, they attempted to synthesize Legal Realism and empirical legal scholarship, which would be capable of formulating,

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120 J. Clay Smith, Jr. & E. Desmond Hogan, *Remembered Hero, Forgotten Contribution: Charles Hamilton Houston, Legal Realism, and Labor Law*, 14 HARV. BLACKLETTER L.J. 1, 3 (1998).

121 Robert J. Cottrol, *Justice Advanced: Comments on William Nelson's* Brown v. Board of Education *and the Jurisprudence of Legal Realism*, 48 ST. LOUIS U. L.J. 839, 843 (2004).

122 KALMAN, *supra* note 72, at 176.

123 JAMES E. HERGERT, AMERICAN JURISPRUDENCE, 1870–1970: A HISTORY 220 (1990).

124 *Id.* at 220.

125 *Id.*; Harold D. Lasswell & Myres S. McDougal, *Jurisprudence in a Policy-Oriented Perspective*, 19 U. FLA. L. REV. 486, 495 (1966) (noting the Realists' "vivid assault" on traditional jurisprudence); Myres S. McDougal et al., *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. OF INT'L L. 188, 261 (1968) (noting Realism's failure to provide a "positive systematic theory").

126 Harold D. Lasswell & Myres S. McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 373 (1971).

127 Lasswell & McDougal, *supra* note 125, at 495; *see* also KALMAN, *supra* note 72, at 177.

promoting, and critiquing policy.[128] McDougal valued the social sciences but felt that such scholarship in and of itself could not replace classical legal thought.[129] Lasswell viewed himself as a "policy scientist" and evaluated the law using all of the intellectual techniques and skills of a political scientist.[130] Ultimately, McDougal and Lasswell developed the Law, Science, and Policy movement.[131]

By 1943, they established part of the framework for Law, Science, and Policy in an article calling for the radical reform of legal education.[132] Their main objective was a curricular reform movement within law schools, or more precisely, "elite" law schools.[133] They contended that a law school's role was to train policymakers.[134] To these thinkers, the Law, Science, and Policy framework was concerned with authoritative decisionmaking.[135] As such, policy scientists were concerned with how those with political authority—e.g., legislatures, courts, administrative agencies, and city councils—made decisions.[136] Another aspect of Law, Science, and Policy was value analysis, which consisted of analyzing the values held by participants in the decisional process.[137] Law, Science, and Policy assumed that anyone applying its system of analysis was a rational actor who attempted to maximize value.[138] With such an ambitious agenda, James Hergert and Robert Stevens, respectively, saw Law, Science, and Policy as "bring[ing] realism to a sort of completion"[139] and as a "remarkable, albeit ultimately unsuccessful, synthesis."[140] Numerous factors may have led to the jettison of the Law, Science, and Policy movement. The policy-science jargon, the formalism of the approach, or the dated social science it employed may all have contributed to Law, Science, and Policy's demise.[141] Additionally, the approach may have been "too elitist, too expensive, . . . too academic," and ultimately too impractical for most American law schools.[142]

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128 HERGERT, *supra* note 123, at 220–21.

129 *Id.* at 220.

130 *Id.*

131 STEVENS, *supra* note 13, at 265.

132 Lasswell & McDougal, *supra* note 94, at 203.

133 KALMAN, *supra* note 72, at 184.

134 STEVENS, *supra* note 13, at 265.

135 HERGERT, *supra* note 123, at 221.

136 *Id.*

137 *Id.* at 222.

138 *Id.* at 223.

139 *Id.* at 224.

140 STEVENS, *supra* note 13, at 265.

141 *Id.* at 266.

142 *Id.*; *see* also KALMAN, *supra* note 72, at 187.

3. *Yale's Divisional Studies Program*

In the wake of the Realist and Law, Science, and Policy movements, Yale Law School embarked on a curricular reform effort.[143] Yale's 1946 Curriculum Committee Report echoed the sentiments of Laswell and McDougal.[144] The report's authors specifically noted that legal education should be "thoroughly" informed by the social sciences and that law students should be taught by social scientists.[145] They stated that, as part of the goal of the new curriculum, a legal education should equip law students "to analyze and assess the politics, economic and social, as well as the historical and doctrinal, factors in legal policy."[146] Furthermore, they needed "a critical and scientific understanding of the methods of study, analysis, and investigation which are used . . . in the various sciences . . . included in the scope of legal studies."[147] The report's final, general recommendation called for

> the institution of faculty seminars for intellectual cross-fertilization; the restoration of the requirement that second- and third-year students take small seminars; perhaps in conjunction with the work of the *Yale Law Journal*; the funding of postdoctoral research at the law school by noted scholars from other disciplines; the recruitment of outside lecturers; and the integration of psychiatry into the study of law.[148]

The law school took no affirmative steps on this report, but the school re-examined its curriculum in 1955.[149] This time, the report's goals focused on three issues: First, it sought to prepare its students for legal practice by teaching them how to specialize once in practice. Second, it sought to improve students' critical thinking and writing skills by placing them in small groups focused on these areas. Third, and more germane to this Note, the program sought to teach students how to integrate law and social science.[150] The law school finally implemented the

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143 Brannon P. Denning, *The Yale Law School Divisional Studies Program, 1954–1964: An Experiment in Legal Education*, 52 J. LEGAL EDUC. 365, 366–69 (2002).

144 *Id.* at 369.

145 *Id.*

146 *Id.* at 369–70 (quoting REPORT OF THE COMMITTEE ON CURRICULUM AND PERSONNEL 1–2 (May 6, 1946) (on file with Sterling Memorial Library, Yale University).

147 *Id.* at 370 (quoting REPORT OF THE COMMITTEE ON CURRICULUM AND PERSONNEL 1–2 (May 6, 1946) (on file with Sterling Memorial Library, Yale University).

148 *Id.*

149 *Id.* at 371–73.

150 *Id.*

program during the 1956–57 academic year.[151] By the early 1960s, however, the Divisional Studies Program had petered out.[152]

D. THE LAW "AND" MOVEMENT AND ITS PROGENY

Just as Columbia and Yale law schools blazed new trails in American jurisprudence during the first half of the twentieth century, so would the University of Chicago and University of Wisconsin law schools in the latter half. The Law and Economics movement took root at Chicago and the Law and Society movement and its progeny, Critical Legal Studies and Critical Race Theory, took shape at Wisconsin.

1. *Law and Economics Movement*

The Law and Economics movement, premised on the notion that the law should be economically efficient,[153] has gained considerable momentum in recent decades.[154] Its roots trace back to the 1700's with the work of David Hume, Adam Ferguson, Adam Smith, and Jeremy Bentham.[155] Within American jurisprudence, the movement took hold at the University of Chicago.[156] In 1937, the Chicago Law School developed an optional four-year curriculum, part of which was reorganized to explore law's social workings.[157] A half-year course called Law and Economic Organization focused on the "distribution of income and the business cycle, economic theory, statistics, legal aspects of competition, control devices, and bankruptcy and reorganization."[158] Two years later, Chicago Law School appointed the first economics professor, Henry Simmons, to the law faculty.[159]

The Law and Economics movement truly came to light with Ronald Coase's research initiative at the London School of Economics, which

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151 *Id.* at 377.

152 *Id.* at 390–95.

153 Charles K. Rowley, *An Intellectual History of Law and Economics*, *in* THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS 12 (Francesco Parisi & Charles K. Rowley eds., 2005) [hereinafter FOUNDING FATHERS].

154 Michael Paradis, *Just Reasonable: Can Linguistic Analysis Help Us Know What It Is to Be Reasonable?*, 47 JURIMETRICS J. 169, 173 (2007) ("Law and economics has been particularly popular in the United States as a form of positivism that views the judicial task as one of utility maximization.").

155 Rowley, *supra* note 153, at 3–8.

156 *Id.* at 12.

157 STEVENS, *supra* note 13, at 159.

158 *Id.*

159 Rowley, *supra* note 153, at 12. In 1949, Aaron Director was appointed as the second economics professor to a law school's faculty. *See* George L. Priest, *The Rise of Law and Economics: A Memoir of the Early Years*, *in* FOUNDING FATHERS, *supra* note 153, at 352.

gave rise to his 1937 essay, *The Nature of the Firm.*[160] In 1964, Coase joined the Chicago Law School's faculty, where he remained until 1982. During his tenure at Chicago, he served as editor and then co-editor of *The Journal of Law and Economics*, which he used to advance the discipline.[161] The writings of Coase[162] and Guido Calabresi[163] in the 1960s further catapulted the Law and Economics movement and spread its methodological approach to torts, property, and contracts.[164] The 1970s witnessed an ever-forward push of the movement with Calabresi's *The Cost of Accidents*[165] and Richard Posner's *Economic Analysis of Law.*[166] Through the latter half of the twentieth century and continuing into this century, the Law and Economics movement has flourished.

2. *Law and Society Movement*

In 1964, Harry Ball, coordinator of the University of Wisconsin's Sociology and Law Program, took the lead in advancing what would come to be known as the Law and Society movement. During the American Sociological Association's annual meeting, he invited all attendees who were interested in the intersection of sociology and law to a breakfast. Approximately ninety individuals attended the breakfast.[167] From that effort, sociologists and law professors developed the Law and Society Association as a forum to promote the rigorous interdisciplinary study of law.[168] Moreover, the development of the Law and Society Association seems to have had as much to do with legitimizing socio-legal studies as it had to do with efforts toward an interdisciplinary exchange

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160 Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937), *reprinted in* THE NATURE OF THE FIRM: ORIGINS, EVOLUTION, AND DEVELOPMENT 18 (Oliver E. Williamson & Sidney G. Winter eds., 1991); *see also* Rowley, *supra* note 153, at 14.

161 Rowley, *supra* note 153, at 17.

162 Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

163 Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

164 Francesco Parisi, *Methodological Debates in Law and Economics: The Changing Contours of the Discipline*, *in* FOUNDING FATHERS, *supra* note 153, at 34.

165 GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970) (applying economic analysis to the accident law system).

166 RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (1973) (arguing that the central feature of the common law is that its rules are designed to achieve efficiency).

167 Felice J. Levine, *Goose Bumps and "The Search for Signs of Intelligent Life" in Sociolegal Studies: After Twenty-five Years*, 24 LAW & SOC'Y REV. 7, 10 (1990).

168 *See* White, *supra* note 78, at 830. *See generally* David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 5–7 (1990). Early in law and society's development, the dominant force was comprised of sociologists. *See* Levine, *supra* note 167, at 11. However, law professors interested in socio-legal studies ultimately brought their perspectives, in larger numbers, to bear on this growing discipline. *See* Trubek, *supra*, at 14–15.

of ideas.[169] Despite this interdisciplinary perspective, the locus of Law and Society scholarship is not legal scholarship and law schools. Felice Levine, first national President of the Law and Society Association, situates the locus at the interdisciplinary intersection of the social sciences, "*including* but not *privileging* our law-trained colleagues attracted to empirical inquiry and law-related matters."[170]

Though initially the Law and Society movement never saw itself as political, its goals reflected the ideas of "people committed to moderate reform" and resonated among liberal lawyers.[171] Thus, many who came to the Law and Society movement had committed to governmental intervention in the economy, moderate wealth redistribution, and governmental intervention to ensure social equality for the disadvantaged, racial minorities, the accused and mentally ill, as well as women.[172] Not only were most law and society founders liberals, they were also "legalists."[173] As legalists, they had faith in the law as a tool for progressive social change. They believed in the liberalism of legal institutions and believed that through legal means most of the flaws in American society would diminish.[174]

Generally, the Law and Society field is the study of law in its social context.[175] More specifically, the Law and Society movement's goal is to employ a social scientific study of the law.[176] However, if one is to study law as a social science, one must define law as more than a mere set of rules and principles. Thus, Law and Society sought to define law "as a social institution, as interacting behaviors, as ritual and symbol, as a reflection of interest group politics, [and] as a form of behavior modification."[177] David Trubek describes five types of law and society actors.[178] The *true scientist* was a scientist who wanted to study the law. The *social problem solver* was a scientist with a social mission to participate in social reform. The *technician*—e.g., statisticians and survey researchers—simply provided technical skills to an expanding field of legal studies. The *imperial jurist* believed social science would supplement legal doctrine and help the law understand its own powers and limitations. Finally, the *skeptical pragmatist* did not believe social science

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169 Frank Munger, *Mapping Law and Society*, *in* CROSSING BOUNDARIES: TRADITIONS AND TRANSFORMATIONS IN LAW AND SOCIETY RESEARCH 26, 28 (Austin Sarat ed., 1998).

170 Levine, *supra* note 167, at 9.

171 Trubek, *supra* note 168, at 8.

172 *See id.* at 8.

173 *See id.*

174 *See id.* at 9.

175 Munger, *supra* note 169, at 26.

176 *See* Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 766 (1986).

177 Trubek, *supra* note 168, at 6.

178 *See id.* at 24–27.

would replace legal studies but viewed it as a useful way to understand the legal process.[179]

Conceptually, Trubek describes five elements that comprise the Law and Society movement.[180] The doctrine of systemicity argues that society is a system that contains interacting elements comprised of individual and group behavior. The doctrine of objectivism argues that the objective knowledge of law governs the legal system's operation, its constituent parts, and that its relation to other systems is realized through the scientific method. The doctrine of disengagement argues that in order to develop such objective knowledge, there needs to be scholarly institutions that disengage from the production of legal doctrine, education of legal professionals, and goals of any societal group. The doctrine of univocality argues that the law contains a set of normative standards available for critique and reconstruction. Finally, the doctrine of progressivism argues for liberal reform.[181]

a. Critical Legal Studies

Critical Legal Studies emerged as one of the leading jurisprudential schools in the second half of the 1970s through the 1980s.[182] In 1976, Duncan Kennedy and David Trubek met and discerned that there were a number of legal scholars around the country engaged in similar scholarship. They decided to convene these individuals, and Mark Tushnet, then Dean of the University of Wisconsin Law School, organized an academic conference.[183] Many of these early Critical Legal Studies scholars met at Yale.[184] Of the nine organizing committee members, Duncan Kennedy, Rand Rosenblatt, and Tushnet graduated from Yale in the early 1970s. Richard Abel and Trubek taught at Yale. Roberto Unger was connected with Yale's Law and Modernization Program, and after graduating from Yale, Thomas Heller was a fellow in the program. Only Morton Horowitz and Stewart Macaulay did not have Yale ties.[185]

Some of Critical Legal Studies founders were formerly active in the Law and Society movement.[186] However, they ultimately disagreed with their Law and Society colleagues on key issues. One of the factors that cleaved Critical Legal Studies from the Law and Society movement was

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179 *See id.*

180 *See id.* at 28.

181 *See id.*

182 Laura Kalman, *The Dark Ages*, *in* YALE LAW SCHOOL, *supra* note 12, at 203.

183 *See* Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1523 (1991).

184 Kalman, *supra* note 182, at 203.

185 *Id.*

186 *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 82 (1996) (noting David Trubek's ties to both the Law and Society movement and Critical Legal Studies).

the debate about the importance of empirical social science. In an article in the *Law and Society Review*,[187] David Trubek assailed empirical social science.[188] G. Edward White writes that Trubek implied two things. First, he suggested that empirical research legitimates the status quo in that it implies that research facts were objectively "there."[189] Second, he argued that a scholar could not separate ideology from methodology in any type of research, including empirical research.[190] Ultimately, according to White, Trubek argued that "to be politically reformist and methodologically neutral was a contradiction in terms."[191]

While Critical Legal Studies is a direct extension of Legal Realism,[192] it is largely so through deconstruction of legal opinions and doctrine.[193] Critical Legal Studies differs from Legal Realism in two respects, however. As noted, while Critical Legal Studies scholars had little faith in social science, the Realists endorsed social science and employed its methods. Additionally, the ethical relativism endorsed by most Critical Legal Studies scholars was different from, and more coherent than, that of the Realists.[194] Thus, Critical Legal Studies has become associated with politically left-leaning law faculty[195] and is based on three propositions. First, law is indeterminate. Second, law is more accurately understood by paying attention to the context in which it is made. Third, law is politics.[196] Critical Legal Studies ultimately lost

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187 David Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC'Y REV. 529 (1977).

188 *See* White, *supra* note 78, at 834.

189 *Id.*

190 *Id.*

191 *Id.*

192 *See* Kalman, *supra* note 174, at 203; *see also* John Henry Schlegel, *Notes Towards an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984); Trubek, *supra* note 168, at 540–45; Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669 (1982).

193 *See* White, *supra* note 78, at 821. Critical Legal Scholars describe this methodological technique as "trashing." In this approach, they (1) take legal arguments seriously in their own terms, (2) discover that the arguments are "foolish," and (3) look for some order in the "internally contradictory, incoherent chaos [they have] exposed." Mark G. Gelman, *Trashing*, 36 STAN. L. REV. 293, 293 (1984). Thus, Critical Legal Scholars are seen as having set out to wage a "full frontal assault" on modern jurisprudence. *See* Allan C. Hutchison & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 199 (1984).

194 Richard Nunan, *Critical Legal Parracide, or: What's So Bad About Warmed-Over Legal Realism?*, *in* RADICAL CRITIQUES OF THE LAW 21, 33 (Stephen M. Griffin & Robert C.L. Moffat eds., 1997).

195 *See* Tushnet, *supra* note 183, at 1516.

196 *See id.* at 1518.

much of its steam from cries that the movement was comprised of nihilists[197] and critiques from women[198] and racial minorities.[199]

b. Critical Race Theory

Just as Realism was the precursor to the Law and Society movement, itself a precursor to Critical Legal Studies, Critical Legal Studies was a precursor to Critical Race Theory.[200] However, before one can understand Critical Legal Study's influence on the development of Critical Race Theory, it is important to understand the role of the seminal figure to its development. Derrick Bell is the forerunner of Critical Race Theory in two ways.[201] Specifically, his departure from Harvard Law School's faculty in 1981 prompted Harvard law students to wrangle with the Harvard's dean over the marginalization of race in the curriculum.[202] More broadly, his resignation created an issue around which legal scholars could rally and develop intellectual relationships that grew over the course of a number of subsequent meetings.[203]

Bell also helped establish a scholarly agenda that placed race squarely at the center of intellectual legal dialogue.[204] Bell's path-breaking book, *Race, Racism, and American Law*,[205] best exemplifies his impact. The aim of the book was to illustrate how laws help to systematically disempower Blacks.[206] Additionally, Bell's litmus test for the efficacy of civil rights laws was how well they contested the condi-

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197 *See* Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (warning that persons espousing the notion that principle is not but cosmetic have a substantial ethical problem as law professors).

198 *See* Robin West, *Deconstructing the CLS-Fem Split*, 2 WIS. WOMEN'S L.J. 85 (1986) (complaining that female law professors are relatively disempowered within the Conference on Critical Legal Studies).

199 *See* Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987) (observing that CLS had failed to place racial questions on its agenda and suggesting that there is a fundamental difference between what CLS proposes and what minorities seek in a legal theory).

200 *See* Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACKLETTER L.J. 1 (2002) [hereinafter Jones, *New Strategies*]; Bernie Donna-Marie Jones, Critical Race Theory: Protesting Against Formalism in the Law, 1969–1999 (May 2002) (unpublished Ph.D. dissertation, University of Virginia) (on file with Alderman Library, University of Virginia) [hereinafter Jones, Protesting Against Formalism].

201 *See* Jones, *New Strategies*, *supra* note 200, at 32–46; Jones, Protesting Against Formalism, *supra* note 200, at 115–59.

202 Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door," in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 10 (Francisco Valdes et al. eds., 2002).

203 *Id.* Bell departed Harvard to assume the deanship at the University of Oregon's law school. *See* Derrick Bell Biography, http://www.answers.com/topic/derrick-bell (last visited Nov. 19, 2007).

204 Crenshaw, *supra* note 202.

205 DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW (2d ed. 1980).

206 *See id.* at xxiii.

tions of racial domination.[207] As Crenshaw suggests, Bell was a realist in that he assessed legal rules in terms of how they function within a racist society.[208] Furthermore, Bell was a Crit—a Critical Legal Studies adherent—in that "he understood the indeterminate and frequently contradictory character of the law."[209]

The Harvard dean's refusal to allow a race and law course into the curriculum prompted a group of students to organize an "Alternative Course." Students of color initiated this class. They raised money and brought in academics of color to teach the course from chapters in Bell's book. Among the scholars who participated were Charles Lawrence, Richard Delgado, Linda Greene, Denise Carty-Bennia, and Neil Gotanda. Many of these individuals became central figures in Critical Race Theory. Students Mari Matsuda and Kimberlé Crenshaw played significant roles as did Harvard's Critical Legal Studies faculty. The course served as an important precursor to Critical Race Theory in that it brought together a number of legal scholars and students to share ideas on race and law.[210]

Critical Legal Studies had a more direct impact as well.[211] Generally, the cleavage of Critical Race Theory from Critical Legal Studies may have been, as described by Richard Delgado, an inevitable result of the different worldviews of whites and people of color.[212] For example, many whites do not readily perceive racism.[213] People of color, on the other hand, see and are on the receiving end of racism daily.[214] This has two effects: First, "even the most sympathetic, left-leaning whites" have to constantly be re-educated about racism.[215] Second, it colors each group's "legal and political theorizing," causing members of the respective groups to take different stances on issues.[216] As such, whites and people of color within the Critical Legal Studies movement had fundamental differences in what they wanted in a legal theory.[217]

A more specific history shows that the 1985 Critical Legal Studies (CLS) conference was organized by its feminist wing—the FemCrits. Women of color were called upon to discuss how they wanted to participate in the conference. Several invitees noted how they might discuss

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207 Crenshaw, *supra* note 202, at 12.

208 *Id.*

209 *Id.*

210 *Id.* at 13–14.

211 *See* Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary*, 23 HARV. C.R.-C.L. L. REV. 407, 407–08 (1988).

212 *See id.* at 407.

213 *See id.*

214 *See id.* at 408.

215 *Id.*

216 *Id.* at 409.

217 Delgado, *supra* note 199, at 301.

race at the conference, which resulted in a racism workshop. The question that launched the workshop was, "What is it about the whiteness of CLS that keep the people of color at bay?" Such a question was not well-received by the "white male heavies of CLS."[218] Two additional events drove people of color from the ranks of the Critical Legal Studies movement. First, during a visit at Stanford, white students complained of Derrick Bell's approach to teaching constitutional law and arranged a series of supplemental lectures by other faculty.[219] Given that Stanford was seen as a CLS stronghold, people of color within CLS were gravely concerned. Second, there was a racial stereotype about Mexicans in the CLS newsletter *The Lizard*.[220]

Finally, at the 1987 CLS conference, attendees hosted a panel entitled "The Minority Critique of CLS Scholarship (and Silence) on Race." The panelists focused their comments on the "racially specific culture of CLS, the critique of rights, and on the silencing of voice[s] of color in the legal academy."[221] In 1988, Kimberlé Crenshaw, Stephanie Phillips, and Richard Delgado began discussions on how to convene individuals interested in the intersection of CLS and race. At the time, Crenshaw was a visiting fellow, Phillips was a Hastie Fellow, and Delgado was a professor. Together, they approached David Trubek, director of the Wisconsin's Institute of Legal Studies, for funds to support a workshop initially called "New Developments in Race and Legal Theory"[222] but ultimately changed to "Critical Race Theory."[223]

On July 8, 1989, twenty-four Critical Race Theory Workshop participants gathered in Madison, Wisconsin.[224] They defined Critical Race Theory as "a race-based, systematic critique of legal reasoning and legal institutions."[225] However, they created an area of jurisprudence that was more than just theory. Critical Race Theory, in addition to being "critical" is in part an activist agenda as it both tries to understand the plight of racial minorities and change it.[226] Delgado and Jean Stefancic indicate that Critical Race Theory has three basic tenets: first, racism is normal in

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218 Crenshaw, *supra* note 202, at 16.

219 *Id.*

220 *Id.* at 16–17.

221 *Id.* at 18.

222 *Id.*

223 *Id.* at 19 ("We would signify the specific political and intellectual location of the project through "critical," the substantive focus through "race," and the desire to develop a coherent account of race and law through the term "theory.").

224 *Id.* at 30 n.18. Conference attendees consisted of: Anita Allen, Taunya Banks, Derrick Bell, Kevin Brown, Paulette Caldwell, John Calmore, Kimberlé Crenshaw, Harlon Dalton, Richard Delgado, Neil Gotanda, Linda Greene, Trina Grillo, Isabelle Gunning, Angela Harris, Mari Matsuda, Teresa Miller, Philip T. Nash, Elizabeth Patterson, Stephanie Phillips, Benita Ramsey, Robert Suggs, Kendall Thomas, and Patricia Williams.

225 DELGADO & STEFANCIC, *supra* note 4, at xix.

226 *Id.* at 3.

the way society operates and the common experience of people of color in the U.S. Second, white-over-color dominance serves important psychic and physical purposes,[227] making racism difficult to remedy. Third, the concept of race is a social construction, a product of people's thoughts and relations.[228] Despite this seeming coherence, however, Critical Race Theory is not merely a school of thought "with an overarching theoretical formulation."[229] It is more accurately a site of resistance and debate.[230] Hackney argues that Critical Race Theory is better conceptualized as a *project*.[231] Duncan Kennedy, as cited by Hackney, notes that "[a] project is a continuous goal-oriented practical activity based on an analysis of some kind . . . but the goals and the analysis are not necessarily internally coherent or consistent over time."[232]

II. CRITICAL RACE REALISM: A DEFINITION AND DEVELOPMENT(S)

Several intellectual movements, schools of thought, and individuals have contributed in various ways to what can be defined as Critical Race Realism. Here, Critical Race Realism consists of (1) a deconstructive element, which is a *systematic*, race-based evaluation and critique of the law and legal institutions, and (2) a constructive element, which is a racially progressive policy agenda. Both elements rely heavily on empirical social science. With this in mind, there is a long history of liberal activism that has employed social science to end the racial status quo in America. There has also been a conservative effort to shore it up. The twentieth century provides a number of instances where the legal battle over racial equality in America has been fought employing social science. For instance, just as social science was employed to advance the aims of the *Brown v. Board of Education*[233] decisions to end racial segregation in schools,[234] there was also a scientific effort to reverse the legal gains of those decisions.[235]

Charles Houston fought on the progressive side of that battle by employing social science and seeking to effectuate change in law and public policy. As such, Houston embodied and put into practice Realist

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227 *Id.*

228 *Id.* at 6–8.

229 James R. Hackney Jr., *Derrick Bell's Re-Sounding: W. E. B. Du Bois, Modernism, and Critical Legal Scholarship*, 23 LAW & SOC. INQUIRY 141, 141 n.1 (1998).

230 *Id.*

231 *Id.*

232 DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 6 (1997).

233 Brown v. Board of Education, 347 U.S. 483 (1954).

234 *See* JACKSON, *supra* note 103.

235 *See* JOHN P. JACKSON, JR., SCIENCE FOR SEGREGATION: RACE, LAW, AND THE CASE AGAINST *BROWN V. BOARD OF EDUCATION* (2005).

philosophy. He was the exemplar of Critical Race Realism. Just as Houston and his efforts provide a template for Critical Race Realism, contemporary efforts and movements help situate it. Houston's work and *Brown*'s effect was to create an increasingly interdisciplinary approach to the law.[236] Contemporary court cases dealing with race issues such as *Griggs v. Duke Power Co.*,[237] *McCleskey v. Kemp*,[238] and *Grutter v. Bollinger*,[239] reflect such interdisciplinarity.[240] In addition to this interdisciplinary legacy, Houston and *Brown* also pointed the way toward a synthesis of social science and the law directed at changing public policy. It is this legacy that I rely upon in looking at how Critical Race Realism may currently be conceptualized. In this subpart, I focus on contemporary efforts toward integrating social science, law, and public policy. I then square Critical Race Realism with these contemporary movements.

A. CONTIGUOUS MODELS: EMPIRICAL LEGAL STUDIES, THE NEW LEGAL REALISM PROJECT, AND BEHAVIORAL REALISM

In light of efforts by Legal Realists and the law and society movement, recent efforts to integrate law and social science are afoot. A new and rigorous empiricism has found its place within legal academia. This is likely because empirical legal scholarship has two substantial benefits: first, it arguably leads to objective knowledge, unfettered by personal prejudices;[241] second, it has incredible potential to affect public policy.[242] As such, it is no surprise that empirical legal scholarship has taken firm root within legal academia in recent years. A number of indicators suggest this: the conference theme in 2006 for the annual meeting of the Association of American Law Schools, for instance, was "Empirical Scholarship: What Should We Study and How Should We Study It?"[243] Additionally, empirical legal scholarship is the "discernible emerging trend" in hires among law faculty, and law schools have hired an increas-

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236 Michael Heise, Brown v. Board of Education, *Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 280, 307 (2005).

237 Griggs v. Duke Power Co., 401 U.S. 424 (1971).

238 McClesky v. Kemp, 499 U.S. 467 (1991).

239 Grutter v. Bollinger, 539 U.S. 306 (2003).

240 Heise, *supra* note 236, at 312–14.

241 Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167, 180–82 (2004).

242 *See* Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741, 1742–46 (2004). *See also* Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1, 7 (2002) (highlighting "the growing number of corporations and lobbying groups paying to produce such data for use in lobbying legislatures and influencing public opinion").

243 Association of American Law Schools Annual Meeting Page for 2006, http://www.aals.org/am2006/theme.html (last visited October 26, 2006).

ing number of JD/PhDs as faculty.[244] Arguably, a significant number of these dual-degree hires are trained in economics, or psychology, or sociology, or political science and presumably trained in empirical methodologies. In addition to hires, recent legal academia trends suggest that law professors are increasingly interested in and producing more empirical scholarship.[245]

Moreover, there is a growing infrastructure for producing and publishing empirical legal scholarship. Several law schools offer courses in empirical methods to train their students.[246] A number of institutions have "programs or initiatives" designed to increase the output of empirical legal scholarship.[247] Washington University in St. Louis has a Workshop on Empirical Research in the Law.[248] UCLA Law School has an Empirical Research Group.[249] Wake Forest Law School has a Center for Student Empirical Studies sponsored by its law review.[250] Additionally, the Institute for Legal Studies at the University of Wisconsin Law

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244 Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 828 (2002).

245 Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 527–29 (2000); Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141, 141 (2006) (describing empirical legal scholarship as "the next big thing in legal intellectual thought").

246 Yale offers Empirical Law and Economics, Bulletin of Yale University, http://www.yale.edu/bulletin/html/law/course.html (last visited October 26, 2006). Stanford offers the following courses: Bayesian Statistics and Econometrics, Empirical Analysis: Mathematical Methods, Quantitative Methods: Finance, Quantitative Methods: Statistical Inference, and Statistical Inference and Empirical Research, Stanford Law School Advanced Courses Page, http://www.law.stanford.edu/program/courses/#2nd-3rd_year_program (last visited October 26, 2006). Harvard offers Empirical Studies of Economic Transformations, Harvard Law School 2006–07 Course Catalog, http://www.law.harvard.edu/academics/courses/2006-07/?id=46342845 (last visited October 26, 2006). Northwestern offers Social Science Research Methods. Northwestern Law School Policy Analysis Concentration Page, http://www.law.northwestern.edu/academics/concentrations/law_social_policy/policy.html (last visited October 26, 2006). Cornell offers Empirical Studies in Leading Civil Rights Issues, Cornell Law School 2006–07 Course Offerings, http://support.law.cornell.edu/students/forms/Courses_by_Category_for_Registrars_site/2006-07_Courses_by_category.pdf (last visited Sept. 15, 2006). The University of Texas at Austin offers an empirical methods course called Social Science & Law, The University of Texas at Austin Course Description Page, http://utdirect.utexas.edu/loreg/clap.WBX?ccyys=20072&class_unique_number=28135 (last visited November 10, 2006).

247 Eisenberg, *supra* note 242, at 1742.

248 Introduction Page, http://werl.wustl.edu/index.php (last visited October 26, 2006). The group consists of "legal and social science scholars that have worked to encourage and facilitate the proper use of empirical methods in legal studies, and of legal materials in social science work."

249 Introduction Page, http://www.law.ucla.edu/home/index.asp?page=840 (last visited October 26, 2006). ERG "specializes in the design and execution of quantitative research in law and public policy, and enables the law faculty to include robust empirical analysis in their legal scholarship."

250 Home Page, http://lawreview.law.wfu.edu/issues/empirical/ (last visited October 26, 2006) (noting that the purpose of the program is to "promot[e] student involvement in the assembly and analysis of data related to the operation of legal systems and legal rules").

School,[251] The Center for the Study of Law and Society at Boalt Law School,[252] and the Baldy Center at the University of Buffalo[253] all support empirical and interdisciplinary scholarship.

Additionally, publications beside traditional law reviews are publishing more empirical scholarship. Faculty-edited, peer-reviewed journals such as the *Journal of Empirical Legal Studies*, *Journal of Legal Studies*, *Journal of Law and Economics*, *Law & Society Review*, and *Journal of Law, Economics & Organization* have emerged and rank among some of the most prestigious law journals.[254] Cyberspace too has become a repository for empirical legal scholarship. The Social Science Research Network's Legal Scholarship Network, a major disseminator of scholarship, includes a section on empirical legal scholarship.[255] Additionally, the recently launched Empirical Legal Studies blog serves as a website where empirical legal scholars discuss research and contemporary issues in the field.[256] There has also been a growth in the number of conferences focused on empirical legal scholarship. These range from small conferences, such as the empirical legal scholarship conference at Northwestern Law School,[257] to national conferences, such as the empirical legal scholarship conference at the University of Texas-Austin Law School.[258] Beyond law schools, agencies such as the National Science

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251 Home Page, http://www.law.wisc.edu/ils/ (last visited October 26, 2006).

252 Research Programs Page, http://www.law.berkeley.edu/centers/csls/research/ (last visited October 26, 2006).

253 About the Center, http://www.law.buffalo.edu/baldycenter/about.htm (last visited November 9, 2006).

254 Colleen M. Cullen & S. Randall Kalberg, *Chicago-Kent Law Review Faculty Scholarship Survey*, 70 CHI.-KENT L. REV. 1445, 1453 (1995) (noting that the Journal of Legal Studies is one of the most cited and prestigious journals among law faculty); Eisenberg, *supra* note 242, at 1742; Heise, *supra* note 244, at 825.

255 Legal Scholarship Network, Experimental & Empirical Studies Information Page, http://www.ssrn.com/lsn/index.html (follow "Subject Matter eJournals" hyperlink; then follow "Experimental & Empirical Studies" hyperlink) (last visited November 5, 2006).

256 Empirical Legal Studies, http://www.elsblog.org/about.html (last visited October 26, 2006). The ELS blog was developed to "advance productive and interdisciplinary discourse among empirical legal scholars." *Id.*

257 Northwestern University School of Law, Conducting Empirical Legal Scholarship Workshop, http://www.law.northwestern.edu/faculty/conferences/empiricalworkshop.html (last visited November 9, 2006).

258 First Annual Conference on Empirical Legal Studies, http://www.utexas.edu/law/news/2005/112805_black.html (last visited November 9, 2006). Of the fifty-four presentations, four explored the issue of race as indicated by the presentation abstracts. Social Science Research Network, CELS 1st Annual Conference on Empirical Legal Studies, http://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=884320 (last visited November 19, 2006). For the full abstract of each paper, see Jeremy A. Blumenthal, *Implicit Theories and Capital Sentencing: An Experimental Study* (June 2006) (unpublished manuscript, *available at* http://ssrn.com/abstract=909603); Dan M. Kahan et al., *Gender, Race, and Risk Perception: The Influence of Cultural Status Anxiety* (Apr. 7, 2005) (unpublished manuscript, *available at* http://ssrn.com/abstract=723762); Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?* (Wash.

Foundation's Law and Social Science division[259] and the National Institute of Justice[260] aid in the development of empirical legal scholarship.

Recent efforts have attempted to create a formalized movement among empirical scholars, known as the New Legal Realism Project. Currently, it is unclear how this movement differs from the law and society movement.[261] Nonetheless, for the past ten years academics have debated the need for a "new legal realism."[262] Finally, in 2005, the American Bar Foundation and the University of Wisconsin Law School's Institute for Legal Studies sponsored the first New Legal Realism symposium,[263] which resulted in the publication of several articles.[264]

The New Legal Realism agenda consists of five points. First, it takes both a bottom-up and top-down approach. A bottom-up approach requires that empirical research must support assertions about the law's impact on everyday people's lives.[265] This approach focuses on a continued effort to study decision-makers and institutions at the top. Furthermore, this bottom-up approach requires an appreciation of "power arrangements and hierarchies" within our legal system.[266] Second, new legal realists seek to facilitate some translation between law and social science—to bridge the gap between "epistemolog[ies], methods, operating assumptions and overall goals."[267] Third, new legal realists attempt to reconcile the issue of research subjectivity in empirical research.[268] Fourth, New Legal Realism must broaden its horizon and focus on both international and national issues.[269] Finally, New Legal Realism incorporates not only empirical research and legal theory, but it must also

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Univ. Sch. of Law, Working Paper No. 06-07-01, 2006), *available at* http://ssrn.com/abstract=913411; Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 L. & HUM. BEHAV. 261 (2007).

259 National Science Foundation, Law and Social Sciences, http://www.nsf.gov/funding/pgm_summ.jsp?pims_id=5422&org=SES&from=home (last visited November 9, 2006).

260 National Institute of Justice, http://www.ojp.usdoj.gov/nij/ (last visited November 9, 2006).

261 *See* Empirical Legal Studies: My Take on New Legal Realism, http://www.elsblog.org/the_empirical_legal_studi/2006/06/my_take_on_new_.html (last visited November 10, 2006) (showing that a number of members of the Empirical Legal Studies blog indicate that they cannot readily discern how New Legal Realism differs from the law and society movement).

262 *See* Howard Erlranger et al., *Foreword: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 337 n.7 (2005).

263 *Id.* at 335; New Legal Realism Home Page, http://www.newlegalrealism.org/ (last visited November 1, 2006).

264 Symposium, *New Legal Realism: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335 (2005); Symposium, *New Legal Realism*, 31 L. & SOC. INQUIRY 797 (2006).

265 *See* Erlranger et al., *supra* note 262, at 340.

266 *Id.*

267 *Id.* at 336, 341–42.

268 *Id.* at 342–43.

269 *Id.* at 343–44.

policy issues, too.[270] In doing so, New Legal Realism cannot simply be a method of critique; it must also point the way towards "positive social change."[271]

Over the past several years, the topic of race has taken *some* root within areas of empirical legal scholarship and social science and law literature. Maybe the clearest indication of this is the New Legal Realism symposium issue of the *Wisconsin Law Review*.[272] Within the launch of this serious integration of empirical methods and legal scholarship, more than one-quarter of the articles focused on race issues.[273] Furthermore, half of the articles from the *Law & Social Inquiry* symposium focused on race issues.[274] This suggests that there is at least some effort by empirical legal scholars to substantively address racial issues.

In addition to efforts by empirical legal scholars and participants in the New Legal Realism Project, a number of scholars have come together to advance what they term Behavioral Realism.[275] According to Behavioral Realism, people have schemas for various categories, including racial categories.[276] Individuals in these racial categories are then automatically ascribed some meaning based on the schema. There are a number of reasons why it is difficult to ascertain these meanings, such as that people often lack introspection or actively conceal their feelings about racial categories, for example.[277] Behavioral Realists employ the Implicit Association Test as a measure of unconscious racial attitudes. Furthermore, their goal is to identify latent processes or assumptions in the law related to human decisionmaking and assess new scientific understanding about human behavior from the mind sciences.[278] As articulated by Jerry Kang, the law must then take into account models of human decisionmaking or state clearly that it will not take this new sci-

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270 *Id.* at 345.

271 *Id.*

272 Symposium, *New Legal Realism*, *supra* note 264.

273 *See* Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557 (2005); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663 (2005); Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617 (2005).

274 *See* John M. Conley, *Tales of Diversity: Lawyers' Narratives of Racial Equity in Private Firms*, 31 LAW & SOC. INQUIRY 831 (2006); Mitu Gulati & Laura Beth Nielsen, *Introduction: A New Legal Realist Perspective on Employment Discrimination*, 31 Law & SOC. INQUIRY 797 (2006); Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 LAW & SOC. INQUIRY 801 (2006); Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 LAW & SOC. INQUIRY 855 (2006).

275 *See e.g.*, Jerry Kang, Behavioral Realism: Future History of Implicit Bias and the Law, Lecture at Ohio State University (Nov. 2006), http://www.law.ucla.edu/kang/Talks/talks.html.

276 *Id.*

277 *Id.*

278 *Id.*

ence into account.[279] Kang further notes that the future of behavioral realism consists of answering a number of descriptive and normative questions. With regards to the former, does implicit racial bias exist? If it does, is there any real-world impact of implicit racial bias? If there is a real-world impact, can it be countered in any way? With regards to the latter, should implicit racial bias be countered? If it should, does it respect notions of individual autonomy? If it does, is the intervention lawful? Ultimately, as Kang further points out, social science and legal scholarship should help us answer these questions.[280] Social science journals should decide if the science is correct, and law reviews should decide if the science is being validly employed.[281] This burgeoning area of scholarship has produced fruitful works in the Harvard Law Review[282] and collaborative efforts between psychology professors and law professors, as featured in the California Law Review Behavioral Realism symposium.[283]

B. CRITICAL RACE REALISM: CRITICAL RACE THEORY AND CONTEMPORARY MOVEMENTS

Narrowly conceptualized, Critical Race Realism is not new. As noted, Charles Hamilton Houston balanced being a law school administrator, an academic, and a practicing civil rights lawyer. Moreover, law professors have engaged in social science, race and law as well as race and empirical legal scholarship for years. Below, in Subpart 1, I highlight the growth of such scholarship as a way to (1) note who is actually engaged in this type of scholarship and (2) help define what issues Critical Race Realism might continue to tackle and what new issues need to

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279 *Id.*

280 *Id.*

281 *Id.*

282 Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (describing the ways in which communication law, cognitive psychological research, and implicit racial bias intersect).

283 R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 (2006) (describing how implicit racial bias relates to racial bias, generally, and in the criminal justice system, specifically); Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006) (describing how system justification theory may be understood in light of implicit racial bias); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV 945 (2006) (describing the social scientific underpinnings of implicit or "unconscious" racial bias); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006) (describing the relations between implicit racial bias and antidiscrimination law); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006) (describing the relationship between implicit racial bias and employment discrimination law); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063 (2006) (describing how affirmative action can be approached in light of implicit racial bias); *see also* Kang, *supra* note 282.

be addressed. Subpart 2 further clarifies what Critical Race Realism is or could be and the benefits stemming from this perspective. Subpart 3 suggests some ways in which Critical Race Realism might be more firmly established.

1. *A Systematic Analysis of Race, Social Science, and Law Scholarship*

To better define Critical Race Realism, what follows is an analysis of social science, race and law, as well as race and empirical legal scholarship over the past twenty years, since the founding of Critical Race Theory. My hope is that this will highlight the progression of this area of scholarship. The first analysis investigated social science, race and law, as well as race and empirical legal scholarship conducted by founders of Critical Race Theory. The second investigated social science, race and law, as well as race and empirical legal scholarship conducted by law faculty at the most highly ranked law schools. The third investigated social science, race and law, as well as race and empirical legal scholarship published in the top twenty general law journals. The fourth investigated social science, race and law, as well as race and empirical legal scholarship published in a select number of law journals focused on race or civil rights issues. The fifth investigated social science, race and law, as well as race and empirical legal scholarship published in interdisciplinary social science and law journals. The sixth investigated unpublished social science, race and law, as well as race and empirical legal scholarship.

> **Analysis 1**: Social Science, Race and Law, and Race and Empirical Legal Scholarship Conducted by Critical Race Theory Founders

For the first analysis, I selected the names of Critical Race Theory's principle figures from the chapter in *Crossroads, Directions, and a New Critical Race Theory* on the history of Critical Race Theory[284] as well as *Critical Race Theory: An Introduction.*[285] Aside from the founding members, my focus was on Black principal figures.[286] I then conducted a Westlaw search of each individual's journal and law review articles. The search terms were *AU(*first name */2* last name*) & "social scien!" empiric! quantitative /s race "African American."* The searches were restricted between the founding year of Critical Race Theory, 1987, and 2006. Final searches were conducted in October of 2006. In conjunction

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284 Crenshaw, *supra* note 202, at 30 n.18.

285 DELGADO & STEFANCIC, *supra* note 4, at v–xi.

286 In addition to Alan Freeman and Charles Lawrence, for the principle members identified, see Crenshaw *supra* note 202, at 30 n.18.

with this search method, results from analyses two through four were also perused to cross-check and ascertain whether additional results were found that were not produced by this first analysis. Only those results that focused on race and with at least one-fourth textual content about social science, race and law, or race and empirical legal scholarship served as actual results for this analysis. Additionally, if any utilized result was part of a symposium, the other symposia articles were analyzed to determine if they too fit within the aforementioned criteria. If they did, they were included in this analysis. These results are listed below; journal articles with at least a designated section on social science, race and law, or race and empirical legal scholarship are footnoted.

This analysis only yielded two results. Between 1987 and 2001, principal Critical Race Theory figures published no social science, race and law, or race and empirical legal scholarship law journal articles.[287] Between 2002 and 2006, they published two law journal articles.[288] Thematically, both articles focused on race, law, and economics.[289]

> **Analysis 2**: Social Science, Race and Law, and Race and Empirical Legal Scholarship Conducted by Faculty at Top Law Schools

For the second analysis, I employed *U.S. News and World Report*'s "America's Best Graduate Schools 2007" to identify the top twenty law schools.[290] I then examined the websites for those law schools to identify faculty possibly engaged in social science, race and law or race and empirical legal scholarship. I only included full-time faculty teaching doctrinal courses in the analysis. Thus, I excluded emeritus faculty, vis-

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287 Only one journal article even had a section dedicated to social science, race and law, or race and empirical legal scholarship. *See* Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 NW. U. L. REV. 215, 238–40 (1998) (describing studies of helping behavior in cross-racial situations).

288 Additionally, one journal article had a section dedicated to social science, race and law, or race and empirical legal scholarship. *See* Isabelle R. Gunning, *Perceptions, Categorizations, and Impartiality: Arbitrators and Racial Equality in Arbitration*, 4 J. AM. ARB. 59, 72 nn.50–51 (2005) (discussing the social scientific assessment of racial bias and applying this research to the field of arbitration).

289 *See* Culp et al., *supra* note 8 (analyzing the continuing existence of racism in light of empirical scholarship on its pervasiveness); Robert E. Suggs, *Poisoning the Well: Law & Economics and Racial Inequality*, 57 HASTINGS L.J. 255 (2005) (applying law and economics analysis to issues of race).

290 American's Best Graduate Schools: Complete Guide to Law Schools, http://www.usnews.com/usnews/edu/grad/rankings/law/lawindex_brief.php (last visited October 1, 2006). I only include faculty at the top twenty law schools as a way to streamline this analysis. I realize that my methodological approach excludes many faculty who may be engaged in research relevant to the topic of this article. I also realize that my methodological approach may seemingly reify the hierarchical nature of legal education. *See* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1982). However, to conduct an analysis of faculty at all law schools would be prohibitively burdensome given the scope of this Note.

iting faculty, clinical faculty, adjunct faculty, and fellows from the analysis. I then examined the websites of identified faculty to determine whether they engaged in race scholarship. The terms *race*, *antidiscrimination*, *civil rights*, and *employment discrimination* were employed in the search. For faculty engaged in *antidiscrimination*, *civil rights*, or *employment discrimination* research, I also looked for additional information which might suggest that they are particularly interested in race scholarship as opposed to, for example, sexual discrimination or sexual orientation discrimination scholarship. Specifically, this was determined by what type of scholarship they had published since 2000 or by what their other research foci were. For some faculty, their research interests were clearly indicated on their website under *Areas of Interest* or *Areas of Expertise*. For others, their research interest was gleaned from the courses they taught, their scholarship since 2000, or identified on their Curriculum Vitae posted on their website. I also selected full-time faculty from *The AALS Directory of Law Teachers, 2005–2006* who were identified by the subject areas Critical Race Theory or Civil Rights.[291] One hundred forty-two faculty members were identified via this method.[292]

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291 THE AALS DIRECTORY OF LAW TEACHERS, 2005–2006 at 1137–38, 1169–72, 1238–39 (2005).

292 The professors at the following institutions were identified: At Yale, the thirteen faculty members were Bruce Ackerman, Ian Ayres, Richard Brooks, Harlon Dalton, Drew Days, III, John Donahue, Owen M. Fiss, Paul D. Gewirtz, Christine Jolls, Dan M. Kahan, Vicki Schultz, Reva Siegel, and Kenji Yoshino. At Stanford, the five faculty members were R. Richard Banks, Richard Thompson Ford, Pamela S. Karlan, Mark G. Kelman, and Alison D. Morantz. At Harvard, the six faculty members were Lani Guinier, Janet E. Halley, Randall L. Kennedy, Kenneth Mack, Charles J. Ogletree, and David B. Wilkins. At Columbia, the nine faculty members were Kimberlé Williams Crenshaw, Elizabeth F. Emens, Katherine M. Franke, Jack Greenberg, Olatunde Johnson, James Liebman, Kendall Thomas, Patricia Williams, and Mary Marsh Zulack. At New York University, the seven faculty members were Derrick Bell, Paulette Caldwell, Samuel Estreicher, Cynthia Estlund, Deborah Malamud, Richard H. Pildes, and Cristina Rodriguez. At Chicago, the one faculty member was Tracey L. Meares. At Michigan, the five faculty members were Roderick Maltman Hills, Jr., Ellen D. Katz, Katherine A. MacKinnon, Rebecca J. Scott, and Marjorie M. Shultz. At the University of Pennsylvania, the seven faculty members were Regina Austin, C. Edwin Baker, Howard Lesnick, Serena Mayeri, Anita L. Allen, Wendell Pritchett, and David Rudovsky. At Boalt, the eleven faculty members were Kathryn Abrams, Lauren B. Edleman, Christopher Edley, Jr., Malcolm M. Feeley, Philip P. Frickey, Ian F. Haney Lopez, Angela P. Harris, Linda Hamilton Krieger, Goodwin Liu, Jonathan Simon, and Jan Vetter. At the University of Virginia, the fifteen faculty members were Barbara E. Armacost, Tomiko Brown-Nagin, Kim Forde-Mazuri, Risa Goluboff, John C. Jefferies, Jr., Michael J. Klarman, Peter W. Low, Richard A. Merrill, Daniel R. Ortiz, George Rutherglen, James E. Ryan, Richard C. Schragger, A. John Simmons, J. H. Verkerke, and Ann Woolhandler. At Duke, the five faculty members were Erwin Chemerinsky, Mitu Gulati, Trina Jones, Charles Clotfelter, and Karla F. Hollow. At Northwestern, the four faculty members were Dorothy E. Roberts, Leonard Rubinowitz, Mayer G. Freed, and Charlton Copeland. At Cornell, the four faculty members were Valarie Hans, Barbara J. Holden-Smith, Sherri Lynn Johnson, and Winnie F. Taylor. At Georgetown, the eleven faculty members were Charles F. Abernathy, Sheryll D. Cashin, Anthony E. Cook,

I then conducted a Westlaw search of each individual's journal and law review articles. The search terms were *AU(*first name */2* last name*) & "social scien!" empiric! quantitative /s race "African American"*. The searches were restricted between the founding year of Critical Race Theory, 1987, and 2006. Final searches were conducted in October of 2006. In conjunction with this search method, results from analyses one, three, and four were also employed to cross-check and ascertain whether additional results were found not produced by this analysis. Only those results that focused on race and with at least one-fourth textual content about social science, race and law, or race and empirical legal scholarship were included in this analysis. Additionally, if any utilized result was part of a symposium, the other symposia articles were analyzed to determine if they too fit within the aforementioned criteria. If they did, they also served as actual results for this analysis. These results are listed below, journal articles with at least a designated section on social science, race and law, or race and empirical legal scholarship are footnoted.

This analysis yielded twenty-seven results. Between 1987 and 1991, faculty at the top twenty law schools published two social science, race and law, or race and empirical legal scholarship law journal articles.[293] These articles focused on how the intent standard works in racial discrimination cases[294] and the role of unconscious racism in criminal law.[295] Between 1992 and 1996, faculty at the top twenty law schools

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Chai Rachel Feldblum, Michael H. Gottesman, Emma Coleman Jordan, Charles R. Lawrence, III, Mari J. Matsuda, Carrie J. Menkel-Meadow, Eleanor Holmes Norton, and Elizabeth Hayes Patterson. At U.C.L.A, the nine faculty members were Gary Blasi, Devon W. Carbado, Kimberlé Williams Crenshaw, Robert David Goldstein, Joel F. Handler, Cheryl I. Harris, Jerry Kang, Christine A. Littleton, and Russell Robinson. (Professor Crenshaw was double-counted, as she holds a joint-appointment with Columbia and U.C.L.A.) At U.S.C., the seven faculty members were Jody Armour, Kareem Crayton, David B. Cruz, Mary L. Dudziak, Susan Estrich, Thomas Griffith, and Ariela Gross. The four Vanderbilt faculty professors were Robert Belton, John C. P. Goldberg, Joni Hersch, and Carol M. Swain. The nine George Washington faculty members were Paul Butler, Robert J. Cottrol, Charles B. Craver, C. Thomas Dienes, Frederick M. Lawrence, Spencer A. Overton, Alfreda Robinson, Michael Selmi, and Joan E. Schaffner. The three University of Minnesota professors were Guy-Uriel E. Charles, Jill Elaine Hasday, and Alex M. Johnson, Jr. Finally, the seven University of St. Louis faculty members were Katherine Y. Barnes, Samuel R. Bagenstos, Christopher Bracey, Pauline T. Kim, D. Bruce La Pierre, Kimberly Jade Noorwood, and Margo Schlanger.

293 *See* Sherri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 312–17 (1996) (describing the psychological dynamics of race and assessments of credibility); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1395–1402 (1988) (discussing judicial response to statistical evidence about racial disparities in capital sentencing).

294 *See* Theodore Eisenberg & Sherri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991) (providing an empirical analysis of the intent standard).

295 *See* Sherri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988).

published six social science, race and law, or race and empirical scholarship law journal articles.[296] These articles explore such topics as discrimination in employment law,[297] bail setting,[298] how mental heuristics lead to racism in legal contexts,[299] land ownership,[300] and stereotyping and prejudice among legal decision-makers.[301] Between 1997 and 2001, these faculty members published six social science, race and law, or race and empirical scholarship law journal articles.[302] The topics explored were voter redistricting,[303] racial attitudes about crime control,[304] and affirmative action.[305] Between 2002 and 2006, these faculty members

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296 *See* Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1829–38 (1996) (providing cost-benefit analysis to narrow tailoring within the context of affirmative action).

297 *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (exploring the intersection of cognitive psychology, discrimination, and employment law); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992) (analyzing federal court decisions addressing the lack of interest defense since Title VII's enactment with particular regards to race).

298 *See* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994) (providing an empirical analysis of racial discrimination and bail setting).

299 *See* Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (describing, generally, how mental shortcuts or heuristics lead people to be racist within the legal context).

300 *See* Ellen D. Katz, *African American Freedom in Antebellum Cumberlad County, Virginia*, 70 CHI.-KENT L. REV. 927 (1995) (exploring land ownership in the antebellum South).

301 *See* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995) (discussing how psychological research on stereotyping and prejudice may help legal decisionmakers break such habits within legal contexts).

302 *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN L. REV. 1111, 1135–46 (1997) (discussing the utility of social science research on unconscious bias and this research's applicability to equal protection).

303 *See* Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997) (exploring whether race-conscious redistricting should be constitutional).

304 *See* Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL L. REV. 1219 (2000) (providing an empirical analysis of minority communities' perceptions of police criminal enforcement); Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137 (1997) (providing an empirical analysis of racial attitudes concerning drug legalization and enforcement).

305 *See* Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1587 (1998) ("[T]he government can remedy shortfalls in private purchasing only when the firms disadvantaged by the government's affirmative action were likely beneficiaries of the private discrimination. This principle implies that the government cannot use affirmative action in one market to remedy discrimination in another. But when purchasing a particular product, the government should be able to remedy private discrimination against sellers of the same product. The but-for adjustment does just this to remedy shortfalls in government purchasing; the single-market justification expands the

published seventeen social science, race and law, or race and empirical scholarship law journal articles.[306] These articles explore such topics as Law and Economics,[307] unconscious racism,[308] lawyer advocacy against racism,[309] affirmative action in law school admissions,[310] school desegregation,[311] and voter-rights.[312]

On average, the University of Virginia faculty published .18 articles per faculty member intersecting social science, race and law, or race and empirical legal scholarship over the past 20 years. The Yale and Michigan faculty both published .2 articles, on average. The New York University faculty published an average of .29 articles. The University of Southern California faculty published an average of .4 articles. The Yale

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procurement remedy to correct for shortfalls in private purchasing . . . ."); Tomiko Brown-Nagin, *A Critique of Instrumental Rationality: Judicial Reasoning About the "Cold Numbers" in* Hopwood v. Texas, 16 LAW & INEQ. 359 (1998); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251 (1998) (exploring the implications of social cognition and social identity theory for the affirmative action debate).

306 Three journal articles included sections dedicated to social science, race and law, or race and empirical legal scholarship. *See* John H. Blume et al., *Education and Interrogation: Comparing* Brown *and* Miranda, 90 CORNELL L. REV. 321, 329–31 (2005) (indicating that *Brown* and *Miranda* both employed extra-legal materials (i.e., social science and police manuals) to broaden their legal arguments); Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1229–31 (2003) (employing social psychology towards understanding the relationship between individual and group racial identity); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1484–89 (2004) (discussing resistance to footnote 11 of *Brown v. Board of Education* where social scientific studies were employed to advance the arguments for school integration).

307 *See* Ayres, *supra* note 8 (2003) (arguing that race-contingent behavior is not undefined but actually knowable); Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613 (2005) (providing an empirical analysis of racial discrimination in consumer economic behavior—taxicab tipping); Carbado & Gulati, *supra* note 8 (discussing how workplace discrimination may be understood from the intersection of law and economics and critical race theory); Culp et al., *supra* note 8 (providing some closing analysis on the continuing existence of racism in light of empirical scholarship on its pervasiveness).

308 *See* Banks et al., *supra* note 283; Blasi & Jost, *supra* note 283; Greenwald & Krieger, *supra* note 283; Jolls & Sunstein, *supra* note 283; Krieger & Fiske, *supra* note 283; Kang, *supra* note 282; Kang & Banaji, *supra* note 283.

309 *See* Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1241 (2002) (providing "a brief overview of the rapidly developing science regarding stereotypes and prejudice, and . . . the implications for lawyers and other advocates"); Blasi & Jost, *supra* note 283.

310 *See* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005) (providing an empirical rebuttal to the argument that affirmative action in law schools serves to reduce the number of black lawyers).

311 *See* James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659 (2003) (discussing the influence of social science on modern school desegregation cases).

312 Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002) (exploring the limits of race-conscious redistricting).

and Cornell faculty published an average of .72 and .75 articles, respectively. Both the Boalt and University of California at Los Angeles faculty published an average of .83 articles. The one faculty member identified at the University of Chicago published an average of 1 article. Collectively, over the past 20 years, law faculty at the top twenty law schools have published an average of .49 articles intersecting social science, race and law, or race and empirical legal scholarship. The results for this analysis are reported in Table 1. Only those law schools with at least one publication are tabled.

TABLE 1. LAW FACULTY ENGAGED IN RACE/SOCIAL SCIENCE RESEARCH

	1987–1991	1992–1996	1997–2001	2002–2006	Average
Yale (11)	0	2	2	4	.72
Stanford (5)	0	0	0	1	.2
NYU (7)	0	0	1	1	.29
U. Chicago (1)	0	0	1	0	1
Boalt (6)	0	1	1	3	.83
Michigan (5)	0	1	0	0	.2
UVA (11)	0	0	1	1	.18
Cornell (4)	2	0	0	1	.75
UCLA (6)	0	0	0	5	.83
USC (5)	0	2	0	0	.4
Total	2	6	6	16	30/.49

Note. The number of faculty at each law school is indicated in parentheses next to each school's name.

Analysis 3: Social Science, Race and Law, and Race and Empirical Legal Scholarship Published in the Top Twenty General Law Journals

In the third analysis, I employed Washington and Lee Law School's journal ranking system to identify the top, general law journals.[313] My search query was for *U.S., General* journals. I searched the most recent database update, 2005, by impact-factor (IF) and selected the top twenty journals.[314] I then conducted a Westlaw search of each journal. Under

313 Law Journals: Submissions and Rankings, http://lawlib.wlu.edu/LJ/ (last visited October 1, 2006). I only include the top twenty general law journals in my analysis as a way to streamline the analysis. I realize that my methodological approach excludes many articles that are published in various other general law journals. However, it would be prohibitive to conduct an analysis of all general law journals given the scope of this article.

314 The identified journals were: *Yale Law Journal, Columbia Law Review, New York University Law Review, Cornell Law Review, Stanford Law Review, Virginia Law Review, Harvard Law Review, California Law Review, University of Pennsylvania Law Review, Duke Law Journal, Vanderbilt Law Review, Minnesota Law Review, University of Chicago Law Review, UCLA Law Review, Northwestern University Law Review, Texas Law Review, South-*

"Search these databases," I input each journal, separately. Then for each journal, the search terms employed were *"social scien!" empiric! quantitative /s race "African American"*. The searches were restricted between 1987 and 2006. Final searches were conducted in October of 2006. In conjunction with this search method, results from analyses one, two, and four were also perused to cross-check and ascertain whether additional results were found not produced by this analysis. Only those results that focused on race and with at least one-fourth textual content about social science, race and law, or race and empirical legal scholarship served as actual results for this analysis. Additionally, if any utilized result was part of a symposium, the other symposia articles were analyzed to determine if they too fit within the aforementioned criteria. If they did, they also served as actual results for this analysis. These results are listed below; journal articles with at least a designated section on social science, race and law, or race and empirical legal scholarship are footnoted.

As shown in Table 2, this analysis yielded forty-four results. Specifically, between 1987 and 1991, the top twenty general law reviews published three articles on social science, race and law, or race and empirical legal scholarship.[315] The topics of these articles included the intent standard in racial discrimination cases,[316] the role of unconscious racism in criminal law,[317] and the changing nature of employment discrimination litigation.[318] Between 1992 and 1996, the top twenty general law reviews published seven articles in the area of social science, race and law, or race and empirical legal scholarship.[319] These articles ex-

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ern California Law Review, *William and Mary Law Review*, *Indiana Law Review*, and *Iowa Law Review*.

315 In addition to these three articles, four others dedicated a section to social science, race and law, or race and empirical legal scholarship. *See* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1066–69 (1991) (discussing the effect of race-consciousness as "an entrenched structure of thought" on how people organize and process information using examples, including two incidents in a law school); *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1525–32 (1988) (discussing empirical studies on race of defendants and the prosecutorial decisionmaking process); Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1395–402 (1988) (discussing judicial response to statistical evidence about racial disparities in capital sentencing); Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 319–46 (1991) (describing the social scientific models in understanding the broadcasting station owner's characteristics and programming choices).

316 *See* Eisenberg & Johnson, *supra* note 294.

317 *See* Johnson, *supra* note 295.

318 *See* John J. Donahue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

319 Two additional journal articles included sections on social science, race and law, or race and empirical legal scholarship. *See* Ayres, *supra* note 296, at 1829–38 (applying marginal cost-benefit analysis to assess whether a program is narrowly tailored within the context of affirmative action); Michael John Weber, *Immersed in an Educational Crisis: Alternative Pro-*

plored discrimination in a variety of contexts, such as employment,[320] bail setting,[321] and lending.[322] They also discussed race-based self-defense claims,[323] economic theories of racial discrimination,[324] and colorblind formalism in courtrooms.[325] Similarly, between 1997 and 2001, a small number of law journal articles (five) were published by the top twenty general law reviews on social science, race and law, or race and empirical legal scholarship.[326] Four of these articles focused on affirmative action[327] while one focused on attitudes of minorities towards crime

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grams for African-American Males, 45 STAN. L. REV. 1099, 1102–21 (1993) (discussing the "[t]heoretical and [e]mpirical [s]upport for the African-American [m]ale [p]ublic [s]chools").

320 *See* Krieger, *supra* note 297 (arguing that cognitive bias is a source of discriminatory decision-making that the Title VII jurisprudence has failed to address); Schultz & Petterson, *supra* note 297 (analyzing federal court decisions in race and sex discrimination cases that addressed the lack of interest defense since Title VII's enactment).

321 For a discussion of a market-based test of unjustified disparate impact using data from the bail bond market that demonstrated systematic over-deterrence of black and male Hispanic defendants, see Ayres & Waldfogel, *supra* note 298.

322 *See* Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787 (1995) (discussing the persistence of lending discrimination and possible remedies under the fair lending laws).

323 *See* Armour, *supra* note 301 (arguing against the legal recognition of race-based self-defense claims by implicating a variety of jurisprudential concerns).

324 *See* Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995) (providing an economic analysis of group formation that is essential to a genuine understanding of racial discrimination).

325 *See* Armour, *supra* note 301 (using psychological research on stereotyping and prejudice to support the argument that colorblind formalism is counterproductive in reducing racial discrimination while referencing stereotypes in court may actually enhance fairness).

326 Eight additional journal articles dedicated a section to social science, race and law, or race and empirical legal scholarship. *See* Delgado, *supra* note 287, at 238–40 (describing studies of helping behavior in cross-race situations); Tanya Katerí Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183, 186–94 (2001) (analyzing statistical data that suggests racial disparity of sexual harassment in the United States and discussing the early explanation for the statistical pattern); Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1, 25–28 (1998) (discussing the influences perception has on human behavior—termed "social cognition"—and the resulting discrimination in the context of contract law); Steven A. Ramirez, *A General Theory of Cultural Diversity*, 7 MICH. J. RACE & L. 33, 40–51 (2002) [hereinafter Ramirez, *Cultural Diversity*] (discussing the concept of race in science and social science); Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127, 137–39 (2001) [hereinafter Ramirez, *New Cultural Diversity*] (discussing empirical data supporting the proposition that embracing diversity generally creates benefits for a business entity); Siegel, *supra* note 302, at 1135–46 (discussing the current operation of the doctrine of discriminatory purpose in the American legal system); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1272–76, 1290–95 (2000) (discussing the social science research on the effects of majority rule and empirical evidence on the impact of juror race on jury deliberations); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983–91 (1999) (exploring how social science research helps explain the impact race has on police officers' assessment of probable cause and reasonable suspicion).

327 *See* Ayres & Vars, *supra* note 305 (offering a new set of constitutionally viable justifications for affirmative actions); Krieger, *supra* note 305 (exploring the implications of social

control.[328] Finally, we see a large increase for the period between 2002 and 2006 with twenty-nine articles on social science, race and law, or race and empirical legal scholarship published by the top twenty general law reviews.[329] These articles explore such topics as the critical race

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cognition and social identity theory for the affirmative action debate); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997) (analyzing the effects of race and sex on tenure-track hiring at accredited law schools using results from a comprehensive empirical study); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1 (1997) (demonstrating through a comprehensive empirical analysis that affirmative action is likely needed to maintain a diverse law student body).

328 *See* Brooks, *supra* note 304 (providing an empirical analysis of minority communities' perceptions of police criminal enforcement).

329 Eleven journal articles, in addition to the twenty-nine yielded by the search, also included sections dedicated to social science, race and law, or race and empirical legal scholarship. *See* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5–10 (2006) (proposing a structural approach to the antidiscrimination law based on the recognition of the pervasiveness of implicit bias); Blume et al., *supra* note 306, at 329–31 (pointing out that both *Brown* and *Miranda* decisions employed extra-legal materials such as social science research and police manuals to broaden their legal arguments); Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1186–87 (2002) (arguing that while the statistical discrimination rationale for the use of the disparate impact approach may be appropriate in the employment context, it is not applicable in the context of educational assessment); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 25–42 (2005) (suggesting rationales for providing discrimination claimants strong legal protection against retaliation through social science research); Charles, *supra* note 306, at 1229–31 (discussing the relationship between individual and group identity through social psychology); Daniel M. Filler, *Silence and the Racial Dimension of Megan's Law*, 89 IOWA L. REV. 1535, 1578–81, 1582–87 (2004) (suggesting that the lack of racial data may help explain the absence of race as an issue in the debate of Megan's Law and offering social and psychological explanations for the lack of such data); Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206, 1212–30 (2006) (describing how social science aids our understanding of how political morality varies among U.S. racial groups and how such variation relates to judicial decisionmaking); Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. Rev. 1821, 1834–39 (2003) (discussing psychological studies that support the existence of own-race bias and bring the reliance on cross-racial eye witness identifications into question); Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127, 130–33 (2003) (providing empirical evidence of racial bias in prosecutorial discretion); Siegel, *supra* note 306, at 1484–89 (discussing resistance to footnote 11 of *Brown v. Board of Education* in which social scientific studies were employed to advance the arguments for school integration); Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law that Is Inclusive?: What* Grutter v. Bollinger *Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 131–37 (2005) (describing empirical studies that explored the relationship between judges' personal attributes, such as gender, race, and political affiliations, and their rulings).

theory and the law and economics,[330] implicit bias,[331] racial disparities in medical care,[332] racial profiling,[333] and implications for lawyers in advocating against racism.[334] Other articles focused on issues that arose in the context of education, such as the use of social science in *Brown v. Board of Education*,[335] education finance reform litigation,[336] affirmative

330 *See* Ayres, *supra* note 8 (arguing that race-contingent behavior is not undefined but actually knowable and increasingly known); Ayres et al., *supra* note 307 (providing an empirical analysis of racial discrimination in taxicab tipping, a dimension of consumer economic behavior that is both discretionary and observable); Carbado & Gulati, *supra* note 8 (discussing how workplace discrimination may be understood from combining the law & economics and critical race theory even though the two theories are often perceived as oppositional discourses); Case, *supra* note 8 (advocating for a taxonomy that focuses on the perspectives of the persons discriminated against in shaping remedies for discrimination); Culp et al., *supra* note 8 (analyzing the critical race theory and its impact on our understanding of racial discrimination); Freshman, *Foreward: Revisioning the Constellations*, *supra* note 8 (setting the stage for a discussion about the critical race theory and law & economics); Freshman, *Prevention Perspectives*, *supra* note 8 (looking at categories of discrimination from the perspective of prevention); Haynes, *supra* note 8 (describing the pervasiveness of racial discrimination); Moran, *supra* note 9 (demonstrating that both law and economics and critical race theory can benefit from each other while each generates different "doctrinal dilemmas and policy puzzles").

331 *See* Banks et al., *supra* note 283 (using empirical studies that demonstrated the persuasiveness of racial inequalities to probe the nature of the consensus opposition to bias and discrimination); Blasi & Jost, *supra* note 283 (demonstrating the important implications of the system justification theory—which operates at both the explicit and implicit level of conscious awareness—for "law, lawyering, and advocacy for social justice"); Greenwald & Krieger, *supra* note 283 (discussing the scientific foundations of implicit or "unconscious" bias); Jolls & Sunstein, *supra* note 283 (suggesting that implicit bias may be controlled through antidiscrimination laws); Kang, *supra* note 282 (describing cognitive psychological research on implicit bias); Kang & Banaji, *supra* note 283 (arguing that the meaning of certain affirmative action prescriptions can be revised with the help of the science of implicit social cognition); Krieger & Fiske, *supra* note 283 (applying the methods of behavioral realism to Title VII disparate treatment cases and arguing that this reading of disparate treatment principles is consistent with Supreme Court precedent, statutory interpretation, and principles of judicial restraint); Michael S. Shin, *Redressing Wounds: Finding A Legal Framework to Remedy Racial Disparities in Medical Care*, 90 CAL. L. REV. 2047 (2002) (exploring the possibility that "implicit cognitive bias, in the form of implicit attitudes and stereotypes, significantly contributes to racial disparities in medical treatment").

332 *See* Shin, *supra* note 331.

333 *See* Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275 (2004) (seeking to clarify "the empirical controversies surrounding racial profiling and thereby shed light on the policy and constitutional law debates").

334 *See* Blasi, *supra* note 309 (providing "a brief overview of the rapidly developing science regarding stereotypes and prejudice, and . . . the implications for lawyers and other advocates"); Blasi & Jost, *supra* note 283 (demonstrating the important implications of the system justification theory, which operates at both the explicit and implicit level of conscious awareness, for "law, lawyering, and advocacy for social justice").

335 *See* Sanjay Mody, Brown *Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002) (arguing that the Court did not rely on the footnote eleven social science studies and explaining reasons for the Court's desire to refer to the studies cited in footnote eleven).

336 *See* Yohance C. Edwards & Jennifer Ahern, *Unequal Treatment in State Supreme Courts: Minority and City Schools in Education and Finance Reform Litigation*, 79 N.Y.U. L.

action in law school admissions,[337] and fairness of LSAT to students of color.[338] The results of this analysis are summarized in Table 2. Only those journals with at least one published article on social science, race and law, or race and empirical legal scholarship are tabled.

REV. 326 (2004) (testing the influence of two factors, the predominant race and setting of plaintiff school districts, on the outcome of education finance reform litigation).

337 *See* Ayres & Brooks, *supra* note 310 (rebutting the claim that affirmative action in law schools has reduced the number of black lawyers and arguing that elimination of affirmative action instead would reduce the number of black lawyers); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005) (addressing empirical shortcomings of Richard Sander's study and predicting a substantial decline in the number of Blacks both entering the bar and enrolling at the nation's most selective law schools); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997 (2005) (demonstrating that affirmative action does not cause black student to fail the bar as Richard Sander argues by correcting the assumptions Sander relied on); Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963 (2005) (providing a rejoinder to critics of his argument that affirmative action in law school admissions serves to reduce the number of black lawyers); Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2005) (providing an empirical critique of affirmative action in law school admissions and arguing that it serves to reduce the number of black lawyers); Richard H. Sander, *Mismeasuring the Mismatch: A Response to Ho*, 114 YALE L.J. 2005 (2005) (discrediting Ho's rebuttal of Sander's argument proposed in one of his earlier works that affirmative action in law schools serves to reduce the number of black lawyers).

338 *See* William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055, 1058 (2001) (arguing that "racial and ethnic gaps on the LSAT are found to be larger than differences in undergraduate grades, law school grades or measures of subsequent success in the legal profession" and that this test bias may be rationale for affirmative action programs).

TABLE 2. NUMBER OF ARTICLES PUBLISHED ON RACE/ SOCIAL SCIENCE SCHOLARSHIP IN THE TOP TWENTY GENERAL LAW JOURNALS

Journal/Year	1987–1991	1992–1996	1997–2001	2002–2006	Total
Yale L. J.	0	0	0	4	4
Colum. L. Rev.	0	0	3	0	3
N.Y.U. L. Rev.	0	0	1	1	2
Cornell. L. Rev.	2	0	0	0	2
Stan. L. Rev.	1	3	0	12*	16
Harv. L. Rev.	0	1	0	1	2
Cal. L. Rev.	0	1	1	8*	10
U. Chi. L. Rev.	0	1	0	0	1
UCLA L. Rev.	0	0	0	1	1
Nw. U. L. Rev.	0	0	0	1	1
Tex. L. Rev.	0	1	0	0	1
Wm. & Mary L. Rev.	0	0	0	1	1
Total	3	7	5	29	44

Note: An asterisk denotes a period where more than one noted journal article was part of a symposium. The analysis identified two symposia for the *Stanford Law Review*[339] and one for the *California Law Review*.[340]

Analysis 4: Social Science, Race & Law and Race & Empirical Legal Scholarship Published in Race and Civil Rights Law Journals

In the fourth analysis, I employed Washington and Lee Law School's journal ranking system to identify law journals on race or civil rights.[341] My first search was for civil rights journals; the search query was *U.S., Human Rights and Civil Rights.* My second search was for journals on race; the search query was *U.S., Minority, Race and Ethnic Issues.* For both searches, I searched for the most recent database update, 2005, by impact-factor (IF). In order to focus on the top journals in both categories, I only selected those journals which were above the mean rank. This search yielded seven journals: Michigan Journal of Race & Law (founded in 1996); Boston College Third World Law Journal (founded in 1980); Law and Inequality (founded in 1983); Journal of Gender, Race and Justice (founded in 1997); Harvard Blackletter Law Journal (founded in 1984); N.Y.U. Review of Law and Social Change (founded in 1971); and Harvard Civil Rights-Civil Liberties Law Review (founded in 1966). I then conducted a Westlaw search of each journal, separately inputting each journal under "search these databases." For each journal, I employed the search terms employed *"social scien!" em-*

339 Freshman, *Forward: Revisioning the Constellations*, *supra* note 8.

340 Symposium, *Behavioral Realism*, 94 CAL. L. REV. 945 (2006).

341 Law Journals: Submissions and Rankings, *supra* note 313.

piric! quantitative /s race "African American" and restricted the dates to 1987 through 2006. The final searches were conducted in October of 2006. To ascertain whether the prior analyses located results not produced by this analysis, I perused the results from analyses one, two, and three. The actual results for this analysis include only those results that focused on race and had at least one-fourth of their textual content about social science, race and law, or race and empirical legal scholarship. Additionally, if any utilized result was part of a symposium, the other symposia articles were analyzed to determine if they, too, fit the aforementioned criteria. If they did, they also served as actual results for this analysis. These results are listed below. Journal articles with at least a designated section on social science, race and law, or race and empirical legal scholarship are footnoted.

This analysis yielded four results. Between 1987 and 1996, the top race/civil rights law journals published no social science, race and law, or race and empirical legal scholarship law journal articles.[342] Between 1997 and 2001, they published only one social science, race and law, or race and empirical legal scholarship law journal article. This article critiqued reliance on cold numbers in law school admissions.[343] Between 2002 and 2006, the top race/civil rights law journals published three social science, race and law, or race and empirical legal scholarship law journal articles.[344] These articles focused on affirmative action,[345] the degree to which inmates' Afro-centric features impact the length of their sentences,[346] and unconscious racism.[347]

> **Analysis 5**: Social Science, Race and Law, and Race and Empirical Legal Scholarship Published in Interdisciplinary, Social Science, and Law Journals

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342 Five journal articles included sections dedicated to social science, race and law, or race and empirical legal scholarship. *See generally* Hernández, *supra* note 326; Johnson, *supra* note 293, at 312–17 (describing the psychological dynamics of race and assessments of credibility); Morant, *supra* note 326 (discussing the relationship between social psychology, race, and contract law); Ramirez, *Cultural Diversity*, *supra* note 326 (discussing cultural conceptions of race); Ramirez, *New Cultural Diversity*, *supra* note 326 (describing corporate diversity initiatives in response to Title VII).

343 *See* Brown-Nagin, *supra* note 305 (critiquing over-reliance on rigid LSAT scores in law school admission in the context of affirmative action).

344 One journal article included a section dedicated to social science, race and law, or race and empirical legal scholarship. *See* Vargas, *supra* note 329, at 131–37 (2004) (describing empirical studies exploring the relationship between judges' personal attributes such as race, political affiliations, and their rulings).

345 *See* Brian N. Lizotte, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625 (2006).

346 *See* William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327 (2005).

347 *See* Reshma J. Saujani, *"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395 (2003).

In the fifth analysis, I identified interdisciplinary journals by employing the methodology Tracey George utilized in *An Empirical Study of Empirical Legal Scholarship*.[348] I selected journals based on the following criteria: the journal's subject matter must be law and a social science; the journal must be peer-reviewed; both law professors and social scientists must publish in the journal; both law professors and social scientists must serve as editors and referees; and the journal must also be part of a legal citation index or legal database. Each edition between 1987 and 2006 of every identified journal was searched via e-journals. Where an edition of the journal was not accessible electronically, I manually searched the journal. The search terms were *race*, *African American*, and *black*. Where an abstract was provided, only the abstract was searched. The actual results for this analysis included only those results that focused on race and had at least one-fourth of their textual content about social science, race and law, or race and empirical legal scholarship. Additionally, if any utilized result was part of a symposium, the other symposia articles were analyzed to determine if they, too, fit within the aforementioned criteria. If they did, they also served as actual results for this analysis. Only studies that focused on the United States and Canada were included in the analysis. The results are noted below. Journal articles with at least one designated section on social science, race and law, or race and empirical legal scholarship are footnoted.

This analysis yielded 113 results. Between 1987 and 1991, the interdisciplinary social science and law journals published nine social science, race and law, or race and empirical legal scholarship articles. These articles focus on criminal justice,[349] social control,[350] and voting.[351] They also explore issues related to the judiciary,[352] social science

348 *See* George, *supra* note 245, at 153–56.

349 *See* Noval Morris, *Race and Crime: What Evidence is There that Race Influences Results in the Criminal Justice System?*, 72 JUDICATURE 111 (1988) (assessing the role of race within the criminal justice system).

350 *See* Charles David Phillips, *Exploring Relations Among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina, 1889–1918*, 21 LAW & SOC'Y REV. 361 (1987) (exploring how various forms of aggression against blacks in the late 19th and early 20th centuries served as social controls).

351 *See* Arthur Lupia & Kenneth McCue, *Why the 1980s Measures of Racially Polarized Voting Are Inadequate for the 1990s*, 12 LAW & POL'Y 353 (1990) (discussing a more effective way of analyzing racially polarized voting).

352 *See* Richard L. Engstrom, *When Blacks Run for Judge: Racial Divisions in the Candidate Preferences of Louisiana Voters*, 73 JUDICATURE 87 (1989) (exploring racial differences in election of black judges); Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities*, 24 LAW & SOC'Y REV. 1197 (1990) (comparatively analyzing sentencing decisions by black and white judges).

in Supreme Court decisions,[353] and affirmative action.[354] Between 1992 and 1996, the interdisciplinary social science and law journals published twenty-three social science, race and law, or race and empirical legal scholarship articles. These articles focus on social science, race and law, generally, as well as[355] antisocial behavior,[356] juries,[357] police,[358] sentencing,[359] and capital punishment.[360] These articles also address issues

353 *See* Alan J. Tomkins & Kevin Oursland, *Social and Social Scientific Perspectives in Judicial Interpretations of the Constitution: A Historical View and an Overview*, 15 LAW & HUM. BEHAV. 101 (1991) (discussing the Court's use of social science in rendering decisions on difficult social issues).

354 *See* Rupert Barnes Nacoste, *Sources of Stigma: Analyzing the Psychology of Affirmative Action*, 12 LAW & POL'Y 175 (1990) (exploring the psychological implications of affirmative action).

355 *See* Valerie P. Hans & Ramiro Martinez, Jr., *Intersections of Race, Ethnicity, and the Law*, 18 LAW & HUM. BEHAV. 211 (1994) (providing a broad overview of social science research on race and law); Darnell F. Hawkins, *Afterword*, 18 LAW & HUM. BEHAV. 351 (1994) (providing a general summation on the intersection of social science, race, and law); Alan J. Tomkins, *Introduction to This Issue: Race Discrimination*, 10 BEHAV. SCI. & L. 151 (1992) (providing opening comment for a special issue on race and law).

356 *See* Dorothy L. Taylor et al., *Racial Mistrust and Disposition to Deviance Among African American, Haitian, and Other Caribbean Island Adolescent Boys*, 18 LAW & HUM. BEHAV. 291 (1994) (testing whether racial mistrust relates to a willingness among black boys to engage in delinquent behavior).

357 *See* Diedre Golash, *Race, Fairness, and Jury Selection*, 10 BEHAV. SCI. & L. 155 (1992) (exploring whether racial composition of juries increases fairness).

358 *See* Linda S. Gottfredson, *Racially Gerrymandering the Content of Police Tests to Satisfy the U.S. Justice Department: A Case Study*, 2 PSYCHOL. PUB. POL'Y & L. 418 (1996) (analyzing how the effect of lowering police tests' merit relatedness in pursuit of race-based goals).

359 *See* James W. Meeker et al., *Bias in Sentencing: A Preliminary Analysis of Community Service Sentences*, 10 BEHAV. SCI. & L. 197 (1992) (exploring whether judges demonstrate racial bias in sentencing); Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179 (1992) (meta-analyzing the relationship between race and sentencing).

360 *See* Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 LAW & SOC'Y REV. 19 (1993) (analyzing how legal discourse deals with violence and pain within the context of a cross-racial crime); Linda A. Foley, *Florida After the Furman Decision: The Effect of Extralegal Factors on the Processing of Capital Offense Cases*, 5 BEHAV. SCI. & L. 457 (1987) (exploring the existence of racial discrimination in capital sentencing); Jonathan R. Sorensen & Donald H. Wallace, *Capital Punishment in Missouri: Examining the Issue of Racial Disparity*, 13 BEHAV. SCI. & L. 61 (1995) (examining racial disparities in capital punishment).

such as affirmative action,[361] employment discrimination,[362] hate crimes,[363] and dispute resolution.[364] Lastly, they also tackle parental rights issues,[365] development issues for poor women,[366] politics,[367] and regulation within the trucking industry.[368] Between 1997 and 2001, the interdisciplinary social science and law journals published 42 social science, race and law, or race and empirical legal scholarship articles. These articles focus on the judiciary,[369] juries,[370] eye-witness testi-

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361 *See* Winfred Arthur, Jr. et al., *Recipient's Affective Responses to Affirmative Action Interventions: A Cross-Cultural Perspective*, 10 BEHAV. SCI. & L. 229 (1992) (exploring how cultural differences affect racial group differences about affirmative action); Susan D. Clayton, *Remedies for Discrimination: Sex, Race and Affirmative Action*, 10 BEHAV. SCI. & L. 245 (1992) (discussing affirmative action within the contexts of race versus sex); Richard B. Darlington, *On Race and Intelligence: A Commentary on Affirmative Action, the Evolution of Intelligence, the Regression Analyses in* The Bell Curve, *and Jensen's Two-Level Theory*, 2 PSYCHOL. PUB. POL'Y & L. 635 (1996) (discussing the link between race and intelligence in the contexts of affirmative action and evolution).

362 *See* Ramona L. Paetzold, *Multicollinearity and the Use of Regression Analyses in Discrimination Litigation*, 10 BEHAV. SCI. & L. 207 (1992) (discussing the difficulty of analyzing regression models of employment discrimination).

363 *See* Phyllis B. Gerstenfeld, *Smile When You Call Me That!: The Problems With Punishing Hate Motivated Behavior*, 10 BEHAV. SCI. & L. 259 (1992) (critiquing hate crime laws).

364 *See* E. Allan Lind et al., . . . *And Justice for All: Ethnicity, Gender, and Preferences for Dispute Resolution Procedures*, 18 LAW & HUM. BEHAV. 269 (1994) (analyzing racial differences in dispute resolution preferences).

365 *See* Sandra T. Azar & Corina L. Benjet, *A Cognitive Perspective on Ethnicity, Race, and Termination of Parental Rights*, 18 LAW & HUM. BEHAV. 249 (1994) (examining racial bias in how judges and mental health professionals make parental rights determinations).

366 *See* Hope Lewis, *Women (Under)Development: The Relevance of "The Right to Development" to Poor Women of Color in the United States*, 18 LAW & POL'Y 281 (1996) (comparing how various forms of development relate to poor women of color and non-western people).

367 *See* Tim R. Sass & Stephen L. Mehay, *The Voting Rights Act, District Elections, and the Success of Black Candidates in Municipal Elections*, 38 J.L. & ECON. 367 (1995) (analyzing the impact of district elections on the electoral success of black city council candidates).

368 *See* John S. Heywood & James H. Peoples, *Deregulation and the Prevalence of Black Truck Drivers*, 37 J.L. & ECON. 133 (1994) (exploring the impact of trucking industry deregulation on black driver prevalence).

369 *See* Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC'Y REV. 733 (2001) (analyzing how judicial discretion impacts racial disparities in sentencing); Roger E. Hartley, *A Look at Race, Gender, and Experience*, 84 JUDICATURE 191 (2001) (analyzing how race may impact delay in judicial confirmation); Doris Marie Provine, *Too Many Black Men: The Sentencing Judge's Dilemma*, 23 LAW & SOC. INQUIRY 823 (1998) (analyzing how judges wrestle with the mass incarceration of black men).

370 *See* Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337 (2000) (analyzing the lack of jury instruction comprehension on discriminatory death sentencing); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695 (1999) (analyzing how peremptory challenges in jury selection among the defense and prosecution differentially racially discriminate); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201 (2001) (discussing racial attitudes held by White jurors).

mony,[371] and prosecutorial discretion.[372] They also explore criminal behavior,[373] policing,[374] sentencing,[375] capital punishment,[376] assessments

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371 *See* Deborah Bartolomey, *Cross-Racial Identification Testimony and What Not to Do About It: A Comment on the Cross-Racial Jury Charge and Cross-Racial Expert Identification Testimony*, 7 PSYCHOL. PUB. POL'Y & L. 247 (2001) (proposing testimony by cross-racial identification experts to ameliorate cross-racial identification evidence problems); James M. Doyle, *Discounting the Error Costs: Cross-Racial False Alarms in the Culture of Contemporary Criminal Justice*, 7 PSYCHOL. PUB. POL'Y & L. 253 (2001) (discussing how White eyewitnesses mis-identify Blacks more often than they do Whites); Heather B. Kleider & Stephen D. Goldinger, *Stereotyping Ricochet: Complex Effects of Racial Distinctiveness on Identification Accuracy*, 25 LAW & HUM. BEHAV. 605 (2001) (investigating how a black person's presence affects recognition accuracy for surrounding whites); Otto H. MacLin et al., *Race, Arousal, Attention, Exposure, and Delay: An Examination of Factors Moderating Face Recognition*, 7 PSYCHOL. PUB. POL'Y & L. 134 (2001) (testing the effect of distraction, arousal and time delay on face recognition of other ethnic groups); Otto H. MacLin & Roy S. Malpass, *Racial Categorization of Faces: The Ambiguous Race Face Effect*, 7 PSYCHOL. PUB. POL'Y & L. 98 (2001) (analyzing the process of recognizing or mis-recognizing faces belonging to other races); Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001) (comparing recognition of faces belonging to one's own race with recognition of faces belonging to other races); Steven M. Smith, R. C. L. Lindsay et al., *Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed in the Cross-Race Situation?*, 7 PSYCHOL. PUB. POL'Y & L. 153 (2001) (comparing recognition of faces belonging to one's own race with recognition of faces belonging to other races); Siegfried Ludwig Sporer, *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7 PSYCHOL. PUB. POL'Y & L. 36 (2001) (discussing comparative difficulty in distinguishing between faces in other ethnic groups); Siegfried Ludwig Sporer, *The Cross-Race Effect: Beyond Recognition of Faces in the Laboratory*, 7 PSYCHOL. PUB. POL'Y & L. 170 (2001) (analyzing cross-race facial recognition through considering ethnic differences at all stages of a criminal investigation); Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL'Y & L. 230 (2001) (proposing a method to ameliorate cross-race facial identification problems); Daniel B. Wright et al., *A Field Study of Own-Race Bias in South Africa and England*, 7 PSYCHOL. PUB. POL'Y & L. 119 (2001) (studying cross-race identification in South Africa and England).

372 *See* Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531 (1997) (analyzing racial factors in prosecutors' discourse about sexual assault defendants' convictability).

373 *See* R. Barry Ruback & Paula J. Vardaman, *Decision Making in Delinquency Cases: The Role of Race and Juveniles' Admission/Denial of the Crime*, 21 LAW & HUM. BEHAV. 47 (1997) (analyzing racial differences in juvenile admission to crimes and how harshly admitters and deniers were treated); Eric Silver, *Race, Neighborhood Disadvantage, and Violence Among Persons with Mental Disorders: The Importance of Contextual Measurement*, 24 LAW & HUM. BEHAV. 449 (2000) (analyzing whether race is a significant predictor of violence among the mentally ill when accounting for neighborhood disadvantage).

374 *See* John J. Donohue III & Steven D. Levitt, *The Impact of Race on Policing and Arrests*, 44 J.L. & ECON. 367 (2001) (examining the relationship between the racial composition of a police force and racial patterns of arrest).

375 *See* Bushway & Piehl, *supra* note 369; David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence From the U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001) (examining the racial impact of the Sentencing Reform Act of 1984).

376 *See* Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277 (2001) (examining how race impacts jurors' decisions about capital sentencing).

of truthfulness,[377] and perceptions of the justice system.[378] Moreover, they explore issues such as affirmative action,[379] law student career outcomes,[380] and law firm diversity.[381] Between 2002 and 2006, the interdisciplinary social science and law journals published thirty-nine social science, race and law, or race and empirical legal scholarship articles. These articles focus on discrimination generally,[382] unconscious ra-

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377 *See* Charles L. Ruby & John C. Brigham, *Can Criteria-Based Content Analysis Distinguish Between True and False Statements of African American Speakers?*, 22 LAW & HUM. BEHAV. 369 (1998) (attempting to generalize a technique for assessing truthfulness to Blacks).

378 *See* Richard R. W. Brooks & Haekyung Jeon-Slaughter, *Race, Income, and Perceptions of the U.S. Court System*, 19 BEHAV. SCI. & L. 249 (2001) (discussing Blacks' perception of the courts across income levels); Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 215 (2001) (presenting a procedural, justice-based model linking public confidence and trust to views about how legal authorities treat the public); Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC'Y REV. 129 (2000) (examining individuals' perceptions of racialized police tactics); Deane C. Wiley, *Black and White Differences in the Perception of Justice*, 19 BEHAV. SCI. & L. 649 (2001) (exploring racial differences in attitudes about the justice system); Scot Wortley et al., *Just Des(s)erts? The Racial Polarization of Perceptions of Criminal Injustice*, 31 LAW & SOC'Y REV. 637 (1997) (examining how extensive media coverage of an interracial crime influences public perception about the criminal justice system).

379 *See* Jean-Pierre Benoit, *Color Blind Is Not Color Neutral: Testing Differences and Affirmative Action*, 15 J.L. ECON. & ORG. 378 (1999) (arguing that color blind policies serve to undermine racial progress); Keith J. Bybee, *The Political Significance of Legal Ambiguity: The Case of Affirmative Action*, 34 LAW & SOC'Y REV. 263 (2000) (critiquing the Court's affirmative action jurisprudence); Douglas K. Detterman, *Tests, Affirmative Action in University Admissions, and the American Way*, 6 PSYCHOL. PUB. POL'Y & L. 44 (2000); Theodore Eisenberg, *An Important Portrait of Affirmative Action*, 1 AM. L. & ECON. REV. 471 (1999) (analyzing affirmative action in university admissions); Howard T. Everson, *A Principled Design Framework for College Admissions Tests: An Affirming Research Agenda*, 6 PSYCHOL. PUB. POL'Y & L. 112 (2000); Linda S. Gottfredson, *Skills Gaps, Not Tests, Make Racial Proportionality Impossible*, 6 PSYCHOL. PUB. POL'Y & L. 129 (2000); Diane F. Halpern, *Validity, Fairness, and Group Differences: Tough Questions for Selection Testing*, 6 PSYCHOL. PUB. POL'Y & L. 56 (2000); Robert Perloff & Fred B. Bryant, *Identifying and Measuring Diversity's Payoffs: Light at the End of the Affirmative Action Tunnel*, 6 PSYCHOL. PUB. POL'Y & L. 101 (2000); Cecil R. Reynolds, *Why is Psychometric Research on Bias in Mental Testing So Often Ignored?*, 6 PSYCHOL. PUB. POL'Y & L. 144 (2000); Matthew H. Scullin et al., *The Role of IQ and Education in Predicting Later Labor Market Outcomes: Implications for Affirmative Action*, 6 PSYCHOL. PUB. POL'Y & L. 63 (2000); Linda F. Wightman, *The Role of Standardized Admission Tests in the Debate About Merit, Academic Standards, and Affirmative Action*, 6 PSYCHOL. PUB. POL'Y & L. 90 (2000); Wendy M. Williams, *Perspectives on Intelligence Testing, Affirmative Action, and Educational Policy*, 6 PSYCHOL. PUB. POL'Y & L. 5 (2000).

380 *See* Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000) (comparing minority and white law school alumni on career outcomes).

381 *See* Elizabeth Chambliss & Christopher Ugen, *Men and Women in Elite Law Firms: Reevaluating Kanter's Legacy*, 25 LAW & SOC. INQUIRY 41 (2000) (exploring the effect of minority partner representation on minority associate representation at elite law firms).

382 *See* Steven D. Levitt, *Testing Theories of Discrimination: Evidence from Weakest Link*, 47 J.L. & ECON. 431 (2004) (analyzing game show participation to discern modes of discrimination).

cism,[383] intelligence testing,[384] *Brown v. Board*'s legacy,[385] affirmative action,[386] and success in law school.[387] They also focus on the judici-

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383 *See* Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483 (2004) (analyzing the effect of unconscious racial stereotype priming on police officers' and probation officers' attitudes about adolescent offenders).

384 *See* Richard E. Nisbett, *Heredity, Environment, and Race Differences in IQ: A Commentary on Rushton and Jensen (2005)*, 11 PSYCHOL. PUB. POL'Y & L. 311 (2005); J. Philippe Rushton & Arthur R. Jensen, *Thirty Years of Research on Race Differences in Cognitive Ability*, 11 PSYCHOL. PUB. POL'Y & L. 235 (2005); J. Philippe Rushton & Arthur R. Jensen, *Wanted: More Race Realism, Less Moralistic Fallacy*, 11 PSYCHOL. PUB. POL'Y & L. 328 (2005); Robert J. Sternberg, *There Are No Public-Policy Implications: A Reply to Rushton and Jensen*, 11 PSYCHOL. PUB. POL'Y & L. 295 (2005); Lisa Suzuki & Joshua Aronson, *The Cultural Malleability of Intelligence and Its Impact on the Racial/Ethnic Hierarchy*, 11 PSYCHOL. PUB. POL'Y & L. 320 (2005).

385 *See* Orley Ashenfeler et al., *Evaluating the Role of* Brown v. Board of Education *in School Equalization, Desegregation, and Income in African Americans*, 8 AM. L. & ECON. REV. 213 (2006); Richard R. W. Brooks, *Diversity and Discontent: The Relationship Between School Desegregation and Perceptions of Racial Justice*, 8 AM. L. & ECON. REV. 410 (2006); Charles T. Clotfelter et al., *Federal Oversight, Local Control, and the Specter of "Resegregation" in Southern Schools*, 8 AM. L. & ECON. REV. 347 (2006); Roland G. Fryer, Jr. & Steven D. Levitt, *The Black-White Test Score Gap Through Third Grade*, 8 AM. L. & ECON. REV. 249 (2006); Thomas J. Kane et al., *School Quality, Neighborhoods, and Housing Prices*, 8 AM. L. & ECON REV. 183 (2006); Alan Krueger et al., *Race, Income, and College in 25 Years: Evaluating Justice O'Connor's Conjecture*, 8 AM. L. & ECON REV. 282 (2006); Douglas S. Massey, *Social Background and Academic Performance Differentials: White and Minority Students at Selective Colleges*, 8 AM. L. & ECON. REV. 390 (2006); Paul E. Sum et al., *Race, Reform, and Desegregation in Mississippi Higher Education: Historically Black Institutions After* United States v. Fordice, 29 LAW & SOC. INQUIRY 403 (2004) (exploring racial integration at historically black colleges and universities); Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admission and the Texas Top 10% Law*, 8 AM. L. & ECON. REV. 312 (2006).

386 *See* Richard A. Epstein, *Of Same Sex Relationships and Affirmative Action: The Covert Libertarianism of the United States Supreme Court*, 12 SUP. CT. ECON. REV. 75 (2004) (comparing judicial standards applied to cases involving homosexuality and affirmative action).

387 *See* Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY 711 (2004) (analyzing the impact of stigmatization on minority student success in law school).

ary[388] and juries.[389] In addition, these articles address sentencing,[390] capital sentencing,[391] psychopathy,[392] perceptions of justice and crime

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388 *See* Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57 (2005) (analyzing the effect of judicial characteristics, such as race, on prison sentencing); Christopher E. Smith & Thomas R. Hensley, *Decision-Making Trends of the Rehnquist Court Era: Civil Rights and Liberties Cases*, 89 JUDICATURE 161 (2005) (analyzing the Rehnquist Courts rulings in civil rights and civil liberties cases).

389 *See* Jordan Abshire & Brian H. Bornstein, *Juror Sensitivity to the Cross-Race Effect*, 27 LAW & HUM. BEHAV. 471 (2003) (analyzing jurors' sensitivity to the cross-race effect as determined by the race of eye-witnesses); Thomas W. Brewer, *Race and Jurors' Receptivity to Mitigation in Capital Cases: The Effect of Jurors', Defendants' and Victims' Race in Combination*, 28 LAW & HUM. BEHAV. 529 (2004) (examining receptivity to mitigation evidence by capital jurors as it varies by race of juror, defendant, and victim); Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621 (2005) (analyzing out-group bias in jury decisionmaking).

390 *See* Schanzenbach, *supra* note 388; John Wooldredge et al., *(Un)Anticipated Effects of Sentencing Reform on the Disparate Treatment of Defendants*, 39 LAW & SOC'Y REV. 835 (2005) (examining how determinate sentencing impacts case outcomes across race).

391 *See* John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165 (2004) (explaining that reluctance to seek death in Black-on-Black crimes accounts for the fact that Blacks represent disproportionately fewer death row inmates); Benjamin Fleury-Steiner, *Narratives of the Death Sentence: Toward a Theory of Legal Narrativity*, 36 LAW & SOC'Y REV. 549 (2002) (analyzing how death penalty trial jurors' consciousness is racialized).

392 *See* Jennifer L. Skeem et al., *Are There Ethnic Differences in Levels of Psychopathy?: A Meta-Analysis*, 28 LAW & HUM. BEHAV. 505 (2004) (assessing whether blacks and whites significantly differ on core psychopathic traits).

control,[393] and hate crimes.[394] Lastly, they cover racial passing,[395] politics,[396] and tort awards.[397]

Analysis 6: Emerging Social Science, Race and Law, and Race and Empirical Legal Scholarship

In the sixth analysis, I searched the Legal Scholarship Network of the Social Science Research Network (SSRN)[398] for papers focused on social science, race and law, or race and empirical legal scholarship. Consecutively, I employed each of the following search terms: *social science* and *race*; *social science* and *African American*; *empirical* and *race*; *empirical* and *African American*; *quantitative* and *race*; and *quantitative* and *African American*. I searched the abstract for these terms and restricted my search to the past year. Only those papers that were written by law faculty or published legal working paper groups were selected in the search. Furthermore, in October of 2006, the inaugural Empirical Legal Scholarship was held at the University of Texas.[399] The papers from this conference are available at SSRN.[400]

Therefore, I searched each of these articles and selected those that focused on issues of race. The search yielded thirteen results. These pa-

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393 *See* Angela P. Cole & Ewart A. C. Thomas, *Group Differences in Fairness Perceptions and Decision Making in Voting Rights Cases*, 30 LAW & HUM. BEHAV. 543 (2006) (analyzing how racial differences affected perceptions of fairness and decisions regarding voting rights cases); Eva G. T. Green et al., *Symbolic Racism and Whites' Attitudes Towards Punitive and Preventive Crime Policies*, 30 LAW & HUM. BEHAV. 435 (2006) (analyzing determinants of whites' punitive and preventive crime policy support); L. Marvin Overby et al., *Justice in Black and White: Race, Perceptions of Fairness, and Diffuse Support for the Judicial System in a Southern State*, 25 JUST. SYS. J. 159 (2004) (exploring racial differences in attitudes about a state judicial system).

394 *See* Dhammika Dharmapala & Nuno Garoupa, *Penalty Enhancement for Hate Crimes: An Economic Analysis*, 6 AM. L. & ECON. REV. 185 (2004) (providing an economic analysis of penalty enhancements for bias crimes); Megan Sullaway, *Psychological Perspectives of Hate Crime Laws*, 10 PSYCHOL. PUB. POL'Y & L. 250 (2004).

395 Mark Golub, Plessy *as "Passing": Judicial Responses to Ambiguously Raced Bodies in* Plessy v. Ferguson, 39 LAW & SOC'Y REV. 563 (2005) (analyzing *Plessy* as a story about racial passing).

396 *See* Allan J. Lichtman, *What Really Happened in Florida's 2000 Presidential Election*, 32 J. LEGAL STUD. 221 (2003) (analyzing black voter suppression in Florida during the 2000 presidential election); John R. Lott, Jr., *Nonvoted Ballots and Discrimination in Florida*, 32 J. LEGAL STUD. 181 (2003) (analyzing black voter suppression in Florida during the 2000 presidential election); Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85 (2004) (examining felon disenfranchisement's impact on state-level voter turnout of black men).

397 *See* Eric Hellan & Alexander Tabarokk, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. LEGAL STUD. 27 (2003) (investigating the impact of jury pool's race on trial awards).

398 Legal Scholarship Network Information Page, http://www.ssrn.com/lsn/index.html (last visited December 22, 2006).

399 First Annual Conference on Empirical Legal Studies, *supra* note 258.

400 Social Science Research Network, *supra* note 258.

TABLE 3. RACE SCHOLARSHIP IN INTERDISCIPLINARY SOCIAL SCIENCE AND LAW JOURNALS

	1987–1991	1992–1996	1997–2001	2002–2006	Total
Am. L. & Econ Rev.	0	1	0	9*	10
Behav. Sci. & L.	1	9*	3	0	13
J. Empirical Legal Stud.	0	0	0	1	1
J. Legal Stud.	0	1	1	5	7
J.L. & Econ.	0	2	2	1	5
J.L. Econ. & Org.	0	0	0	1	1
Judicature	2	0	2	1	5
Just. Sys. J.	0	0	0	1	1
Law & Hum. Behav.	1	6	6	7	20
Law & Pol'y	3	1	0	0	4
Law & Soc'y Rev.	2	1	5	3	11
Law & Soc. Inquiry	0	0	3	2	5
Psychol. Pub. Pol'y & L.	0	2	20*	7*	29
Sup. Ct. Econ. Rev.	0	0	0	1	1
Total	9	23	42	39	113

Note: An asterisk denotes a period where more than one noted journal article was part of a symposium.

pers explore such topics as school segregation,[401] affirmative action,[402] health care,[403] tax law,[404] and law and economics.[405] Other articles fo-

401 *See* Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455 (2005).

402 *See* Barnes, *supra* note 258; Paul J. Beard, *The Legacy of* Grutter*: How the Meredith and PICS Courts Wrongly Extended the 'Educational Benefits' Exception to the Equal Protection Clause in Public Higher Education* (Pac. Legal Found., Working Paper No. 06-003, 2006), *available at* http://ssrn.com/abstract=924436; Sean A. Pager, *Who's In and Who's Out? Confronting the 'Who Question' in Affirmative Action: Can We Learn from India's Answer?* (Ind. Legal Stud., Research Paper No. 50, 2006), *available at* http://ssrn.com/abstract=890317.

403 *See* Jonathan D. Kahn, *From Disparity to Difference: How Race-Specific Medicines May Undermine Policies to Address Inequalities in Health Care*, 15 S. CAL. INTERDISC. L.J. 105 (2005).

404 *See* Jennifer Jolly-Ryan, Teed off About Private Club Discrimination on the Taxpayers' Dime: Tax Exemptions and Other Government Privileges to Discriminatory Private Clubs (Mar. 20, 2006) (unpublished manuscript), *available at* http://ssrn.com/abstract=894335.

405 *See* John J. Donohue, *The Law and Economics of Antidiscrimination Law* (Nat'l Bureau of Econ. Research, Working Paper No. W11631, 2005), *available at* http://ssrn.com/abstract=812005.

cused on implicit racial bias,[406] risk perception,[407] crime perception,[408] the death penalty,[409] and jury selection.[410]

Analysis Conclusions

The collective results of these analyses indicate several things: Despite some interest in recent years, Critical Race Theory founders have not employed much social science or empirical methods in their scholarship. Much of the research in this area has been conducted by non-Critical Race Theorists. In fact, it also seems that most of this scholarship is produced by white law faculty, though this is admittedly mere speculation. These faculty members are largely at nine of the top twenty law schools. In particular, Ian Ayres and Richard Brooks at Yale, Linda Hamilton Krieger at Boalt, and Gary Blasi and Jerry Kang at UCLA have published multiple articles in this area. As such, the social science, race, and law scholarship as well as the race and empirical legal scholarship of professors currently at these nine law schools have grown considerably in the past five years.

When comparing law journals, much of this scholarship appears in the top general law reviews as opposed to specialized race and law or civil rights journals. This could be due to the hierarchical nature of legal academic publishing. Within these journals, there has been a progression in the number of articles published with a significant up-tick in the past five years. This is in part due to several symposia on social science, race, and law issues during this period. Thus, the symposia on affirmative action in law school admissions and book reviews of *Pervasive Prejudice* and *Crossroads, Directions, and a New Critical Race Theory* in the *Stanford Law Review* and the symposium on behavioral realism in the *California Law Review* account for the drastic jump in the number of articles that intersect social science, race, and law or explore race and law issues empirically over the past five-year period.

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406 *See* Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decision-Making and Misremembering (Aug. 2006), (unpublished manuscript), *available at* http://ssrn.com/abstract=927547.

407 *See* Dan M. Kahan et al., Gender, Race, and Risk Perception: The Influence of Cultural Status Anxiety (Aug. 2006) (unpublished manuscript, *available at* http://ssrn.com/abstract=72376 2).

408 *See* Jeremy A. Blumenthal, *Perceptions of Crime: A Multidimensional Analysis with Implications for Law and Psychology*, 38 MCGEORGE L. REV. 629 (2007).

409 *See* Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decision to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006); Jeremy A. Blumenthal, Implicit Theories and Capital Sentencing: An Experimental Study (2006) (unpublished manuscript, *available at* http://ssrn.com/abstract=909603.

410 *See* Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007).

Despite the noticeable growth in social science, race, and law scholarship as well as race and empirical legal scholarship published in law reviews, the real impact in this area is seen in interdisciplinary social science and law journals. Three times as many articles have been published in these journals when compared to law reviews and journals. Within interdisciplinary journals there has been a steady progression in the number of articles published, particularly during the past ten years. Psychology and law journals—*Psychology, Public Policy & Law* as well as *Law and Human Behavior*—have been the biggest outlets. The latter publishes articles across multiple disciplines but is the official journal of Division 41, the American Psychology-Law Society, of the American Psychological Association. This is partially accounted for by the symposia in *Psychology, Public Policy, & Law* on race, juries, and eye-witness testimony as well as one on race and intelligence testing.

The articles published by these academics and within these journals cover an array of topics. Some of the more popular issues addressed include antidiscrimination law, *Brown v. Board of Education*'s legacy, and affirmative action especially within the context of law school admissions. What I term legal actors and participants—judges, juries, and eye witnesses—were also well covered vis-à-vis other topics. Two fairly new topics also emerged. Law and economics applied to race issues as well as unconscious racism as assessed by the Implicit Association Test were two areas of growing interest.

2. *An Integrative Model*

As I noted, Critical Race Realism is a synthesis of Critical Race Theory, empirical social science, and public policy. Such an integrative approach is nothing new. Charles Houston employed social science in a litigation strategy as a means to legally end school segregation which in turn had policy reverberations.[411] Contemporarily, law professors have also demonstrated growing interest in the intersection of race and social science.[412] Thus, my contention is simply that Critical Race Theorists should employ empirical modes of understanding race and racism among legal actors and within legal institutions and doctrine more often. Quite possibly, it should be the dominant strand of critical race scholarship.

Critical Race Theorists may argue any of the conventional points against engaging in empirical research.[413] Additionally, they may also

411 See Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2446–56 (2004) (discussing the rise of policy litigation after *Brown v. Board of Education*).

412 *See infra* Part II.B.1, Analysis 2.

413 *See* Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 331–33 (1989) (indicating that inconvenience, lack of control, tedium, uncertainty, ideology, resources, time, tenure, and training may all be arguments law faculty use against engaging in empirical legal scholarship).

make arguments, more particular to Critical Race Theory, against synthesizing Critical Race Theory and empirical legal scholarship. First, quite like their Critical Legal Studies predecessors, Critical Race Theory scholars insist that facts are irrelevant, maybe even pretextual, to judicial decision outcomes.[414] Employing statistical data supports the idea that such data is neutral and objective. To employ such a social scientific approach is fundamentally antithetical to Critical Race Theory doctrine. Second, privileging numbers undermines the power of narrative, a central Critical Race Theory methodology.[415]

My attempt is not to cast aside one of the dominant strands of critical race scholarship—narrative. I concur wholeheartedly with Richard Delgado's analysis that,

> [t]he stories of outgroups aim to subvert the ingroup reality. In civil rights, for example, many in the majority hold that any inequality between blacks and whites is due either to cultural lag, or inadequate enforcement of currently existing beneficial laws—both of which are easily correctable. For many minority persons, the principal instrument of their subordination is neither of these. Rather, it is the prevailing mindset by means of which members of the dominant group justify the world as it is, that is, with whites on top and browns and blacks on the bottom.

Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.[416]

In a nutshell, narrative is a rich descriptive method. When engaged in, it may serve as a cathartic tool for the narrator.[417] It may also allow "the other" to gain a sense of perspective,[418] maybe even empathy.[419]

However, narrative has its share of weaknesses—ones that would be substantially buttressed if employed in conjunction with empiricism. As noted by Daniel Farber and Suzanna Sherry, there are concerns about the

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414 *See id.* at 326.

415 *See* Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1488–89 (2004).

416 Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1988).

417 *Id.* at 2437.

418 *See id.* at 2437–38.

419 Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2105 (1989).

validity of narratives.[420] This is likely to be particularly so among those naïve about issues of race or those who are outright antagonists to the Critical Race Theory agenda—racial progress. Farber and Sherry cite four validity concerns. The first is that fictional narrative creates a "spurious aura of empirical authority."[421] The second deals with the degree to which the narrative is truthful.[422] Similarly, the third focuses on the difficulty of actually discerning if truth is being spoken—a methodological issue.[423] Finally, the fourth concern is the degree to which the narrative account is representative of any population of people.[424]

Indeed it is quite possible to be both critical and empirical.[425] Moreover, the benefits of synthesizing Critical Race Theory with empirical legal scholarship are manifold. First, empirical legal scholarship methods allow for theory development, empirical testing, and theory refinement.[426] Furthermore, employing empirical research methods leads to "fairly" objective knowledge, which is "relatively" unfettered by personal prejudices.[427] Additionally, empirical methods have the "propensity to sharpen our focus on the normative questions that may be concealed by factual complexity and by the willingness of [some] to avoid responsibility for [their] value choices."[428] For example, though empirical research may impact powerful people's attitudes and actions, such individuals also have "defenses to ward off offensive or inconvenient knowledge."[429] However, when an individual or an institution can no longer employ empirical uncertainties to continue to engage in conscious or unconscious racist conduct, they must ultimately state their normative preferences.[430]

Second, it has long been noted that empirical legal scholarship is of value to Critical Race Theory. Derrick Bell noted that "empiricism is a crucial aspect of Racial Realism. By taking into consideration the abysmal statistics regarding the social status of black Americans, their op-

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420 *See* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 830–40 (1993).

421 *See id.* at 831–32.

422 *See id.* at 832–35.

423 *See id.* at 835–38.

424 *See id.* at 838–40.

425 *See* David M. Trubek & John Esser, *"Critical Empiricism" in American Legal Studies: Paradox, Program, or Pandora's Box?*, 14 LAW & SOC. INQUIRY 3 (1989).

426 *See* Thomas S. Ulen, *The Unexpected Guest: Law and Economics, Law and Other Cognate Disciplines, and the Future of Legal Scholarship*, 79 CHI.-KENT L. REV. 403, 428 (2004).

427 Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV, 167, 180–82 (2004).

428 Schuck, *supra* note 413, at 335.

429 Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WISC. L. REV. 365, 397 (2005).

430 Schuck, *supra* note 413, at 335.

pression is validated."[431] As such, empirical legal scholarship can be a more useful tool in highlighting racial disparities in the law's application vis-à-vis traditional case analysis.[432] As such, it allows Critical Race Theorists to reach out to individuals who are less willing to accept a central principle of Critical Race Theory—that people of color are subordinated in America. This is done by revealing that although blatant racism may be significantly diminished in America, unconscious racism exists and still adversely impacts the lives of Blacks and other people of color.[433] As Karl Llewellyn noted, "[W]e need improved machinery for making the facts about such effects – or about needs and conditions to be affected by a decision – available to the courts."[434] Empirical social science is just such machinery.

With these factors in mind, an empirical analysis of race and law issues has some general yet substantive benefits. These benefits are evinced whether empirical methodology is employed alone or in conjunction with the narrative approach. Furthermore, these benefits speak directly to the concerns raised by Farber and Sherry. First, empiricism bolsters claims made by theory or personal narrative. Second, empiricism provides a method to determine how true a theory or narrative is. This may be less so in determining how accurate an individual's personal account of racism is, but it speaks to Farber and Sherry's final validity concern. Empiricism allows one to test the degree to which theory or a personal account of reality is true for others. Where it is generalizable, especially for a vast number of similarly situated individuals, public policy may be implicated.[435]

Thus, the third benefit of synthesizing empirical legal scholarship and Critical Race Theory should be concerned with, what Robert Summers described as pragmatic instrumentalism—a means-end relationship to law.[436] Legal scholarship, more readily than any other type of re-

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431 Bell, *supra* note 10, at 365.

432 *See* Tanya Kateri Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1239 (2006).

433 *See* Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1489–91 (2004).

434 Llewellyn, *supra* note 76, at 1254.

435 *See* Farber & Sherry, *supra* note 420, at 838.

436 SUMMERS, *supra* note 42, at 20. Summers' theory of Pragmatic Instrumentalism is quite analogous to Legal Realism and argues three points: "First, it conceives the primary task of legal theory to be the provision of a coherent body of ideas about law which will make law more valuable in the hands of officials and practical men of affairs . . . . Second, a theory of this type is instrumentalist in its view that legal rules and other forms of law are most essentially tools devised to serve practical ends . . . . Third, the type of legal theory treated and developed here is also distinctive in its focus on the instrumental facets of legal phenomena, including: the nature, variety, and complexity of the goals law may serve; law's implementive

search, has the potential to shape public policy.[437] In this vein, the benefit of Critical Race Theory's employment of social science is that social science may help shape courts', legislatures', and administrative agencies' policy decisions.[438] Policy goals, and the best methods for pursuing them, necessitate data about the "policies and about empirical assumptions underlying the policies and about the likely effect of various routes for achieving them."[439] Social science can provide those data.[440] As such, law must be seen as both a response to social needs and as having an impact on social issues.[441] Charles Houston's efforts at Howard Law School, to create a "laboratory for civil rights and a nursery for civil rights lawyers,"[442] demonstrates an effort to create such policy-changers—social engineers. Both practicing attorneys[443] and law professors[444] have demonstrated a long history of serving as such social engineers. Thus, legal policy may be shaped by a number of actors, involve substantive or procedural law, and relate to public or private law.[445] The legal scholar, legal policymaker, or practicing lawyer may shape public policy.[446] A legal academic may employ social science through his research,[447] by providing a more systematic approach to understanding the role of race within the legal system. A legal policymaker may employ social science in two ways, either procedurally or substantively.[448] Procedurally, she may employ social science to get the legislature or courts to function in a more racially fair manner. Substantively, the policymaker may employ social science to look at the underlying racial fairness of a

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machinery; the kinds of means-goal relationships in the law; the variety of legal tasks that officials must fulfill to translate law into practice, the efficacy of law; and its limits." *Id.*

437 *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI L. REV. 1, 8 (2002).

438 *See* Richard Lempert, *"Between Cup and Lip": Social Science Influences on Law and Policy*, 10 LAW & POL'Y 167, 170–75 (1988); *see also* Warren, *supra* note 242, at 7 (highlighting "the growing number of corporations and lobbying groups paying to produce such data for use in lobbying legislatures and influencing public opinion").

439 Gary B. Melton et al., *Psychologists as Law Professors*, 42 AM. PSYCHOLOGIST 502, 502 (1987).

440 *See id.*

441 *See* WILLIAM C. LOUTHAN, THE POLITICS OF JUSTICE: A STUDY IN LAW, SOCIAL SCIENCE, AND PUBLIC POLICY (1979).

442 AUERBACH, *supra* note 62, at 212.

443 Gerald Lawrence Fetner, Counsel to the Situation: The Lawyer as Social Engineer, 1900–1945, at 42–82 (1973) (unpublished Ph.D. dissertation, Brown University) (on file with John Hay Library, Brown University).

444 *Id.* at 83–126.

445 *See* STUART NAGEL & LISA BIEVENUE, SOCIAL SCIENCE, LAW, AND PUBLIC POLICY 5–6 (1992).

446 *See id.* at 35.

447 *See id.* at 40–41.

448 *See id.* at 38–39. Procedurally, the authors actually focus on the efficiency and effectiveness of the policymaking entity. Substantively, the authors focus on the underlying soundness of a rule of law.

rule of law. A practicing lawyer may employ social science by introducing it into evidence to advance certain arguments in a case.[449]

Ultimately, the challenge to the broader goal of using social science to shape public policy with regards to race may not be whether it would be effective but rather where it would be most effective. For example, judges may not be well-suited to understand the significance of the social science evidence.[450] Courts are not well-equipped to respond to changes in the social science literature.[451] Social science evidence, once accepted as persuasive by courts, becomes precedent.[452] Such precedent becomes difficult to alter when additional research changes the conclusions of previous social science.[453] However, legislators can adapt to changes in social science much faster than courts.[454] This is because "legislators are more frequently the site of decision-making on controversial issues on which social scientists seek to present evidence, and legislators do not have to wait for live controversy to present itself before addressing such issues."[455]

3. *Creating a Critical Race Realism*

A number of legal actors could be deemed critical race realists. Law professors, however, may be in the best position to actually formulate a Critical Race Realism agenda. This is largely because law professors can best produce Critical Race Realism scholarship. Nevertheless, they are not trained to be effective empirical legal scholars. There are a few reasons for this. First, law schools are not particularly good at teaching its students, some of whom go on to be law professors, how to systematically "find, interpret, prove, and rebut" facts.[456] Second, social scientists are taught to subject their hypotheses to "every conceivable test and data source," in attempt to disconfirm the theory.[457] However, a lawyer attempts to marshal all possible evidence in support of her hypothesis and "distract attention" from any possible contradictory information.[458] A Critical Race Realist should utilize the best of both of these approaches. Third, legal scholars largely do their academic work isolated from their

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449 *See id.* at 35–36.

450 Abner J. Mikva, *Bringing the Behavioral Sciences to the Law: Tell It to the Judge or Talk to Your Legislator?*, 8 BEHAV. SCI. & L. 285, 287 (1990).

451 *Id.* at 287.

452 *Id.*

453 *Id.* at 287.

454 *Id.* at 285–89 (noting that employing social science to shape policy may be most effective with legislatures).

455 *Id.* at 287.

456 Schuck, *supra* note 413, at 325.

457 Epstein & King, *supra* note 437, at 8.

458 *Id.*

social science counterparts and suffer from such a failure to dialogue.[459] Fourth, law professors, unlike their social scientist counterparts, do not have a stable group of graduate students trained in empirical methodology and statistical analysis.[460] Thus, legal academics are likely at a handicap in developing an empirical agenda.

Thus, to develop a Critical Race Realism, law schools might consider offering not only courses in empirical legal scholarship[461] but also empirical legal scholarship courses focused on Critical Race Theory topics.[462] Critical Race Theorists may also take any of three steps to advance Critical Race Realism. First, they may "take an empirical research course".[463] Several universities offer programs to train faculty in empirical research methodology. For example, the University of Michigan, through its Inter-university Consortium for Political and Social Research (ICPSR) Summer Program in Quantitative Methods, offers courses in basic and advanced quantitative analysis.[464] Harvard University, through its Institute for Quantitative Social Science, offers a variety of degree and training programs, conferences, and seminars and workshops.[465] Northwestern recently offered an Empirical Legal Scholarship Workshop.[466] Second, Critical Race Theorists could also collaborate with social scientists in other departments[467] or the growing number of social scientist law professors.[468] An additional source of collaboration could be social

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459 *See id.*, at 45–48.

460 Richard L. Revesz, *A Defense of Empirical Scholarship*, 69 U. CHI. L. REV. 1, 169, 188 (2002).

461 *See* Lee Epstein & Gary King, *Building an Infrastructure for Empirical Research in the Law*, 53 J. LEGAL EDUC. 311, 313 (2003).

462 Theodore Eisenberg offers a course at Cornell Law School entitled "Empirical Studies in Leading Civil Rights Issues," Cornell Law School 2005–06 Course Offerings, https://support.law.cornell.edu/students/forms/Courses_by_Category_for_Registrars_site/2005-06_Courses_by_Category.pdf (last visited Sept. 15, 2006).

463 Epstein & King, *supra* note 461, at 315.

464 Inter-university Consortium for Political and Social Research, About the Summer Program, http://www.icpsr.umich.edu/training/summer/about.html (last visited October 26, 2006). The mission of the program is "[t]o offer instruction for the primary development and "upgrading" of quantitative skills by college and university faculty and by nonacademic research scholars[; t]o extend the scope and depth of analytic skills for graduate students, college and university faculty, and research scientists from the public sector[; t]o furnish training for those individuals who expect to become practicing social methodologists[; t]o provide opportunities for social scientists to study those methodologies that have special bearing on specific substantive issues[; and t]o create an environment that facilitates an exchange of ideas related to the development of methodologies on the frontier of social research." *Id.*

465 The Institute for Quantitative Social Science at Harvard University, About IQSS, http://www.iq.harvard.edu/about_iqss (last visited October 26, 2006).

466 Northwestern University School of Law, *supra* note 257 (providing "the formal training necessary to design, conduct, and assess empirical studies, and to use statistical software (Stata) to analyze and manage data").

467 Epstein & King, *supra* note 461; George, *supra* note 245, at 150.

468 Heise, *supra* note 244, at 829; Melton et al., *supra* note 439 (discussing the place of Ph.D. psychologists as law faculty).

science graduate students interested in the intersection of race and law issues. Critical Race Theorists might also actively recruit graduate students engaged in social science, race, and law scholarship to law school. Such an approach would possibly add to the pool of minority law students and provide law professors with a research assistant, trained in research methodology, for three years. Finally, Critical Race Theorists could simply import social science and empirical scholarship into their own work.

CONCLUSION

Critical Race Theory was founded as "a race-based, systematic critique of legal reasoning and legal institutions."[469] It has been critiqued, however, as struggling to define its substantive mission, methodological commitments, and connection to the world outside of academia.[470] This Note attempts to provide a specific methodology that is consistent with Critical Race Theory's overarching mission and that has both applied and academic components. Empirical social science is this methodology which should ultimately (1) expose racism where it may be found, (2) identify its effects on individuals and institutions, and (3) put forth a concerted attack against it, in part, via public policy arguments. I call this concept Critical Race Realism.

Critical Race Realism is drawn from a long and rich intellectual history. This history started with the growth of interdisciplinary studies in American legal education and traversed its way through intellectual movements at Columbia, Yale, Chicago, and Wisconsin law schools. The recent explosion in empirical legal scholarship and the New Legal Realism Project provide contemporary efforts with which Critical Race Realism must square itself. Ultimately, the intersection of social science, race and law, or race and empirical legal scholarship is not a new nexus. The efforts of Charles Hamilton Houston in ending school segregation point to this fact. Furthermore, there has been growing interest in these areas within recent years. However, given this history and contemporary movement, I advocate that Critical Race Theory incorporate more empirical social science. I do not think that there is an incompatibility between being critical and being empirical. Furthermore, I do not think that such an approach need supplant Critical Race Theory's narrative approach. I do, however, believe empirical social science can greatly enhance Critical Race Theorists' arguments and advance Critical Race Theory's goals. Accordingly, I hope Critical Race Theorists take steps to indeed make Critical Race Theory more *systematic*.

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469 DELGADO & STEFANCIC, *supra* note 4.

470 Moran, *supra* note 9.