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Laura Gómez teaches in the areas of race and the law, law and society, constitutional law, civil procedure and criminal law. Her scholarship, including two books, has focused on the intersection of law, politics and social stratification in both contemporary and historical contexts. In *Misconceiving Mothers: Legislators, Prosecutors and the Politics of Prenatal Drug Exposure* (1997), she documented the career of the “crack baby” / “crack mother” social problem in the media and public policy, situating it at the nexus of the abortion debate, the drug war and competing discourses of criminalization and medicalization as they played out in the late 1980s. In her 2007 book, *Manifest Destinies: The Making of the Mexican American Race*, Gómez examines how law and racial ideology intersected to create new racial groups and to restructure the turn-of-the-twentieth-century racial order in the Southwest and the nation as a whole.

She is active in national scholarly organizations, including the Law and Society Association, where she just completed a two-year term as president. She has served as an associate editor of *Law & Society Review* and has served on the editorial boards of *Law & Social Inquiry*, *SIGNS*, *Aztlan* and *Studies in Law, Politics and Society*.

Professor Gómez rejoined the UCLA faculty in 2011, following six years as a professor of law and American studies at the University of New Mexico. From 1994 to 2005, she held joint appointments in law and sociology at UCLA. From 2000 to 2002, she was a co-founder and the first co-director of UCLA’s Critical Race Studies Specialization. In addition to master’s and doctoral degrees in sociology from Stanford, she earned a J.D. from Stanford Law School. She clerked on the Ninth Circuit Court of Appeals for Judge Dorothy W. Nelson.



# UNDERSTANDING LAW AND RACE AS MUTUALLY CONSTITUTIVE\*

Laura E. Gómez

This article examines the relationship between law and race, highlighting the fact that law and race shape each other in powerful ways that until recently have been little explored by scholars. Social scientists who study law have tended to focus on race as an independent variable that helps predict a legal outcome and have often narrowly defined race as phenotype and measured it in binary (Black or White) terms.<sup>1</sup> Critical race theorists (mostly legal scholars), in contrast, have made race their central focus and have treated law as an independent variable that explains race, in its various manifestations, though they have not tended to systematically use social science methods.<sup>2</sup>

## I. INTRODUCTION

Critical race theory emerged in the mid-1980s, along with a critical mass of African American law professors in the U.S.<sup>3</sup> Scholars in the field write in the areas of civil rights and race law (with particular prominence in the fields of constitutional law, anti-discrimination law, and employment law), as well as in an increasingly diverse array of other doctrinal areas such as criminal law and procedure, torts, family law, tax law, and environmental law.<sup>4</sup> Critical race scholars write about race and the law from a perspective that is critical of the anti-discrimination model that has been dominant in legal scholarship and American jurisprudence since the 1970s. The anti-discrimination model conceives of racism and racial discrimination as individualized, aberrational, and capable of remedy within the current legal framework, whereas critical race scholars view racism as institutionalized and endemic, and thus as frequently immune to anti-discrimination law and policy.

The past two decades have seen the rise of a literature that looks deeply at the role played by law in constructing racial identities and categories, as well as compared how law has shaped the experiences of different racial groups in the U.S.<sup>5</sup> A related recent literature has explored law's role in shaping ostensibly non-racial categories that are heavily endowed with considerable racial meaning, such as citizens, criminals, drug addicts, terrorists, etc.<sup>6</sup>

More recently, scholars have recognized that the constitutive process goes in both directions: "law not only constructs race, but race constructs law: racial conflicts dis-

tort the drafting and implementation of laws; skew the development, character and mission of legal bureaucracies; alter how various communities, including Whites, understand and interact with legal institutions; and twist the self-conception of legal actors, from lawmakers to lawyers, cops to judges.”<sup>7</sup> This article identifies an emerging genre of socio-legal scholarship that explores how law and race construct each other in an ongoing, dialectic process that ultimately reproduces and transforms racial inequality.

I draw on several recently published monographs that should be seen as constituting this emerging literature. Each book focuses on the interaction of law and race in a particular time and place (most in the U.S., including regions colonized by the U.S. such as Hawaii and the Southwest, but also in Canada and Jamaica). Comparing in-depth case studies of how law and race intersect in particular geographic locations at particular times allows us to begin to tease out some general patterns that describe how law and race mutually constitute each other. Though these are historical studies, they are written by scholars trained in the disciplines of anthropology, law, political science, sociology, and history (and combinations of those fields), as well as in interdisciplinary doctoral programs.

Many books about race take up the law to some extent, but I have included only studies that both feature law in a central way and treat law as a dynamic social and cultural force. *Law* is broadly defined to include legislation, appellate opinions, trials, litigation/prosecution data, and the activities of legal actors (both formal, such as judges and lawyers, and informal, such as mid- and low-level bureaucrats who initiate, implement or support legal processes). I have not included books concerned primarily with legal doctrine or its evolution.<sup>8</sup> A second selection criterion was how the books approach race: these books embrace the intellectual study of race as a socially constructed phenomenon, and they appreciate law as a central force shaping race. *Race* is understood broadly to refer to a range of social phenomena that can be operationalized as racial categories and boundaries, racial identity (including how race intersects with gender, class, and sexual and other identities), racial conflict, racial ideology, racism, and so forth.<sup>9</sup>

While I focus here on historical case studies, I am not arguing that law and race are mutually constitutive only in the past. Law and race continue to interact in powerful ways today,<sup>10</sup> but there is something compelling about historical examples of their interaction. In part this is because examples from history allow us to unmask race as a part of the natural world we take for granted; they invite us to step out of our own social world where, in general, it is harder for the beneficiaries of White privilege to see race and racism being enacted. Historical cases are also appealing because there is little contention over the general fact that law played a central role

in producing and reproducing racial subordination in the past, while there is much more debate over law's current role in reproducing racism.<sup>11</sup>

There also are unique methodological advantages to historical research: interpretation of archival materials may allow social scientists a great deal more latitude in how they capture race, by measuring it variously as racial categories and boundaries, racial identity, racial conflict, racial ideology, and racism, rather than as a dichotomous variable based on self-identification, for example. Moreover, historical methods have been embraced by legal scholars in the critical race theory movement, even when those scholars have not had formal training in history. But an emphasis on historical cases also introduces particular hazards, the most significant of which is the danger of presentism—of blithely applying contemporary ideas about race to historical contexts where they simply were not relevant. I have tried to guard against the latter and to point out where I think authors have made that error.

**W**hat race means is deeply contested in popular culture, law, politics, and science. Sociologist Ann Morning's research on contemporary popular conceptions of race finds three dominant understandings of race: (1) race as biology (despite the fact that scientists agree that race is not biologically meaningful, people continue to believe, according to Morning's research, that biology produces "real" racial differences); (2) race as culture (people associate racial difference with cultural differences like musical preferences, food preferences, celebration of cultural traditions; here race is used similarly to ethnicity); and (3) socially constructed race (the idea that race is not real but rather produced by people; this can support a conservative orientation like color blindness or a progressive orientation like affirmative action).<sup>12</sup> Sociologist Eduardo Bonilla-Silva identified a fourth popular notion of race: color blind race. Under this view, the social constructionist view of race combines with the notion that people should pretend they do not "see" race and/or, if they do see race, ignore it.<sup>13</sup>

## II. THEORIZING RACE

These four popular conceptions of race also infuse scientific, political, and legal notions of race.<sup>14</sup> For example, the Supreme Court in its case law on the 14th Amendment and anti-discrimination legislation like Title VII shifts back and forth between a variety of the notions of race.<sup>15</sup> Moreover, these very different ideas about race are not mutually exclusive for most people, but instead coexist, only to be situationally invoked by people to make sense of everyday interactions in which race is salient.<sup>16</sup>

The concept of race "invokes biologically based human characteristics (so-called 'phenotypes'), [but] selection of these particular human features for racial signifi-

tion is always and necessarily a social and historical process.<sup>17</sup> This view of race as socially constructed emphasizes power relations (subordination) and inequality (stratification), drawing heavily on the historical roots of racial exclusion, rather than, for example, racial identity. From this view, the historical facts of racial exclusion are paramount—exclusion from personhood under slavery; exclusion from citizenship in cases such as *Dred Scot*, in laws that restricted naturalization to Whites (and after the Civil War, to Whites and Blacks), and in the contemporary demonization of Mexican immigrants as undeserving of citizenship; exclusion from particular spaces via Jim Crow legislation; and exclusion from political rights such as voting, serving on juries, running for elected office, testifying in court, and so forth. “In that history, racial classification turned not on what one felt [or how one identified racially], but, instead, on what others allowed one to do.”<sup>18</sup>

While both race and ethnicity are about socially constructed group difference in society, race is always about hierarchical social difference, whereas ethnicity may be non-hierarchical, depending on the social context. While it has become common for social scientists to prefer to talk about race as ethnicity since the late 1940s,<sup>19</sup> I eschew the term ethnicity because its use tends to defuse the emphasis on race as fundamentally about power and stratification.<sup>20</sup> In particular, a focus on ethnicity tends to emphasize individualized self-identification as an unfettered choice, rather than the structural constraints on racial boundaries that exist as the result of historically-rooted racial oppression. Despite the fact that ethnicity and race overlap considerably and the ways in which ethnicity remains important in diverse societies across the world, I agree with sociologists Stephen Cornell and Douglas Hartmann that race remains “the most powerful and persistent group boundary in American history.”<sup>21</sup>

The studies highlighted here adopt the social constructionist view of race that has become pervasive in the social sciences over the past few decades.<sup>22</sup> As an intellectual approach to race, the constructionist view has three main components. First, it rejects a biological basis for race (i.e., “there is greater variation within racial groups than between them”).<sup>23</sup> Second, it views race as a social construct: “a social invention that changes as political, economic, and historical contexts change.”<sup>24</sup> Third, although race is socially constructed (indeed, because of its power as a social construct), race has real consequences.<sup>25</sup> In its recent statement on the topic, the American Sociological Association concluded that race is embedded in virtually all American social institutions and practices.<sup>26</sup>

One of the most compelling theories taking the constructionist position is the theory of racial formation put forth in 1986 by sociologists Michael Omi and Howard Winant.<sup>27</sup> According to this theory, race has both ideological and structural dimen-

sions: “A vast web of racial projects mediates between the discursive or representational means in which race is identified and signified on the one hand, and the institutional and organizational forms in which it is routinized and standardized on the other.”<sup>28</sup> The state (state institutions, state actors, government agencies and policies) plays a major role in structuring race and racism and, as a result, law is a key player in racial formation theory, despite the fact that Omi and Winant did not develop that line of analysis.

The studies in this emerging field build, self-consciously or not, on racial formation theory by situating racial projects within legal systems and processes. In this way, they contribute to our knowledge about how law and race both relate to broader political dynamics and state projects. I proceed by describing how these studies illustrate the process by which law and race co-construct each other in a continuous, back and forth process. Cumulatively, they present new insights about law, race, and how they co-construct each other to ultimately reproduce and transform racial inequality in society.

Sociologist Renisa Mawani’s recent book *Colonial Proximities: Crossracial Encounters and Juridical Truths in British Columbia, 1871-1921*<sup>29</sup> provides a gripping portrait of how the racial order and the legal order shaped each other in 19th century British Columbia. She describes this “colonial contact zone” as “a space of racial inter-mixture—a place where Europeans, aboriginal peoples, and racial migrants came into frequent contact, a conceptual and material geography where racial categories and racisms were both produced and productive of locally configured and globally inflected modalities of colonial power” and where government officials, missionaries, and private employers (who exercised a quasi-legal authority) generated practices of colonial governance that were fundamentally racialized.<sup>30</sup> Two examples illustrate how racial dynamics shaped law and how law in turn shaped the racial order.

### III. LAW AND THE RACIAL ORDER

Some of the earliest sites for inter-racial encounters were the salmon canneries, central to the region’s capitalist development and hence its emergence as a viable colonial outpost. The canneries relied on a racially diverse workforce that included mostly male White settlers, male Chinese immigrants, and local aboriginal people (both men and women). Inter-racial mixture at work threatened White domination by producing mixed race progeny and by introducing the potential for inter-racial solidarity among workers.<sup>31</sup> One of the mechanisms employed by the cannery owners to decrease these possibilities—in a setting in which they regulated many aspects of workers’ lives à la company towns—was to assign housing by race.<sup>32</sup> Among Whites, housing was segregated by class as well, with White elites living in



larger, single-family homes (located furthest from the worst odors of the cannery) and White workers assigned to private bungalows and cottages. Chinese workers, in contrast, were forced to reside collectively in “overcrowded and unsanitary” bunkhouses; and aboriginal workers were pushed either to the outskirts of the canneries where they worked or remained living in their nearby villages, often located on the periphery of canneries. In this way, law-like residential segregation inscribed pre-existing racial differences in order to sharpen those differences (and dampen cross-racial contact) in a newly racially diverse geographic setting.

Another example comes from the legal regulation of prostitution. Putatively, prostitution anxiety focused on aboriginal, mixed race, and Chinese girls and women who were perceived as being exploited by aboriginal and Chinese men who sold “their women” into the sex trade (or allowed women to sell themselves into it). Contrasting and dynamic state responses to aboriginal and Chinese women illustrate how law and the racial order produced each other. In the early contact period characterized by European fur traders, there was no effort to regulate White men’s sexual and social relations with aboriginal women.<sup>33</sup> Later, when the numbers of White female settlers increased significantly, colonial authorities promoted inter-racial prostitution rather than concubinage in order to encourage White endogamy.<sup>34</sup> By the end of the century, after an express legal campaign, aboriginal women were contained on reserves and were no longer perceived as a marital or sexual threat to settler society.<sup>35</sup> But by that time, the newer population of Chinese immigrants was perceived as “contaminating” settler society.<sup>36</sup> Based on her review of the correspondence, legislation, and other official documents written to and by colonial officials, Mawani concludes that the late 19th and early 20th century anti-prostitution rhetoric became the justification for the physical exclusion of Chinese immigrants at the border (especially female immigrants), as well as a way to justify the continued political exclusion of those Chinese who already had entered British Columbia.<sup>37</sup> Thus, legal responses to prostitution themselves hardened racist ideas, while simultaneously reflecting taken-for-granted racial truths.

My book *Manifest Destinies: The Making of the Mexican American Race*<sup>38</sup> explores a different colonial contact zone, 19th century New Mexico, but similarly looks at how law and race interacted and ultimately reproduced and transformed racial inequality. In a setting in which American colonizers had neither a realistic chance of militarily dominating large numbers of native Mexicans and diverse Indian peoples or the hope of quickly attracting large numbers of White settlers, they embraced a divide and conquer strategy in which whiteness became a key wedge between Mexicans and Pueblo Indians.

Building on the pre-existing Spanish-Mexican racial order, the Americans exploited Mexicans’ claims of racial mixture (as a people descended both from Spaniards and

Indians) to justify endowing Mexican men with a host of rights (voting rights, the right to hold office, jury service, etc.) and to withhold these same rights from Pueblo Indian men, even though the latter had citizenship rights under Mexican rule and arguably under the treaty ending the 1846-'48 war between the U.S. and Mexico.<sup>39</sup> The result was a local racial order in which Mexican Americans functioned as a wedge group between White Americans, located above them on the racial hierarchy, and Pueblo Indians, located below them. At the national level, Mexican Americans again played a wedge role due to their off-white status, buffering Whites above them (and especially marginal Whites like Irish and Italian immigrants) from Blacks at the bottom of the racial order.<sup>40</sup>

In his book *Racism on Trial: The Chicano Fight for Justice*,<sup>41</sup> legal scholar Ian Haney López explores the 20th century ramifications of Mexican Americans' 19th century status as an off-white racial group. Although others believe he overstates the case,<sup>42</sup> Haney López argues that Mexican Americans were poised at the time of the Chicano civil rights movement to choose between a White and a non-white racial identity. The larger society's view of Mexican Americans as non-white others played a crucial role, especially as it was manifested in responses by police and prosecutors in two criminal trials of groups of young Mexican American men for politically motivated offenses in the early 1970s.

Haney López postulates a theory about how racial ideology is reproduced as a key aspect of producing the racial order: "[H]ow do ideas about race operate—how do they arise, spread, and gain acceptance? What is the relationship between race as a set of ideas and racism as a set of practices?"<sup>43</sup> Building on Omi and Winant's work, he postulates that "common sense racism"—"a complex set of background ideas that people draw on but rarely question in their daily affairs ... stock ideas and practices that we have absorbed and heavily relied upon but to which we give little thought"—provides the answer.<sup>44</sup> For example, the taken-for-granted notion that Mexican Americans were generally inferior to Whites (common sense in mid-20th century California) led Los Angeles County judges to exclude them from grand jury service, even as they proclaimed that they did not personally know any qualified Mexican Americans and that they did not intend to discriminate against Mexican Americans.<sup>45</sup> The racial order virtually ensured the legal system's exclusion of Mexican American citizens on grand and petit juries, and that legal outcome, in turn, affirmed their racially inferior position in society.

Anthropologist Pem Davidson Buck similarly explores the ways in which race becomes naturalized after decades of the common-sense reproduction of racist ideas, in this case ideas about race deeply intertwined with class-based stereotypes.

In *Worked to the Bone: Race, Class, and Privilege in Kentucky*,<sup>46</sup> Buck notes that Kentucky's early homesteads went only to White veterans, but with a built-in bias based on social class: enlisted men received 100 – 300 acre lots, whereas officers sometimes received thousands of acres.<sup>47</sup> During this era, homesteading was risky because the region's original inhabitants, Cherokee and Shawnee Indians, adamantly resisted White encroachment on their lands [they continued to do so until they were forcibly removed to Indian Territory (later Oklahoma) in the 1830s]. According to Buck, poor White settlers in Kentucky constructed themselves racially against these Indian populations: "In essence they became a military buffer between Native Americans and advancing White settlement. For people without access to capital or land in the heavily settled East, the chance for upward mobility—if they survived—made the risk worthwhile. They now had reason to treasure White privilege."<sup>48</sup>

But the precariousness of frontier life, coupled with rampant land speculation, meant that property quickly became concentrated among wealthy Whites: by 1780, 75 percent of White Kentuckians were poor and landless,<sup>49</sup> and within another two decades, 21 White landowners owned one-quarter of the state's land.<sup>50</sup> Some delegates to the constitutional convention of 1792 argued that the franchise should be restricted to property owners, but given the land distribution, that probably would have led to a revolt among the White masses. Instead, in a move that would have repercussions for the next two centuries, all White men were enfranchised as a way to solidify White privilege and the Black/White racial divide.<sup>51</sup>

Political scientist Julie Novkov explores similar themes in a very different style in her 2008 book *Racial Union: Law, Intimacy, and the White State in Alabama, 1865-1954*.<sup>52</sup> She rejects ahistorical invocations of "white supremacy," instead seeking to link racial ideology to state-building in order "to describe the linkage between racial ideology in politics and culture and its concrete manifestations in state institutions in the post-bellum U.S. South."<sup>53</sup> She examines anti-miscegenation law and its enforcement as a key site "for the creation, articulation, rationalization, and ultimately reflection of the supremacist state, through its attention to the meaning of racial boundaries."<sup>54</sup> Novkov persuasively illustrates how racial ideology (White supremacy) produced racist laws (inter-marriage bans), and how that subsequently led to hardened racial boundaries that ultimately justified the racial order in which Blacks were subordinate to Whites.

Delegates to the 1901 state constitutional convention vigorously debated but ultimately rejected two amendments to the anti-miscegenation law: one that would have defined Blacks via the hypodescent rule and a second that would have added Chinese and Native Americans to those proscribed from marrying Whites. Instead, they effectuated the subordination of Blacks by voting to disenfranchise African

American men; within two years, the number of Black men registered to vote plummeted from 181,000 to 5,000.<sup>55</sup> The first quarter of the century witnessed a series of anti-miscegenation cases (trial and appellate) in which defendants raised a variety of definitional challenges to their status as “White” or “Black” and, faced with inconsistent responses from the courts, the Alabama legislature in 1927 adopted the one-drop rule—any Black ancestry sufficed to make a person Black.<sup>56</sup> Law both reflected the racial order and helped to produce it in a more intransigent form.

While legal narratives of the American South often focus exclusively on Black/White race relations, both Buck and Novkov are attentive to the presence of American Indians in the South and to the attendant complications of a multi-group racial order. Historian Moon-Ho Jung more directly takes up questions of a tri-racial dynamic in the U.S. South by interrogating the ideological and material roles of “coolies”—exploited Chinese contract laborers—in post-bellum Louisiana. In *Coolies and Cane: Race, Labor and Sugar in the Age of Emancipation*,<sup>57</sup> Jung links 19th century immigration law and policy with the national dialogue about slavery and emancipation, while also putting the South in the broader context of both Caribbean sugar production (Louisiana’s main competitor at the time) and Chinese migration across the Western hemisphere.

Sugar plantation owners needed a large, flexible workforce [many more workers were needed during the grinding and planting seasons than at other times<sup>58</sup>], so Louisiana planters turned to Chinese laborers as a way to provide flexibility after emancipation so that they would not be dependent on recently freed slaves. Jung investigates one sugar plantation’s labor policies immediately following emancipation, finding that their hiring rolls included free Blacks (who worked at wages ranging from \$8 – \$19.50/month), White (European) immigrants (who contracted for \$20/month pay and their transportation costs from Chicago, if they stayed four months or more), and Chinese contract laborers (who worked for \$16/month).<sup>59</sup> Ironically, Louisiana planters’ labor shortage became even more acute after 1877, when Republican rule was defeated in Louisiana and a Black exodus to Kansas led planters to depend even more on immigrant laborers, both White and Chinese.<sup>60</sup> In the end, coolies served as a surplus army of labor for sugar planters in Louisiana, even as they played a role in “whitening” otherwise marginal European immigrants who moved to the region in the post-bellum period.<sup>61</sup>

Anthropologist Virginia Domínguez presents a fascinating study of the complex ways in which individual identity choices are heavily constrained by both social meaning and institutional forces (including the legal system) in *White by Definition: Social Classification in Creole Louisiana*.<sup>62</sup> A system of racial hierarchy that accreted over centuries (and three different colonial governments) eventually was codified

via Louisiana's anti-miscegenation laws, themselves designed to limit the inter-generational transfer of wealth from White men to women of color (and their mixed-race children).<sup>63</sup> Statutory law and case law interacted in sometimes unpredictable (or perhaps highly predictable) ways. In 1910 the state supreme court ruled that a White man had not violated the law by living with a woman who was one-eighth Black because an "octoroon was not negro," but rather a person of color within the Louisiana tradition. Within 30 days of the ruling, the legislature banned unions between Whites and anyone who had any amount of African ancestry, thereby helping to solidify a new understanding of race as binary rather than tertiary.<sup>64</sup>

As the one-drop rule became entrenched in Louisiana, legal bureaucrats saw it as their obligation to enforce it. Domínguez tells of Louisiana's vital statistics registrar, Naomi Drake, who in the 1950s and 1960s instituted what she termed "race-flagging" of birth and death certificates. Drake investigated as racially "suspicious" 4,700 birth certificates and 1,100 death certificates between 1960 and 1965 alone.<sup>65</sup> Her enforcement did not stop with the passage of the federal Civil Rights Act or with the social changes in race relations of the 1970s, but only in 1983, when the state legislature mandated self-identification as Louisiana's definitive method of assignment to racial categories.<sup>66</sup> As historian Peggy Pascoe notes, bureaucrats like Drake played as significant a role as other legal actors (legislators, judges and prosecutors) in reproducing race and racism: "[officials like marriage license clerks] carried out their tasks as a matter of bureaucratic routine rather than criminal enforcement, in quiet county offices rather than dramatic courtrooms ... a seemingly natural documentary 'fact' of race was produced in marriage license bureaus."<sup>67</sup>

J. Kehaulani Kauanui, who has a doctorate from the History of Consciousness program at the University of California at Santa Cruz and who teaches in an anthropology department, has recently published a study of the congressional passage of the 1921 Hawaiian Homes Commission Act. Congress enacted the legislation roughly mid-way between the United States' formal acquisition of Hawaii as a colony in 1898—although American missionaries and business interests had been active on the islands since the 1820s<sup>68</sup>—and admission of Hawaii as a state in 1959. In *Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity*,<sup>69</sup> Kauanui argues persuasively that Hawaii's racial order shaped the law's definition of who was Native Hawaiian for purposes of receiving land allotments under the law, which in turn came to define (and still often defines today) the category of Native Hawaiians under a 50 percent blood quantum rule. Hawaii's three-tiered racial order in the early 20th century consisted of Asians (who were typed as alien, non-citizens), Native Hawaiians, and everyone else, principally Whites but also mixed-race persons who did not fit squarely in the other categories.<sup>70</sup>

The Homes Commission law was ostensibly designed to provide redress to Native Hawaiians, who were suffering from drastic poverty and high mortality rates<sup>71</sup> and who were viewed collectively as capable of eventually assimilating into the White settler society.<sup>72</sup> In contrast, Asians (and especially the Japanese, who were numerically dominant at the time), were viewed as collectively unassimilable and also disenfranchised because Congress had refused to extend citizenship rights to Asian immigrants living in Hawaii in 1900 when it granted them to Native Hawaiians (U.S.-born Japanese Americans did not vote in substantial numbers until the 1930s).<sup>73</sup> The law's focus on providing reparations to Native Hawaiians (via land allotments) sought to rehabilitate them as against Asians, but sought to do so narrowly, setting a 50 percent blood quantum definition for Native Hawaiian status. Hawaii's racial dynamics produced the law, but the law exerted a powerful influence on those very dynamics by instituting a rigid definition of ancestry to define Native status (and by rejecting indigenous ideas about kinship that Kauanui argues today trump blood quantum in some contexts).<sup>74</sup> The result was the transfer of property wealth to a narrower segment of those who could potentially claim Native Hawaiian status, which left much of the land originally allotted in the public domain and thus available to be leased by sugar plantation owners and eventually owned Whites.<sup>75</sup>

**T**his article has described an emerging field in socio-legal studies that investigates how law and race mutually constitute each other in an ongoing, dialectic process. These studies build on racial formation theory by situating racial projects within legal systems and processes. In this way, they contribute to our knowledge about how law and race both relate to broader political dynamics and state projects. They illustrate how law and race co-construct each other in a continuous, back and forth process. Cumulatively, they present new insights about law, race, and how they co-construct each other to ultimately reproduce and transform racial inequality in society.

#### IV. CONCLUSION



- \* This essay is an abridged version of Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487 (2010).
1. See Laura Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 453 (Austin Sarat ed., 2004); Osagie K. Obasogie, *Race in Law and Society: A Critique*, in RACE, LAW AND SOCIETY 445 (Ian Haney López ed., 2007). I follow historian Peggy Pascoe's lead in capitalizing Black(s) and White(s) because other terms frequently used as racial terms (American Indian(s), Mexican American(s), etc.) are capitalized and, for White(s), capitalization "help[s] mark the category that so often remains unmarked, and taken for the norm." PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 14 (2009).
  2. See Gómez, *supra* note 1.
  3. For edited collections on critical race theory, see DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW (6th ed. 2008); DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS (2003); CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2d ed. 2003); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002); JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (2nd ed. 2007); RACE LAW STORIES (Rachel F. Moran & Devon Wayne Carbado eds., 2008). For the application of critical race theory outside the legal academy, see Ricky Lee Allen, *Whiteness and Critical Pedagogy*, in CRITICAL PEDAGOGY AND RACE 53 (Zeus Leonardo ed., 2005); Tara J. Yosso & Daniel G. Solórzano, *Conceptualizing a Critical Race Theory in Sociology*, in BLACKWELL COMPANION TO SOCIAL INEQUALITIES 117 (Mary Romers & Eric Margolis eds., 2005).
  4. For review of the literature, see Gómez, *supra* note 1.
  5. See ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2008); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE (2001); Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2009); Kitty Calavita, *The Paradoxes of Race, Class, Identity and 'Passing': Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 LAW & SOC. INQUIRY 1 (2000); Michael A. Elliott, *Telling the Difference: Nineteenth-Century Legal Narratives of Racial Taxonomy*, 24 LAW & SOC. INQUIRY 611 (1999); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999); Laura E. Gómez, *Race, Colonialism and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 LAW & SOC'Y REV. 1129 (2000); Philip Goodman, "It's Just Black, White, or Hispanic": An Observational Study of Racializing Moves in California's Segregated Prison Reception Centers, 42 LAW & SOC'Y REV. 735 (2008); Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1 (1991); Cheryl



- I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Tanya Katerí Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Race and Gender*, 4 J. GENDER RACE & JUST. 183 (2001); Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130 (2000); Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875-1905*, 24 LAW & SOC. INQUIRY 377 (1999); George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997); Michelle McKinley, *Fractional Freedoms: Slavery, Legal Activism, and Ecclesiastical Courts in Colonial Lima, 1593-1689*, 28 LAW & HIST. REV. 749 (2010); Elizabeth Mertz, *The Uses of History: Language, Ideology and Law in the United States and South Africa*, 22 LAW & SOC'Y REV. 661 (1998); Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473 (2003); Deenesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities*, 41 LAW & SOC'Y REV. 587 (2007).
6. See, e.g., LAURA E. GÓMEZ, *MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE* (1997); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004); SHERENE H. RAZACK, *CASTING OUT: THE EVICTION OF MUSLIMS FROM WESTERN LAW AND POLITICS* (2008); JOHN TEHRANIAN, *WHITEWASHED: AMERICA'S INVISIBLE MIDDLE EASTERN MINORITY* (2009); ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595 (2005); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1574 (2002).
  7. Ian Haney López, *Introduction*, in *RACE, LAW AND SOCIETY*, *supra* note 1, at xi, xviii; see also Gómez, *supra* note 1, at 462.
  8. For example, employment discrimination and immigration law are categories of legal doctrine and policy that deeply implicate race, but I did not include books that primarily trace the evolution of legal doctrine in a particular historical period. See, e.g., ANDREW GYORY, *CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT* (1998); PAUL D. MORENO, *FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA, 1933-1972* (1997); LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995).
  9. I did not include books that consider law and race from this perspective but that are not rooted in a thick description of a specific place or region. See, e.g., RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); HANEY LÓPEZ, *supra* note 5; PASCOE, *supra* note 1.
  10. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994); HOWARD WINANT, *THE WORLD IS A GHETTO: RACE AND DEMOCRACY SINCE WORLD WAR II* (2001); Samuel R. Lucas & Marcel Paret, *Law, Race, and Education in the United States*, 1 ANN. REV. L. & SOC. SCI. 203 (2005); Leith Mullings, *Interrogating Racism: Toward an Antiracist Anthropology*, 34 ANN. REV. ANTHROPOL. 667 (2005).
  11. See Devon W. Carbado & Rachel F. Moran, *Introduction*, in *RACE LAW STORIES*, *supra* note 3.

12. Ann Morning, *Toward a Sociology of Racial Conceptualization for the 21<sup>st</sup> Century*, 87 SOC. FORCES 1167, 1171 (2009).
13. EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (2003).
14. See Brackette F. Williams, *A Class Act: Anthropology and the Race to Nation Across Ethnic Terrain*, 18 ANN. REV. ANTHROPOL. 401, 402 (1989).
15. See Gotanda, *A Critique of "Our Constitution is Color-Blind"*, *supra* note 5.
16. See Morning, *supra* note 12.
17. OMI & WINANT, *supra* note 10, at 55.
18. Lucas & Paret, *supra* note 10, at 203–04.
19. See Vilna Bashi, *Racial Categories Matter Because Racial Hierarchies Matter: A Commentary*, 21 ETHNIC & RACIAL STUDIES 959 (1998).
20. See Faye V. Harrison, *The Persistent Power of "Race" in the Cultural and Political Economy of Racism*, 24 ANN. REV. ANTHROPOL. 47, 48 (1995); Morning, *supra* note 12, at 1173.
21. STEPHEN CORNELL & DOUGLAS HARTMANN, ETHNICITY AND RACE: MAKING IDENTITIES IN A CHANGING WORLD 25 (1998).
22. See Morning, *supra* note 12; Am. Anthropological Ass'n, *Statement on 'Race'*, <http://www.aaanet.org/stmts/racepp.htm> (May 17, 1998); Am. Sociological Ass'n, *The Importance of Collecting Data and Doing Social Scientific Research on Race* (2003), available at [http://www2.asanet.org/media/asa\\_race\\_statement.pdf](http://www2.asanet.org/media/asa_race_statement.pdf)<http://www.aaanet.org/stmts/racepp.htm>.
23. Am. Anthropological Ass'n, *supra* note 22; see also Howard Winant, *Race and Race Theory*, 26 ANN. REV. SOC. 169 (2000); Am. Sociological Ass'n, *supra* note 22.
24. Mullings, *supra* note 10, at 674; see also Am. Anthropological Ass'n, *supra* note 22; Am. Sociological Ass'n, *supra* note 22.
25. See CORNELL & HARTMANN, *supra* note 21; OMI & WINANT, *supra* note 10.
26. Am. Sociological Ass'n, *supra* note 22.
27. OMI & WINANT, *supra* note 10.
28. OMI & WINANT, *supra* note 10, at 60; see also Mullings, *supra* note 10.
29. RENISA MAWANI, COLONIAL PROXIMITIES: CROSSRACIAL ENCOUNTERS AND JURIDICAL TRUTHS IN BRITISH COLUMBIA, 1871-1921 (2009).
30. *Id.* at 5.
31. *Id.* at 66.
32. *Id.* at 68.
33. *Id.* at 87–90.
34. *Id.* at 87.
35. *Id.* at 101–02, 108.
36. *Id.* at 109.
37. *Id.* at 109–10, 119.
38. GÓMEZ, *supra* note 6.
39. *Id.* at 81–98.

40. *Id.*; see also Laura E. Gómez, *Opposite One-Drop Rules: Mexican Americans, African Americans, and the Need to Reconceive Turn-of-the-Twentieth-Century Race Relations*, in *HOW THE UNITED STATES RACIALIZES LATINOS: WHITE HEGEMONY AND ITS CONSEQUENCES* (José A. Cobas et al. eds., 2009).
41. IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003).
42. See Mary Romero, *Brown Is Beautiful*, 39 *LAW & SOC'Y REV.* 211 (2005).
43. HANEY LÓPEZ, *supra* note 41, at 6.
44. Sociologist Mary Romero has criticized the idea of common sense racism as overly psychological and distracting away from the role of the state and political economy in perpetuating racism (issues better addressed by the older concept of institutional racism, she says). Romero, *supra* note 42, at 225–27.
45. HANEY LÓPEZ, *supra* note 41, at 113–27.
46. PEM DAVIDSON BUCK, *WORKED TO THE BONE: RACE, CLASS, POWER, & PRIVILEGE IN KENTUCKY* (2001). For critiques of the book, see Eric Arnesen, Book Review, 66 *INT'L LAB. & WORKING-CLASS HIST.* 218 (2004) (reviewing BUCK, *supra*); Penny Messinger, Whiteness Study Plumbs Kentucky, *H-NET REV.* (Aug. 2002) (reviewing BUCK, *supra*), <http://www.h-net.org/reviews/showrev.php?id=6597>.
47. BUCK, *supra* note 46, at 30–31.
48. *Id.* at 31.
49. *Id.* at 32.
50. *Id.* at 41.
51. *Id.* at 33.
52. JULIE NOVKOV, *RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA, 1865-1954* (2008).
53. *Id.* at 4.
54. *Id.* at 16.
55. *Id.* at 72–74.
56. *Id.* at 142.
57. MOON-HO JUNG, *COOLIES AND CANE: RACE, LABOR, AND SUGAR IN THE AGE OF EMANCIPATION* (2006).
58. *Id.*; Arthur L. Stinchcombe, *Cultures of Discipline: Law Teaches Hawaii to Become a Colony*, 28 *LAW & SOC. INQUIRY* 591, 601 (2003).
59. JUNG, *supra* note 57, at 190.
60. *Id.* at 216–17.
61. See Erika Lee, Book Review, 41 *J. SOC. HIST.* 1081 (2008) (reviewing JUNG, *supra* note 57).
62. VIRGINIA R. DOMÍNGUEZ, *WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA* (1986).
63. See PASCOE, *supra* note 1, at 11.
64. DOMÍNGUEZ, *supra* note 62, at 31–32.
65. *Id.* at 36–37. For a similar pattern involving Indians in 1920s Virginia, see HELEN C. ROUNDTREE, *POCAHONTAS'S PEOPLE: THE POWHATAN INDIANS OF VIRGINIA THROUGH FOUR CENTURIES* (1990).

66. DOMÍNGUEZ, *supra* note 62, at 52.
67. PASCOE, *supra* note 1, at 133.
68. SALLY ENGLE MERRY, COLONIZING HAWAII: THE CULTURAL POWER OF LAW (2000).
69. J. KEHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY (2008).
70. *Id.* at 91.
71. *Id.* at 81–82.
72. *Id.* at 91.
73. *Id.* at 94–96.
74. *Id.* at 41–42. This may be the least convincing aspect of the book. For a critique that Kauanui’s contemporary political agenda has influenced her historical analysis, see Emma Kowal, *Of Transgression, Purification and Indigenous Scholarship*, 10 ASIA PAC. J. ANTHROPOLOGY 231 (2009).
75. KAUANUI, *supra* note 69, at 8, 70.