

**EMPIRICAL METHODS AND CRITICAL RACE THEORY:  
A DISCOURSE ON POSSIBILITIES FOR A HYBRID  
METHODOLOGY**

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*The present objective will be to identify the distinguishing features of the movement paying special attention to its theory and methodology. The focus on theory and methodology imports an assumption, which should be made explicit, that the long-term viability of the movement and the potential for its application to the politics of law depends upon its attaining and sustaining a degree of theoretical and methodological coherence.*

—Alan Hunt<sup>1</sup>

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## INTRODUCTION

In 2006, I published one of my first law review articles as a legal academic, “Black Women’s Stories and the Criminal Law: Restating the Power of Narrative.”<sup>2</sup> The article explored the particular ways that one’s social identity may inform how one is treated within the criminal justice system. At the center of the article was a story about my maternal grandmother, who had been arrested as an accessory to murder in 1968.<sup>3</sup> The article sought to demonstrate how her individual identity was largely erased by the court and replaced with one that attempted to assess her culpability not just based upon her behavior but also based on her status as a black woman on welfare.<sup>4</sup> To support this claim, the principal method of analysis within the article involved interrogating stereotypical descriptions of my grandmother deployed within the court’s papers. The effects of the stereotypes were rendered visible by comparing claims from the court’s documents to media accounts and personal family stories about her involvement within the case.<sup>5</sup> At bottom, the article attempted to explore the inner workings of what UCLA Law Professor Devon Carbado had brilliantly previously described as the “crime of identity.”<sup>6</sup>

As narrative discourse was at the heart of the article, this work became part of a pre-existing debate over the use of the method within legal scholarship, especially Critical Race Theory (CRT).<sup>7</sup> Notable

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1. Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1, 2 (1986) (discussing Critical Legal Studies).

2. Mario L. Barnes, *Black Women’s Stories and the Criminal Law: Restating the Power of Narrative*, 39 UC DAVIS L. REV. 941 (2006). The article was based upon research conducted while I was a William H. Hastie Fellow at the University of Wisconsin Law School; while they were written at the same time, a co-author and I first published another article: Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black: Why Title VII Should Apply Even if Lakeisha and Jamal are White*, 2005 WIS. L. REV. 1283.

3. Barnes, *supra* note 2, at 963–66. The murder case at issue was *People v. Washington*, 71 Cal. 2d 1170 (1969).

4. Barnes, *supra* note 2, at 966–68.

5. *Id.* at 973–77.

6. *See id.* at 958 (citing Devon Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 962 (2002)).

7. *See, e.g.*, Nancy Levit, *Reshaping the Narrative Debate*, 34 SEATTLE U. L. REV. 751, 755–58 (2011); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (including contributions from renowned CRT scholars Derrick Bell, Richard Delgado, and Patricia Williams). Interestingly, given how negatively some legal scholars treated CRT uses of storytelling, narrative has now been embraced by other disciplines, including the sciences. *See* DAVID HERMAN, *STORYTELLING AND THE SCIENCES OF THE MIND* (2013) (using case studies and exploring connections between narrative studies and cognitive sciences research).

critics, such as Judge Richard Posner,<sup>8</sup> and legal scholars, including Dan Farber and Suzanna Sherry,<sup>9</sup> Anne Coughlin,<sup>10</sup> Douglas Litowitz,<sup>11</sup> and Dan Subotnik,<sup>12</sup> derided CRT based on its use of allegory, autobiography, and other personal stories. The conventional criticism held that CRT's reliance on narrative or "storytelling" was problematic because stories were neither verifiable nor necessarily typical and stood in opposition to more appropriate methods of legal inquiry that sought to elevate so-called objective and neutral truths.<sup>13</sup> As a result of this skepticism, at the time, scholar Kim Scheppelle noted a disjuncture within legal discourse involving the use of stories, where insiders were presumed to tell stories that were "officially approved" while outsiders were presumed to tell stories that were "officially distrusted."<sup>14</sup>

As "Black Women's Stories" was being written, an important text on legal consciousness was gaining significant attention in sociolegal circles. In that text, based on a number of in-depth interviews with subjects about their everyday interactions, scholars Patricia Ewick and Susan Silbey presented a constitutive theory of legal consciousness. Their theory described law as both influenced by, and central to, the construction of citizen attitudes and understandings.<sup>15</sup> For many who read the book, a key innovation of the Ewick and Silbey framework was that it suggested all people had access to a multiplicative or

8. See Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737 (1997); Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40.

9. DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997); Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

10. Anne Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995).

11. Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503 (1997).

12. DAN SUBOTNIK, *TOXIC DIVERSITY: RACE, GENDER, AND LAW TALK IN AMERICA* (2005).

13. Barnes, *supra* note 2, at 952; Nancy Cook, *The Call to Witness: Historical Divides, Literary Narrative, and the Power of Oath*, 98 MARQ. L. REV. 1585, 1588-92 (2015); Levit, *supra* note 7, at 755; cf. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 110 (2000) ("This endless telling and retelling, casting and recasting of stories is essential to the conduct of the law. It is how law's actors comprehend whatever series of events they make the subject of their legal actions.").

14. Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2079-80 (1989).

15. PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998); Patricia Ewick & Susan S. Silbey, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 NEW ENG. L. REV. 731 (1992).

polyvocal consciousness.<sup>16</sup> This meant that at varying times subjects found themselves “before the law” or submitting to seemingly reified legal process; “with the law,” reflecting agency or an ability to game legal processes; or even “against the law,” which involved the deployment of strategies to resist law’s demands.<sup>17</sup> As a critical scholar, the real revelation in this work was in the fact that their method essentially consisted of theorizing about legal attitudes and norms based upon the harvesting of a few stories culled from a larger set of interviews. In effect, a method that had been so vilified within CRT was commonly accepted as a part of qualitative inquiry within the sociolegal studies.<sup>18</sup> Through stories, I surmised that both critical and sociolegal scholars generated “separate but compatible theories to explain how we exist in the world.”<sup>19</sup> While I later complicated my beliefs about the use of narrative in sociolegal and critical scholarship,<sup>20</sup> I suggested then and still believe in stories as a point of synergy around which collaborations can be forged and sociolegal knowledge can be gained.<sup>21</sup>

In the years after I articulated an interest in stories as a point of commonality between critical and sociolegal scholars, a formal and deliberate project centering on placing broader swaths of race scholars and social scientists in greater conversation was undertaken. The work

16. EWICK & SILBEY, *supra* note 15, at 44–47.

17. *Id.* at 47–49.

18. My point was not just that Ewick and Silbey and other sociolegal researchers included interviews within their studies, it was that their claims that stories as tools or method held special significance in understanding how legal attitudes and outcomes were constructed. Barnes, *supra* note 2, at 979–87; *see also* LAW’S STORIES: NARRATIVE AND THE RHETORIC IN LAW (Peter Brooks & Paul Gewirtz eds., 1996); Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 161 (2014) (“[S]ocial science itself has recognized storytelling as a valuable way of describing the racial and political landscape from within it.”); Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC’Y REV. 197 (1995). For a discussion on narrative as a research tool common to law and other literatures, see Mitsunori Misawa, *Social Justice Narrative Inquiry: A Queer Crit Perspective* 240–42 (Adult Educ. Research Conference, Paper No. 34, 2012), available at <http://newprairiepress.org/aerc/2012/papers/34/>; Daniel G. Solórz & Tara J. Yosso, *Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research*, 8 QUALITATIVE INQUIRY 23 (2002) (discussing how CRT’s use of the concept of “counter-stories” could be used as a means to displace so-called objective and neutral narrative accounts within education scholarship).

19. Barnes, *supra* note 2, at 985.

20. Mario L. Barnes, *Racial Paradox in a Law and Society Odyssey*, 44 LAW & SOC’Y REV. 469, 473, 475–81 (2010) (arguing that based on the experiences of critical scholars applying narrative methodology, a greater sensitivity may need to be demonstrated when law and society scholars engage in similar forms of storytelling).

21. *Id.* at 480–83.

and movement that grew out of that project is now referred to as empirical methods and critical race theory (e-CRT).<sup>22</sup> One of the progenitors of the project was UC Hastings Law Professor Osagie Obasogie, who, along with his colleague Professor Joan Williams, convened working groups in 2010 and 2011 to consider “rethinking race scholarship in a manner that reflected the theoretical orientation put forward by critical race scholarship and also embraced the methodological contributions of social science research.”<sup>23</sup> These groups have continued to meet regularly at academic institutions across the country and have produced two volumes of e-CRT writings,<sup>24</sup> in addition to the work presented within this publication.

As is typically the case with a burgeoning movement, a moment arises where it is appropriate to reflect on its progress. The goal here is to further elaborate upon the history of e-CRT’s multi-disciplinary collaboration but also to interrogate where the project now finds itself, six years in. Given that the movement and work are still early in their development, a full assessment of the e-CRT movement and the scholarship it has produced is a bit premature. Within this space, however, it is possible to assess what has transpired thus far and pose a series of questions about the current status and future possibilities of e-CRT. Consistent with the quote that begins this article, which describes an early assessment of Critical Legal Studies (CLS), it is at least time to inquire into whether participation in e-CRT requires one to adopt a set of commitments or conform for the purpose of theoretical or methodological coherence. As others before have warned, it can be problematic to attempt to superimpose an orthodoxy over an in-progress, context-specific, and shifting scholarly movement.<sup>25</sup> Even understanding the challenge of a review at this point, it is possible to query what it means for a scholar or scholarship to be considered a part of e-CRT. Are there a range of options for what it means to “do” this

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22. In the alternative, the movement is also referred to as “Critical Race Theory and Empirical Methods.” See, e.g., Symposium, *Critical Race Theory and Empirical Methods Conference*, 83 *FORDHAM L. REV.* 2953 (2015).

23. Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 *UC IRVINE L. REV.* 183, 185 (2013).

24. See Symposium, *Critical Race Theory and Empirical Methods*, 3 *UC IRVINE L. REV.* 183 (2013); Symposium, *supra* note 22.

25. On this point, with regard to CRT, founding member Professor Kimberlé Crenshaw has surmised,

Specifically, the view of CRT as a stable project sometimes denies the extent to which CRT was and continues to be constituted through a series of dynamic engagements situated within specific institutions over the terms by which their racial logics would be engaged.

Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 *CONN. L. REV.* 1253, 1260 (2011).

work? As a project at the intersection of disparate disciplinary traditions, are there certain views or practices endemic to CRT or the social sciences that must be represented before one can claim that work is situated within the e-CRT enterprise? As a movement the substantive origins of which are tied to CRT, e-CRT is presumed to maintain a strong commitment to anti-subordination. Based on initial working group meetings and writings, however, I have uncovered few assertions of other hardened e-CRT principles, parameters, or requirements. As such, initial questions about e-CRT are much more likely to focus on who can and should police its intentionally porous boundaries.

In service to these and other questions, Part I below will trace the origins of the e-CRT movement. Part II will assess the progress of the movement by evaluating some of the early work produced within it, with a focus on the constitution of collaborations and questioning what it actually means to “do” e-CRT. In light of the progress of the movement thus far and the troubles that have plagued previous progressive scholarly movements, Part III evaluates challenges e-CRT frameworks may face moving forward. This evaluation of e-CRT concludes by suggesting that all processes involving collaboration require compromise. The ultimate success of e-CRT will turn on whether the concessions that will be required to keep complex concepts of race grounded in empirical research and social science methods utilized as a meaningful tool within progressive racial discourses prove manageable or fatal.

## I. ORIGIN STORIES

Scholarly movements often have origin stories, which involve connections to earlier movements and groups of scholars, along with key moments of fissure or breakaway. CLS,<sup>26</sup> for example, partially owed its genesis to groundwork laid by law and society scholars<sup>27</sup> and intellectual terrain first plowed by the legal realists.<sup>28</sup> The CRT

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26. For an overview of Critical Legal Studies, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1982).

27. See OSAGIE OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* 183 (2014).

28. *Id.* at 184; Hunt, *supra* note 1, at 4 (“The sense of excitement and expectation generated by the emergence of critical legal studies is in large part due to the promise it holds out of replacing this dominant tradition of liberal legalism. It explains in no small degree the self-consciousness of the critical theorists of their linkages to the Realist tradition.”). For a description of the tenets of Legal Realism, see Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278 (2001).

movement, by contrast, has a complex origin story<sup>29</sup> but was partially spurred by key disagreements related to both intellectual commitments and annual gatherings within CLS.<sup>30</sup> While they are not precisely successor movements, a number of even more recent scholarly movements, including Latina/o Critical Theory (LatCrit),<sup>31</sup> Socioeconomic Class Critical Theory (ClassCrits),<sup>32</sup> and Queer Critical Theory (Queer Crits),<sup>33</sup> certainly owe a part of their formation to CRT. An interesting aspect of the rise of the e-CRT movement is that it defies this breakaway tradition. The e-CRT project was not created in a moment of theoretical dispute with another generative movement. Rather, e-CRT arose out of an intentional attempt to forge a union between scholars, traditions, and methods previously thought to be more disparate than complementary. That genesis is next considered.

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29. Kimberlé Crenshaw notes that CRT was produced from a “unique confluence of temporal, institutional, and political factors.” Crenshaw, *supra* note 25, at 1258. “[W]hat nourished CRT and facilitated its growth from a collection of institutional and discursive interventions into a sustained intellectual project was a certain dialectical *misalignment*.” *Id.* at 1259; *see also* Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1510–14 (2009) (noting that CRT owes part of its sustained success to student activism at Harvard and Berkeley and the events of a CLS meeting in Los Angeles, all of which took place in the late 1980s).

30. *See* OBASOGIE, *supra* note 27, at 183–84; Mario L. Barnes, “*The More Things Change . . .*”: *New Moves for Legitimizing Racial Discrimination in a “Post-Race” World*, 100 MINN. L. REV. 2043 (2016); Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1596–99, 1603 (2011); Kimberlé Crenshaw et al., *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, at xiii (Kimberlé Crenshaw et al. eds., 1995); Crenshaw, *supra* note 25, at 1287–88, 1295–96.

31. Frank Valdes, one of the founders of LatCrit, provides the following description of its origins:

Born from and during a 1995 colloquium on Latinas/os and critical race theory, LatCrit theory is an intervention designed to highlight Latina/o concerns and voices in legal discourse and social policy. As its origins indicate, this Latina/o-identified genre of outsider jurisprudence was conceived as a movement closely related to CRT. Because it was born of the CRT experience, LatCrit theory views itself as a “close cousin” to CRT, a cousin that always welcomes CRT, both in spirit and in the flesh, to its gatherings.

Francisco Valdes, *LatCrit: A Conceptual Overview*, LATCRIT, <http://latcrit.org/content/about/conceptual-overview/> (last visited Mar. 14, 2016).

32. ClassCrits have adopted a name that appears to refer to no long-form variant and is described as “reflect[ing] our interest in focusing on economics through the lens of critical legal scholarship movements, such as critical legal studies, critical feminist theory, critical race theory, LatCrit, and queer theory.” *About ClassCrits*, CLASSCRITS, <https://classcrits.wordpress.com/about/> (last visited Mar. 14, 2016).

33. For an introduction to Queer Critical Theory, *see* NIKKI SULLIVAN, *A CRITICAL INTRODUCTION TO QUEER THEORY* (2003).

At least as early as University of Hawaii Law Professor Charles Lawrence's borrowing of social psychology literature on unconscious bias in his germinal 1987 *Stanford Law Review* article, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,"<sup>34</sup> we have seen critical race scholars attempt to deploy social science frames, methods, and research in their work. Two scholars, in particular, however, were at the forefront of conceptualizing and laying ground work for a collaborative project between race scholars and empirical researchers: UCLA Law Professor Laura Gómez and UC Hastings College of the Law Professor Osagie Obasogie. It is in their work that we see a broad-based call for a more nuanced study of race in law and the social sciences that has become known as e-CRT. It is also their work that has provided at least an initial pronouncement for the nature of partnerships or substance of work to be considered under the e-CRT umbrella.

In 2004, Professor Gómez published "A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory," which appears as a chapter in the *Blackwell Companion to Law and Society*.<sup>35</sup> In that chapter, Professor Gómez opined that law and society scholars had not been sufficiently attentive to issues of racial inequality. Though she presented data demonstrating that there was a dearth of race scholarship published in the premier peer-reviewed sociolegal journals,<sup>36</sup> she also pointed out that "[r]ace does not exist outside of law; it is constituted by law."<sup>37</sup> Gómez explains that the empirical operationalization of race should capture the complexity of race as a social reality that changes in different historical and social contexts. Importantly, she cautioned sociolegal researchers that it would be a mistake to "treat[] race as an easily measurable independent variable."<sup>38</sup> She also criticized CRT scholars for failing to fully

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34. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

35. Laura E. Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, in BLACKWELL COMPANION TO LAW AND SOCIETY 453 (Austin Sarat ed., 2004).

36. *Id.* at 456–57 (noting that, between two leading law and society journals, only fifteen articles on race were published over the ten-year period of 1990–2000).

37. *Id.* at 453.

38. *Id.* at 455; Carbado & Roithmayr, *supra* note 18, at 157 (discussing research variables and claiming "ostensibly neutral practices regarding the choice of dependent and independent variables necessarily preclude more nuanced and more structural investigations of race"). An equally concerning condition exists when scholars oversimplify the meaning of race. See Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 465 (1996) ("[M]any analysts of racial matters have abandoned the serious theorization and reconceptualization of their central topic: racism.").

operationalize their theories of race “due in part to a failure to engage methodologies common in law and society research.”<sup>39</sup>

In 2012, she revisited these themes in her Law and Society presidential address, “Looking for Race in All the Wrong Places,” which appeared in the *Law and Society Review*.<sup>40</sup> There, she argued that sociolegal scholars should not only conceptualize race as socially constructed but should also “grapple with the gap between how race is theorized and how we operationalize race in empirical research.”<sup>41</sup> In her address, she offered three broad suggestions for reshaping a sociolegal research agenda: (1) race should be studied as a process rather than as an outcome; (2) researchers should design more comparative studies that look at race, racism, and racialization across racial groups; and (3) researchers should pay careful attention to the conceptualization of race being used in research.<sup>42</sup>

Professor Gómez’s goals for how race should occupy a more prominent place in sociolegal studies were built upon by Professor Obasogie. First, in 2006, he followed up her work analyzing the articles published in leading peer-reviewed sociolegal journals. Confirming her results, he found that a careful study of race was rarely at the center of published work and that sociolegal journals published race-centered work less often than most top law journals.<sup>43</sup> Second, in addition to forming the e-CRT working groups,<sup>44</sup> Professor Obasogie explicated the proposed goals of a cooperative e-CRT project. In a foreword to the first e-CRT symposium, published in the *UC Irvine Law Review*, he stated,

Linking social science methods with critical race theory provides a remarkable opportunity to pursue race scholarship

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39. Gómez, *supra* note 35, at 453.

40. Laura E. Gómez, *Looking for Race in All the Wrong Places*, 46 *LAW & SOC’Y REV.* 221 (2012).

41. *Id.* at 234.

42. *Id.* at 235–36.

43. Osagie K. Obasogie, *Race in Law and Society: A Critique*, in *RACE, LAW AND SOCIETY* 445 (Ian Haney López ed., 2006). Professor Obasogie has recently expanded on the analysis in this chapter. See Osagie K. Obasogie, *The Constitution of Identity: Law and Race*, in *THE HANDBOOK OF LAW AND SOCIETY* 339 (Austin Sarat & Patricia Ewick eds., 2015). At a time when Professor Gómez and Professor Obasogie were discussing the lack of race-focused work in peer-reviewed journals, it is worth noting that Cincinnati Law Professor Emily Houh offered a similar critique of edited sociolegal manuscripts. See Emily M.S. Houh, *Still, at the Margins*, 40 *LAW & SOC’Y REV.* 481 (2006) (reviewing *THE SOCIAL ORGANIZATION OF LAW: INTRODUCTORY READINGS* (Austin Sarat ed., 2004) and criticizing the lack on CRT scholars within the collection and the failure of law and society scholars to more generally embrace CRT perspectives).

44. See *supra* notes 22–24 and accompanying text.

that is both theoretically sophisticated and empirically robust. That is to say, it is an opportunity to think about and measure race in new and exciting ways that builds upon the strengths of multiple disciplines to assess, document, and theoretically extrapolate the hidden ways in which not only law and society construct race, but the way that race constructs law and society.<sup>45</sup>

While the work of Professors Gómez and Obasogie was formative to what has come to be called e-CRT, other critical and sociolegal scholars have also referenced the potential of CRT and social science hybrid formations. For example, while I questioned his use of narrative in the piece,<sup>46</sup> in his 2009 presidential address, Law and Society President Richard Lempert also called for sociolegal scholars to take up the cause of racial equality in their research.<sup>47</sup> In other contexts, scholars contributed to expanding ties between critical and empirical work by establishing interdisciplinary institutional bodies, which foregrounded studies of race. The University of California Center for New Racial Studies—a multi-campus research program—was one such body. In addition to funding race-themed research by University of California graduate students and scholars from amongst all of the campuses,<sup>48</sup> it has also published emblematic work.<sup>49</sup> The potential synergy between CRT and other disciplines has also been embraced by senior CRT scholars. In 2011, in a piece reassessing the history, contributions, and future possibilities of CRT, movement co-founder Professor Kimberlé Williams Crenshaw wrote that the next phase for CRT will require it to embrace scholars from other disciplines. She noted, in particular,

Building on our own histories of synthesizing thematic frames within the interstices of competing ideological discourses, the potential for recreating the conditions of possibility today lie in identifying counterparts who, like critical race theorists, currently reside at the margins of a

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45. Obasogie, *supra* note 23, at 185.

46. See *infra* note 127 and accompanying text.

47. Richard Lempert, *A Personal Odyssey Toward a Theme: Race and Equality in the United States: 1948–2009*, 44 *LAW & SOC'Y REV.* 431 (2010).

48. The Center was only funded for a term of years and is no longer supplying grants. For information on its work, including the research proposals it funded, see U. CAL. CENTER FOR NEW RACIAL STUD., <http://www.uccnrs.ucsb.edu/> (last visited Apr. 28, 2016).

49. See, e.g., *THE NATION AND ITS PEOPLES: CITIZENS, DENIZENS, MIGRANTS* (John S.W. Park & Shannon Gleeson eds., 2014).

variety of different disciplines, who are in some ways lined up within and in other ways critical of the prevailing knowledge-producing conventions about race within their field of practice. What is needed is a crisp exchange of ideas, tools, histories and contemporary understandings from critical thinkers who are fully conversant with and able to deploy the conventions of their disciplines to explain how they contribute to racial hierarchy.<sup>50</sup>

Other critical scholars have expressed similar views that, moving forward, CRT scholars will need to engage with myriad disciplines and methods.<sup>51</sup>

While the call to collaborate has been clear, the specifics of those collaborations are somewhat ambiguous. Legal scholars such as Professors Gómez, Obasogie, and Carbado advocate that e-CRT should involve a mutually respectful structure I refer to as a “framing of equals,” under which the engagements between CRT and social science research would be understood as mutually beneficial.<sup>52</sup> Additionally, Professor Crenshaw indicated that CRT scholars reaching out to other disciplines should do so keeping CRT’s political commitments intact.<sup>53</sup> These formation calls did not, however, attempt to specify preferred types of collaborations between critical legal scholars and social scientists or articulate the components of the work to be considered within the e-CRT oeuvre.<sup>54</sup> It is for this reason that e-CRT—like CRT

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50. Crenshaw, *supra* note 25, at 1348–49.

51. Devon Carbado, for example, stated, “[T]he time is ripe for what one might call ‘Critical Race Empiricism’—that is, a methodological approach that would constitute an empirical intervention into CRT and a CRT intervention into empirical studies.” Carbado, *supra* note 30, at 1638; *see also* CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW (Gregory S. Parks et al. eds., 2010) (calling for law to more liberally borrow empirical findings from psychological studies); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (discussing “behavioral realism,” which applies psychological and cognitive research within law).

52. *See supra* notes 6, 35–43, 51 and accompanying text.

53. *See supra* note 50 and accompanying text.

54. By contrast, LatCrit, as part of its self-definition, prescribed necessary commitments to knowledge production and anti-subordination politics. On this point, founding scholars Francisco Valdes and Margaret Montoya have claimed,

In our view, the principal purpose of Latina/o legal studies must be to elucidate and disseminate suppressed knowledges that can help to facilitate this sort of social justice action. From our perspective, the point of situating Latinas/os at the epicenter of contemporary legal discourses must be to nudge along this intergenerational, international, and interdisciplinary struggle against historic supremacies and present hierarchies. As a matter of substance and principle, the LatCrit example, we hope, will help to nudge

itself—should be imagined as a fairly broad umbrella movement. To explore what e-CRT is, then, is not to instantiate an orthodoxy but to assess the work that has been done. One challenge that exists in discerning whether work is e-CRT is that, outside of articles within symposia grouped under the topic, it is not clear which articles touching upon race and social science should be included. Based on that challenge, a primary question to be explored must be what it means for scholars and work to respectively “do” and “be” e-CRT.

## II. CONSIDERING WHAT IT MEANS TO “DO” E-CRT

Given that the e-CRT project centers neither on a narrowly focused subject matter nor on a particular method but instead on a call for a type of mutually respectful engagement that produces a more searching consideration of race, it can be difficult to absolutely declare what work is definitively e-CRT.<sup>55</sup> For example, one might presumptively consider work that has appeared in e-CRT symposia to be, through self-identification, representative whether or not the pieces are widely interdisciplinary in nature or consider race in particular ways.<sup>56</sup> What other work should be included? Certain disciplines outside of law, for example, have wholly or partially embraced CRT as a means of internal critique,<sup>57</sup> and recently, scholars have considered more deliberate ways to introduce CRT across borders.<sup>58</sup> There is no

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Latina/o studies and actions in law and policy away from just another iteration of assimilationist self-interest politics-as-usual, and toward something new, something better, something more reasonably calculated to promote social justice through knowledge production and principled action.

Margaret E. Montoya & Francisco Valdes, “Latinas/os” and the Politics of Knowledge Production: *LatCrit Scholarship and Academic Activism as Social Justice Action*, 83 IND. L.J. 1197, 1201 (2008).

55. Scholars found a similar predicament to exist for CRT. See Gómez, *supra* note 35, at 454 (“[N]either what constitutes critical race theory nor which authors write from the perspective are self-evident; both questions are contested by people within the field and outside it.” (citation omitted)).

56. See *infra* notes 66, 67, 73, 75, 97 and accompanying text.

57. See Crenshaw, *supra* note 25, at 1256 (noting CRT has had an influence on “education, psychology, cultural studies, political science, and even philosophy” (citation omitted)). For over a decade, education has been an example of a discipline that has significantly embraced CRT. See CRITICAL RACE THEORY IN EDUCATION: ALL GOD’S CHILDREN GOT A SONG (Adrienne D. Dixon & Celia K. Rousseau eds., 2006); Gloria Ladson Billings, *Race . . . to the Top, Again: Comments on the Genealogy of Critical Race Theory*, 43 CONN. L. REV. 1439, 1452 (2011).

58. See, e.g., MATHIAS MÖSCHEL, LAW, LAWYERS AND RACE: CRITICAL RACE THEORY FROM THE UNITED STATES TO EUROPE (2014). In Australia, scholars have developed the Australian Critical Race and Whiteness Studies Association (ACRAWSA), which has borrowed the insight of U.S. CRT founders to advance a “body of scholarship which engages an interdisciplinary approach to critique and

reason such endeavors should not be included, but there has been little scholarly discussion of the breadth of the movement. By contrast, other work that both includes empirical studies and considers race in varied and sophisticated ways may claim no affiliation to the e-CRT movement. Is this work also e-CRT? I am not sure there is anyone who could answer this question. As e-CRT involves a loosely associated group of scholars with some similar intellectual commitments but no power to police group inclusion, the answer almost certainly must be, “maybe.” Though a researcher’s intent may not dictate how work is understood or embraced, no work should be co-opted by a scholarly project if that project includes even a thin ideological component. Therefore, if a researcher is not at least willing to minimally accept a movement’s important tenets, then inclusion should be suspect.<sup>59</sup>

#### A. *e-CRT and Collaborative Form as Method*

Just because there may be some difficulty in discerning which work belongs to the burgeoning e-CRT tradition does not mean that we are incapable of performing some interim assessment. Within and outside of e-CRT symposia, there has been scholarship over the last several years that draws on social science methods and critical race literatures. This work, by different configurations of scholars from law and other disciplines, has taken on widely disparate topics. Based upon that work, I wish to propose that at least four options or categories for “doing” e-CRT have emerged.<sup>60</sup>

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deconstruct the function of hegemonic whiteness in Anglo-Australian law.” Trish Luker & Jennifer Nielsen, *Editorial: Law Race and Whiteness*, 4 ACRAWSA E-J., no. 2, 2008, at 4, <http://www.acrawsa.org.au/files/ejournalfiles/editorials/10IntroductionLuker&Nielsen.pdf> (last visited Mar. 29, 2016).

59. The point here is that there are ways in which scholars could do interdisciplinary race work that would offend those advocating e-CRT. This was certainly the case with CRT, where some work on race, which included legal considerations, had nothing to do with the progressive and anti-racist approaches of CRT. See, e.g., DINESH D’SOUZA, *THE END OF RACISM* (1995); DAN FARBER & SUSANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997); JOHN MCWHORTER, JR., *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* (2001); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1999). For a criticism of some of the positions advanced by these and other conservative scholars, see MICHAEL BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 5–8, 132–42 (2003).

60. In a previous writing, I suggested that there were primarily two ways to “do” e-CRT—critical scholars leveraging empirical work and working alone or with empiricists to create research studies. See Mario L. Barnes, *Taking a Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovations in Self-Defense Laws*, 83 *FORDHAM L. REV.* 3179, 3185 (2015).

## 1. SOLO CROSS-DISCIPLINARIANS

Some e-CRT work is accomplished by scholars with training in empirical methods and a demonstrated awareness of CRT's tenets, methods, and political commitments<sup>61</sup> as solo cross-disciplinarians. These scholars are so named because, based on their training and knowledge, they conduct their own original empirical work without collaborators. The hallmark of the best work of these scholars is that

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61. While attempting to identify a fully representative set of premises would be difficult, some generally accepted CRT tenets have been identified. *See* OBASOGIE, *supra* note 27, at 190–99 (identifying the defining characteristics of CRT as a focus on race as socially constructed, defining the contours of intersectionality and anti-essentialism, and storytelling). Carbado and Roithmayr contributed the following list:

1. Racial inequality is hardwired into the fabric of our social and economic landscape.
2. Because racism exists at both the subconscious and conscious levels, the elimination of intentional racism would not eliminate racial inequality.
3. Racism intersects with other forms of inequality, such as classism, sexism, and homophobia.
4. Our racial past exerts contemporary effects.
5. Racial change occurs when the interests of white elites converge with the interests of the racially disempowered.
6. Race is a social construction whose meanings and effects are contingent and change over time.
7. The concept of color blindness in law and social policy and the argument for ostensibly race-neutral practices often serve to undermine the interests of people of color.
8. Immigration laws that restrict Asian and Mexican entry into the United States regulate the racial makeup of the nation and perpetuate the view that people of Asian and Latino descent are foreigners.
9. Racial stereotypes are ubiquitous in society and limit the opportunities of people of color.
10. The success of various policy initiatives often depends on whether the perceived beneficiaries are people of color.

Carbado & Roithmayr, *supra* note 18, at 151. This list has tenets in common with earlier articulations of CRT. *See also* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 *YALE L.J.* 1757, 1766–67 (2003) (discussing systemic racism, the dangers of colorblind racism, and understanding the potentially intersectional characteristics of oppression as core CRT tenets advanced in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (Francisco Valdes et al. eds., 2002)). As a general matter, CRT has been described by one of its co-founders as a movement committed to “transforming the relationship among race, racism, and power.” RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 2 (2001). A number of prominent CRT theories and commitments are discussed in the foreword to the second e-CRT symposium. *See* Kimani Paul-Emile, *Foreword: Critical Race Theory and Empirical Methods Conference*, 83 *FORDHAM L. REV.* 2953, 2955–57 (2015).

race is investigated in nuanced and innovative ways. Two notable scholars associated with e-CRT who have produced work of this ilk in recent years are Osagie Obasogie and Kaaryn Gustafson. Professor Obasogie conducted an empirical study that queried how the blind understand the concept of race. He found that race was so central as a social-organizing influence within the United States that related negative stereotypes are effectively communicated even to persons who were blind since birth.<sup>62</sup> Through interviews conducted with aid recipients outside of welfare offices, Gustafson's study explored how welfare policies, including rules criminalizing welfare fraud, disproportionately and negatively affect women of color.<sup>63</sup> Both of these scholars conducted empirical research that was attendant not only to how race shapes the phenomena they were studying but to the specific tenets of CRT.<sup>64</sup> Such a focus is a primary goal of e-CRT work.<sup>65</sup>

Solo cross-disciplinarians need not be JD/PhDs, just persons with both methodological training and familiarity with critical race discourses. For example, Temple University criminal justice scholar Nicole Gonzalez Van Cleve has no law degree but has been involved in the e-CRT working groups, and I would consider her a solo cross-disciplinarian. Her new book, from the Stanford University Press, *Crook County: Racism and Injustice in America's Largest Criminal Court*, which employs ethnography to explore racial abuses

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62. OBASOGIE, *supra* note 27.

63. See KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011). Another good example of this type of ethnographic e-CRT work is Boston University Law Professor Khiara Bridges's excellent work on the politicized and racialized aspects of pregnancy and birth. See KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION (2011).

64. GUSTAFSON, *supra* note 63, at 189–202; OBASOGIE, *supra* note 27, at 183–204. It should be noted that both books won the Herbert Jacob Book Prize from the Law and Society Association. For a list of Herbert Jacob Book Prize winners, see *Herbert Jacob Book Prize Winners*, LAW & SOC'Y ASS'N, [http://www.lawandsociety.org/prizes/jacob\\_winners.htm](http://www.lawandsociety.org/prizes/jacob_winners.htm) (last visited Mar. 28, 2016). While any list of this kind should be regarded as necessarily partial, another strong example of work by a researcher trained in law and empirical methods predated the formation of e-CRT. See LAURA BETH NIELSEN, LICENSE TO HARASS: LAW, HIERARCHY, AND OFFENSIVE PUBLIC SPEECH (2004) (While this work did not address CRT specifically, it included thoughtful and nuanced considerations of how race shaped the legal attitudes and legal consciousness of the study subjects with regard to First Amendment protections and enforcements.). Laura Beth Nielsen, however, has been a participant in e-CRT working groups and her more recent work fits well within the formal e-CRT project. See, e.g., Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 SO. CAL. L. REV. 313 (2012) (using an empirical study of federal employment discrimination cases to determine how identity affects judicial decision making).

65. See *infra* notes 81–90 and accompanying text.

within Cook County criminal courts, certainly qualifies as representative e-CRT work.<sup>66</sup> Solo cross-disciplinarians do, however, tend to be sociolegal or law-and-society scholars who give considerations of race greater primacy in their work.<sup>67</sup> It is no surprise, then, that other examples of such scholarship have been produced by scholars with significant ties to the Law and Society Association.<sup>68</sup>

While the solo cross-disciplinarian category works well for scholars trained and working at the intersection of law and social sciences, it is less clear to what extent it also covers race work not necessarily inclusive of CRT theories or race scholars trained and working more squarely within the humanities. More generally, there has been little discussion of whether e-CRT would embrace race work employing methods that are less empirically focused, such as literary

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66. NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* (2016). In the acknowledgments section of the book she references the importance of e-CRT to the project. *Id.* at 192. One could make a similar claim about the recent work of Ellen Berrey, another sociologist without a law degree, whose work interrogates the legal and social implications of racial diversity. *See* ELLEN BERREY, *THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE* (2015). There are other examples of non-JD/PhD solo cross-disciplinarian, whose primary discipline is law: Indiana Law Professor Victor Quintanilla is trained in law and policy but has designed and used empirical studies within his research. *See, e.g.*, Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011); Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 UC IRVINE L. REV. 187, 188 (2013); *see also* Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557 (example of a law professor conducting his own on-the-ground empirical research of black land loss through forced sales in the American South).

67. There are other such examples from the recent two e-CRT collections. *See* Ifeoma Ajunwa, *The Modern Day Scarlet Letter*, 83 FORDHAM L. REV. 2999, 3002–03 (2015); Meera E. Deo, *Faculty Insights on Educational Diversity*, 83 FORDHAM L. REV. 3115, 3117–18 (2015); Paul Gowder, *Critical Race Science and Critical Race Philosophy of Science*, 83 FORDHAM L. REV. 3155, 3157–58 (2015); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 UC IRVINE L. REV. 297, 300 (2013).

68. Obasogie, Gustafson, and Nielsen are long-time members and have served as trustees and officers within the Law and Society Association (LSA). Nicole Gonzalez Van Cleve is the co-chair of the LSA “Critical Research on Race and the Law” Collaborative Research Network, which organizes panels at each annual meeting. *See* 2016 - 2018 Trustees, LAW & SOC’Y ASS’N, <http://www.lawandsociety.org/officers/2018trustees.html> (last visited Apr. 28, 2016). Other similar sociolegal scholars who have produced solo cross-disciplinary e-CRT work include UCLA Law Professor and former LSA President Laura Gómez and Indiana University Law Professor and former LSA Treasurer Jeannine Bell. *See, e.g.*, LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* (2008); JEANNINE BELL, *HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING* 4 (2013).

critique or discourse analysis. The potential limits of e-CRT as an organizing structure will be discussed further below. For now, however, consider what it might mean to suggest that the life-changing work of towering figures such as W.E.B. Du Bois,<sup>69</sup> Toni Morrison,<sup>70</sup> Cornel West,<sup>71</sup> and James Baldwin<sup>72</sup> would not have been considered sufficiently empirical to be included within the developing e-CRT tradition.

## 2. FRUITFUL COLLABORATIONS

Fruitful collaboration may be the quintessential form of work that was expected when e-CRT was moved from theory into practice. After all, the working groups began by bringing critical scholars into contact with empiricists with the hope that insights and approaches would be shared and that joint projects could one day result. In early meetings, it was common to ask critical scholars to introduce and comment upon empirical work and social scientists to present and provide feedback on critical work. Fruitful collaborations, then, honor the fact that legal scholars may not always have the in-depth knowledge of methods that will be needed for significant projects. Similarly, empirical scholars may fail to design studies or interpret data in ways that are sensitive enough to capture phenomena that critical theories have explicated. Coming together in fruitful collaboration, legal scholars and social

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69. While Du Bois was the first African American to earn a PhD in sociology at Harvard, in 1895, some of his most important work was produced as essays and literary/cultural critique. *See, e.g.*, W.E. BURGHARDT DU BOIS, *THE SOULS OF BLACK FOLK* (1909); W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (Transaction Publishers 2013) (1935) (While it uses some post-war empirical data, the text is largely written as an essay.). Diversity between academic training and the form and content of published work exists in the modern scholarly circles as well. *See, e.g.*, JULIANNE MALVEAUX, *ARE WE BETTER OFF? RACE, OBAMA AND PUBLIC POLICY* (2016). Dr. Malveaux is an economist trained at MIT and former college president. *Id.* at ix. She, however, is also a public intellectual who more routinely publishes her social and political commentaries as columns and essays. *See, e.g.*, JULIANNE MALVEAUX, *WALL STREET, MAIN STREET AND THE SIDE STREET: A MAD ECONOMIST TAKES A STROLL* (1999) (a collection of her columns); Julianne Malveaux, *Race, Rage, and the Ace of Spades*, in *WHEN RACE BECOMES REAL: BLACK AND WHITE WRITERS CONFRONT THEIR PERSONAL HISTORIES* 101 (Bernestine Singley ed., 2002) (an essay exploring what it means to play the race card).

70. TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* (1992).

71. CORNEL WEST, *RACE MATTERS* (rev. ed. 2001).

72. JAMES BALDWIN, *NOTES OF A NATIVE SON* (Beacon Press 2012) (1955); JAMES BALDWIN, *THE FIRE NEXT TIME* (Vintage International 1993) (1962) (assessing the perils connected to America refusing to accept its fate as a multiracial nation).

scientists work together on projects that not only include multifaceted considerations of race but also employ empirical methods.

One such recent example is Wisconsin Law Professor Tonya Brito's ongoing and fascinating work with social scientists observing and documenting the contours of child support enforcement proceedings in multiple locations. An initial analysis of their data on how these proceedings construct race is included in the *Fordham Law Review* e-CRT collection.<sup>73</sup> Another example is work that my colleague UC Irvine Law Professor L. Song Richardson has conducted on policing and the deployment of suspicion heuristics with UCLA social psychologist Phil Goff.<sup>74</sup>

Fruitful collaborations, however, should not be thought to be simplistic configurations consisting of one legal scholar and one empiricist. From this and the past e-CRT collections, we see multiple examples of co-authoring involving persons from multiple disciplines, including law-trained scholars, who have at other times published as solo cross-disciplinarians.<sup>75</sup> The contribution of e-CRT seems to be that it presupposes, or at least encourages, dynamic and shifting partnering as part of representative projects. These partnerships not only encourage mutual respect for different kinds of knowledge<sup>76</sup> but also result in e-CRT being partially constructed as an inter-disciplinary and collective enterprise.

### 3. THEORY ENGAGERS

In the early working groups, a point of tension in the meetings was the assertion that empirical research presented an opportunity for critical scholars to test theories that had long been advanced. As Professor Kimani Paul-Emile asserted, the hopeful understanding of social scientists taking up CRT doctrines involved "the premise that the significant issues raised by CRT could be strengthened by increased

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73. Tonya L. Brito et al., "I Do for My Kids": *Negotiating Race and Racial Inequality in Family Court*, 83 *FORDHAM L. REV.* 3027, 3028–29 (2015) (the project brings together scholars from the areas of law, sociology, and social work).

74. L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 *IOWA L. REV.* 293, 295–96 (2012).

75. See, e.g., Ming Hsu Chen & Taeku Lee, *Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act*, 3 *UC IRVINE L. REV.* 359, 361 (2013); Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 *WIS. L. REV.* 541; Osagie K. Obasogie et al., *Race in the Life Sciences: An Empirical Assessment, 1950-2000*, 83 *FORDHAM L. REV.* 3089, 3092 (2015); Gregory S. Parks & Rashawn Ray, *Poetry as Evidence*, 3 *UC IRVINE L. REV.* 217, 220–21 (2013).

76. See *infra* notes 141, 143 and accompanying text.

reliance on social science research methods that quantitatively and qualitatively measure the structural inequities exposed through CRT analysis.”<sup>77</sup> A number of scholars, however, bristled at the idea that claims emanating from the lived experience of discrimination and subordination needed to be empirically verified. Moreover, these scholars certainly would not have shifted or abandoned their beliefs based on researchers asserting the claims could not be verified through empirical studies. It is for this reason that empirical studies of foundational CRT concepts, even when conducted by well-meaning and sympathetic researchers, have a potential to damage the delicate trust being built between critical and sociolegal scholars. This concern over disconfirming studies, however, ultimately neither derailed future working group meetings nor stalled the emergence of empirical studies seeking to explicate CRT principles.

Thus far, attempts by empiricists to engage CRT’s central theories or tenets have been modest. The one topic around which a number of studies have been conducted is intersectionality.<sup>78</sup> Within legal scholarship, Professor Kimberlé Crenshaw is widely regarded as introducing the significance of the concept.<sup>79</sup> Intersectionality was not just a theory designed to suggest the importance of seeing an individual’s identity as existing at the intersection of their race, gender, class, etc. Rather, the theory was about seeing discrimination as occurring through overlapping and reinforcing practices, where certain experiences—including but not limited to the experiences of black women and others inhabiting multiple identity categories—were largely left out of feminist and anti-discrimination discourses.<sup>80</sup>

In a number of recent studies of differing kinds, separate strands of intersectionality theory have been the subject of empirical inquiry. An early example of this empirical verification work was conducted by Rachel Kahn Best, Lauren Edelman, Linda Krieger, and Scott Eliason. They constructed a study assessing the effects of filing intersectional

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77. Paul-Emile, *supra* note 61, at 2957.

78. On the prevalence of intersectionality writing in CRT, see Gómez, *supra* note 35, at 462.

79. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 139, 140; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991) [hereinafter Crenshaw, *Mapping the Margins*].

80. See Kimberlé Crenshaw, *Why Intersectionality Can’t Wait*, WASH. POST (Sept. 24, 2015), <https://www.washingtonpost.com/news/in-theory/wp/2015/09/24/why-intersectionality-cant-wait/>.

claims within the employment context.<sup>81</sup> Unsurprisingly to critical scholars, using a multivariate regression analysis, the study found that persons making intersectional claims were disadvantaged. In fact, they were only half as likely to prevail as those that alleged a single basis of discrimination in employment cases.<sup>82</sup> Additional studies of intersectionality have been done by a political scientist, Ange-Marie Hancock, who did not give primacy to exploring “intersectionality as a testable explanation.”<sup>83</sup> Rather, Hancock has sought to investigate the “most appropriate way to empirically operationalize” the theory.<sup>84</sup> The research did so by shifting the focus from Crenshaw’s conception of intersectionality<sup>85</sup> to the more multidimensional variant of “paradigm intersectionality.”<sup>86</sup> In this collection, there is a new and broader engagement with intersectional analysis. In “Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement,”<sup>87</sup> Gwendolyn Leachman expands the engagement with intersectional theories to include feminist and CRT Scholar Angela Harris’s foundational work on antiessentialism.<sup>88</sup> In a piece that deftly brings CRT and sociolegal theories to bear, she “draw[s] on the institutional research in sociology to suggest a series of structural dynamics that may further explain the persistence of essentialism in LGBT civil rights agendas and the agendas of similar civil rights movements.”<sup>89</sup> Interestingly, she argues that intramovement marginalization by race (and other identity categories) arises out of “institutional and organizational mechanisms”<sup>90</sup> rather than individual insensitivities. The promising element of these particular examples of “theory engagers” is that, in testing or applying the CRT concept of

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81. Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC’Y REV. 991, 992 (2011).

82. *Id.* at 1009. The study also found that claimants who were both women and racial minorities experienced less success when filing claims. *Id.*

83. Ange-Marie Hancock, *Empirical Intersectionality: A Tale of Two Approaches*, 3 UC IRVINE L. REV. 259, 260 (2013).

84. *Id.*

85. Crenshaw, *Mapping the Margins*, *supra* note 79, at 1244 (“exploring the various ways in which race and gender intersect in shaping structural, political, and representational aspects of violence against women of color”).

86. Ange-Marie Hancock, *When Is Fear for One’s Life Race-Gendered? An Intersectional Analysis of the Bureau of Immigration Appeals’s* In RE A-R-C-G-Decision, 83 FORDHAM L. REV. 2977, 2981 (2015).

87. Gwendolyn M. Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement*, 2016 WIS. L. REV. 655.

88. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

89. Leachman, *supra* note 87, at 657.

90. *Id.* at 682.

intersectionality and building upon it, the social scientists have kept the elements of the theory intact. There also have been no outcomes suggesting that critical scholars need to rethink the theory or its operation.

As Leachman's article demonstrates, one need not create and conduct a study to test some CRT tenet in order to perform effective theory engagement. In an area other than intersectionality, work by Geoff Ward, in this current collection of articles, is also instructive. Trained as a sociologist, Ward has previously done excellent work on race and juvenile justice<sup>91</sup> and historical racial violence.<sup>92</sup> More recently, however, his work has particularly started to draw on the insights of CRT. In both his work on "slow violence"<sup>93</sup> and "Microclimates of Racial Meaning: Historical Racial Violence and Environmental Impacts,"<sup>94</sup> he addresses synergies between social sciences and CRT. Additionally, in the latter piece, he engages with CRT founder Richard Delgado's theory of "rotten social background" in his discussion of severe environmental deprivations.<sup>95</sup> In much the same way as the empiricists who engaged intersectionality theory, Ward's complementary incorporation of CRT work is likely to raise no concern from either critical scholars or social scientists. A critical moment of fissure may, however, arise in e-CRT when an engagement with a CRT principle or theory seeks to challenge or disprove it.<sup>96</sup> In other words, the strength of any enterprise is much more likely to be revealed in moments of contest rather than cooperation.

#### 4. EMPIRICAL DIVINERS

Finally, the fourth category identified here describes e-CRT scholars and projects that use existing empirical studies and research to enhance their theories and claims. While not necessarily trained in social science methods, these empirical diviners or dilettantes—depending on one's point of reference about the advisability of such

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91. GEOFF K. WARD, *THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE* (2012).

92. Nick Petersen & Geoff Ward, *The Transmission of Historical Racial Violence: Lynching, Civil Rights-Era Terror, and Contemporary Interracial Homicide*, 5 *RACE & JUST.* 114 (2015).

93. Geoff Ward, *The Slow Violence of State Organized Race Crime*, 19 *THEORETICAL CRIMINOLOGY* 299, 300 (2015) (describing the phrase "slow violence" as existing for victimization that is "attritional, dispersed, and hidden").

94. Geoff Ward, *Microclimates of Racial Meaning: Historical Racial Violence and Environmental Impacts*, 2016 *WIS. L. REV.* 575.

95. *Id.* at 622–24.

96. Carbado & Roithmayr, *supra* note 18, at 150.

work—seek to make sense of empirical findings within their projects. The engagement with social science research can range from narrow or strategic<sup>97</sup> to quite broad.<sup>98</sup> Much of the work I have done over my entire academic career, alone and with co-authors, has been of this nature.<sup>99</sup> This also covers quite a bit of work that appears in the two previously mentioned e-CRT symposia and this collection. A concern that arises for this group is whether they have the empirical training and sophistication necessary to understand the findings and potential limitations of a given study. For example, social scientists who are generally supportive of critical scholars drawing on empirical research have expressed the following concern with regard to psychological studies:

In their understandable eagerness to appropriate empirical evidence that bears the legitimizing authority of psychological science, perspectives like Critical Race Realism may turn a blind eye toward the racial positioning inherent in scientific theory and method.<sup>100</sup>

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97. Certain work, for example, uses social scientific theory as a background literature to foreground the author's explication. *See, e.g.*, DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014) (using analogies to monopolies and cartels and research on lock-in models, positive feedback loops, and social networks to explore her theory of persistent racial inequality); Barnes, *supra* note 2, at 948–51 (my own use of sociolegal research on legal consciousness as a comparator); Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 *FORDHAM L. REV.* 3211, 3213 (2015) (strategically employing distributional analysis in service to progressive criminal law scholarship); L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 *FORDHAM L. REV.* 2961, 2962 (2015) (using social cognition theories related to unconscious bias, stereotype threat, and masculinity threat to inform analysis of police behavior during stops).

98. In previous articles, co-authors and I heavily relied on empirical studies as critical to the theses advanced. *See* Mario L. Barnes & Robert S. Chang, *Analyzing Stops, Citations, and Searches in Washington and Beyond*, 35 *SEATTLE U. L. REV.* 673, 675 (2012) (analyzing seven years of police auto stop data compiled by the Washington State Police); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 *WIS. L. REV.* 1283, 1289–90 (heavily relying on resume studies conducted by Bertrand and Mullainathan to propose a model for rectifying proxy discrimination with employment discrimination); Barnes, *supra* note 60, at 3189–96 (analyzing all empirical studies of stand your ground laws available at the time to address the deterrence value and racial consequences of the statutes).

99. Barnes, *supra* note 60, at 3186 n.33 (listing all of my scholarship in which social science studies were considered).

100. Glenn Adams & Phia S. Salter, *A Critical Race Psychology Is Not Yet Born*, 43 *CONN. L. REV.* 1355, 1360 (2011). For consideration of these and other

It is for this reason that the training of solo cross-disciplinarians and partnerships with social scientists in fruitful collaborations present somewhat safer options. The potential weakness posed by empirical diviners, however, should be regarded as no greater than that which arises for theory engagers. While the e-CRT work accomplished by those in the former category may produce work that insufficiently appreciates or misapplies research findings, work conducted by those in the latter may create studies that are ill-attentive to how race is actually experienced.<sup>101</sup> If e-CRT is to stand as a true joining of equals, problems resulting from both types of fallacy should be regarded as similarly problematic.

*B. Giving Space to Initial Formations but with a Watchful Eye*

A number of significant questions remain about how e-CRT work is or should be “done.” First and foremost, there remains a content question. Ostensibly, there will be work that touches upon race and employs some empirical grounding that scholars involved in the project will not embrace as representative. Second, there are likely other acceptable e-CRT manifestations and permutations.<sup>102</sup> One relevant category not discussed more explicitly involves social scientists who are not necessarily steeped in CRT literatures but who nonetheless include thoughtful considerations of race within their work. Should this be considered e-CRT? In a recent issue of the *Law and Society Review*, I reviewed a wonderful book, *Pulled Over*, by University of Kansas scholars, that looks at over two thousand police stops in the Kansas

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challenges faced by those doing this form of e-CRT, see *infra* notes 134–135 and accompanying text.

101. See EDUARDO BONILLA-SILVA, *WHITE SUPREMACY & RACISM IN THE POST-CIVIL RIGHTS ERA* 9 (2001) (noting that for some who study race, “lack of a sophisticated understanding of how racism operates in the contemporary United States” and an overzealous commitment to methods may prevent a researcher from “correctly assessing the status of racial minorities.”). It would seem that the dangers of misinterpretation for both theory engagers and empirical diviners could be mitigated by e-CRT serving as a body to facilitate the review and exchange of work between critical scholars and social scientists.

102. These categories are designed to represent loose and shifting formations. Some work even involves parts of multiple categories. For example, recent work done by Indiana Law Professor Victor Quintanilla—previously used as an example of a solo cross-disciplinarian—is co-authored with a psychologist (a fruitful collaboration) and involves analysis not of original studies but of morality research conducted by others (empirical divining). See Victor D. Quintanilla & Cheryl R. Kaiser, *The Same-Actor Inference of Nondiscrimination: Moral Credentialing and the Psychological and Legal Licensing of Bias*, 104 CALIF. L. REV. 1, 9–11 (2016).

City metropolitan area.<sup>103</sup> This thoughtful exploration of racial profiling using multiple methods made a number of helpful findings. It noted that race mattered most in investigatory rather than public safety stops.<sup>104</sup> Looking at multiple factors for stops, the authors found that Blacks were most likely to be stopped, especially young, black men driving either recent model foreign luxury cars or older model domestic luxury brands in neighborhoods where they were presumed “out of place.”<sup>105</sup> Blacks were also treated more punitively during stops, even when controlling for socioeconomic class.<sup>106</sup> Importantly, the researchers conducted interviews with drivers who had been stopped, and these narratives depicted the starkly different and disrespectful ways black men were treated during stops.<sup>107</sup> Again, while none of the co-authors are avowed critical race scholars,<sup>108</sup> the project is especially sensitive to interactive effects of variables, including race of the driver.

Although it does not prominently engage CRT proper, is *Pulled Over* still e-CRT work? If so, why? What are the hallmarks and standards necessary to be included?<sup>109</sup> As suggested above, even if a

103. CHARLES R. EPP ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 1, 11–12 (2014) (using both quantitative and qualitative studies of multiple factors, including race, in an analysis of how race shapes police stops and citizenship).

104. *Id.* at 52–56.

105. *Id.* at 69–71.

106. *Id.* at 102.

107. *Id.* at 84–92.

108. The scholars are in the political science department and School of Public Affairs and Administration at the University of Kansas. While the scholars do not use CRT as a primary lens within the book, they do mention the significance of CRT and e-CRT in their methods section. *See id.* at 21 n.73 (citing the work on narrative by critical scholars Mario Barnes and Richard Delgado); *see also id.* at 23 n.81 (citing to the work of e-CRT founders Laura Gómez and Osagie Obasogie on the dangers of treating race in black-white binary terms).

109. On this question, consider the fact that quite of a bit of research in criminology and sociology includes questions of race without specifically engaging CRT. Even without a particular tie to CRT, it is likely that some of this research would be embraced by e-CRT. *See, e.g.*, VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* (2011); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2011); Jennifer Carlson, *The Equalizer? Crime, Vulnerability, and Gender in Pro-Gun Discourse*, 9 *FEMINIST CRIMINOLOGY* 59 (2014) (a thought-provoking exploration of how crime control and the social construction of crime not only produce racial disadvantage but also masculine privilege); Kathleen Daly & Michael Tonry, *Gender, Race, and Sentencing*, 22 *CRIME & JUST.* 201, 207 (1997) (describing how criminal justice statistical data include an essentialist understanding of racial/ethnic differences and often lack measures to gauge socioeconomic class); *see also* Petersen & Ward, *supra* note 92; Ward, *supra* note 94. Also, while I consider *The Enigma of Diversity*, BERREY, *supra* note 66, to include enough of an engagement with critical theory to be included within e-CRT, others might find that it is no more or less representative than *Pulled Over*, EPP ET AL., *supra* note 103. Whatever one thinks of

commitment to CRT is indicated, shall there be limits on which disciplines and methods are understood to belong to the enterprise?<sup>110</sup> While there are prescriptions from founding e-CRT scholars as to the mutual respect that should be involved in e-CRT engagements, there are no bright-line standards. As such, there is an argument to be made that, even though no critical scholar was involved and the authors were not themselves critical race scholars, *Pulled Over* should be considered e-CRT or at least e-CRT-adjacent. Perhaps the most significant factor to be considered in making this case is that the authors conclude that the race bias performed in police stops is not due to individual racism but instead to a group of “racially framed” institutional practices.<sup>111</sup> This crucial finding supports a central tenet of CRT related to institutional bias,<sup>112</sup> while nothing in the book raises skepticism with regard to its treatment of race.

As the *Pulled Over* example demonstrates, the categories of e-CRT knowledge production described herein are only partially representative of an enterprise that is evolving. There are likely to be other formations, but how—other than through the creation of work explicitly acknowledged by the e-CRT community as belonging to the tradition—will inclusion or representativeness be measured? The above described categories strike me as unobjectionable. Who, however, will vet or evaluate more troubling formations or projects? By what standards will they be measured? Even if future working groups or other interested parties create no formal framework, at some point, there will be a need to at least acknowledge informal understandings. Currently, there have been no insurmountably critical points of tension among scholars within e-CRT because the content and collaborations of e-CRT have been loose and inclusive. In the future, however, tensions may arise when calls for content analysis or methodological coherence are brought to the fore.<sup>113</sup> There may also be breaks over how race should be studied or which scholars’ visions of the project should occupy the center.<sup>114</sup> At

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the unresolved question of what constitutes e-CRT, both projects include the kind of nuanced consideration of race at the heart of the call for e-CRT’s formation.

110. See *supra* notes 69–72 and accompanying text.

111. EPP ET AL., *supra* note 103, at 12.

112. Carbado & Roithmayr, *supra* note 18, at 157–58.

113. We saw just such a contested moment in the development of LatCrit. See Keith Aoki & Kevin Johnson, *An Assessment of LatCrit Theory Ten Years After*, 83 IND. L.J. 1151, 1157–59, 1195 (2008). For a response to this critique, see Montoya & Valdes, *supra* note 54, at 1200–01, 1229.

114. See, e.g., Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397, 398 (noting how discussions of racism can become obscured in environments where well-meaning individuals use analogy to place other forms of discrimination at the center of the dialogue); Athena D. Mutua,

this point, the wisest course of action would be to provide e-CRT time and space to continue to evolve, with the understanding that both hard questions and hard-fought compromises may be a part of the movement's future.

### III. CHALLENGES

While the projects and formations that have been part of laying the e-CRT foundation thus far have been varied, it would be naïve to imagine this work has produced no concerns. As an enterprise built at the cross-section of a progressive scholarly tradition and social science disciplines, it is only logical that disputes over e-CRT, however small, would develop on both sides of the intersection. I next consider a range of concerns that are broadly evocative of critical and sociolegal perspectives. Alongside these concerns, I add my own comments on the potential for certain points of difference to destabilize the project. Much like the categories of doing e-CRT work considered above, these potential challenges should be regarded as initial, partial, and contingent concerns for a dynamic and still-forming movement.

#### A. Critical Commentaries

Among critical scholars, in a recent article, UCLA Law Professor Devon Carbado and USC Law Professor Daria Roithmayr have taken the lead in turning a searching eye toward assessing a potential marriage between CRT and social sciences.<sup>115</sup> In particular, they argue that broadly embracing social science methods poses some risks for CRT. First, Carbado and Roithmayr argue that critical scholars have significantly challenged claims to neutrality and objectivity that may be undermined by relying on research methods or findings.<sup>116</sup> Second,

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*Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177, 1177, 1179, 1216–17 (1999) (discussing how to maintain progressive scholarly movements composed of disparate interests).

115. Carbado & Roithmayr, *supra* note 18. First, the authors note that commentators have asserted, “[F]oundational principles of social science are potentially at odds with foundational principles of CRT.” *Id.* at 155 (citation omitted). The authors, however, focus most of their attention on quantitative social science methodologies. *Id.* at 150.

116. *Id.* at 156–57. In particular, critical scholars have argued about the differences resulting from using “first-person” versus “third-person” observations about the world. Jerome M. Culp, Jr., Angela P. Harris & Francisco Valdes, *Subject Unrest*, 55 STAN. L. REV. 2435, 2436–37 (2003) (“The questions presented by scientific observation are not dependent on who is doing the observing. For critical race theory, however . . . questions, perceptions, and priorities change drastically in the

scholars of CRT have concerned themselves with legal frameworks and how they can tend to instantiate disadvantage. The legal frameworks of intentional discrimination and colorblindness are provided as examples of ostensibly neutral considerations within equal protection analysis, which actually serve the ends of bias.<sup>117</sup> According to Carbado and Roithmayr, “social science is subject to a similar framework critique,” which has resulted historically in “social science and its classifications . . . serv[ing] the ideology of white supremacy and the political project of racial segregation and exclusion.”<sup>118</sup> Finally, a schism may exist between CRT’s focus on racial disparities being produced through structural inequality and models within social science that focus more on individual behavior as the primary source of racial bias.<sup>119</sup>

As members of past e-CRT working groups, Carbado’s and Roithmayr’s experiences within these spaces inform their very helpful insights into the current status of the project. Other critiques of CRT reaching out to other disciplines, including my own, predated or were simultaneous to the rise of e-CRT. For example, in the year the first e-CRT working group met, UCLA Law Dean Emerita Rachel Moran commented on the disconnect between CRT and the social sciences.<sup>120</sup> Specifically, she noted, that critical scholars “pointedly rejected social scientists’ claims to objectivity and neutrality, equating their methodology with a positivism that did little more than reinforce the status quo.”<sup>121</sup> This rejection is premised upon beliefs about race<sup>122</sup> that “reduce[] the relevance of empirical inquiry by evoking absolutes on each side.”<sup>123</sup> In an earlier piece exploring the possibility of greater synergies between CRT and law and economics, in particular, Devon

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realm of subordination as we shift in perspective from observer to observed” (citation omitted)).

117. Carbado & Roithmayr, *supra* note 18, at 157.

118. *Id.* at 158.

119. *Id.* at 159.

120. Rachel F. Moran, *What Counts as Knowledge? A Reflection on Race, Social Science, and the Law*, 44 *LAW & SOC’Y REV.* 515, 522 (2010).

121. *Id.* at 522 (citation omitted).

122. She describes those beliefs as a “dialectic on race” composed of the following commitments:

The Critical Race Theory (CRT) movement in turn has adopted an explicitly oppositionalist stance, treating pervasive racism and intractable racial self-interest as foundational assumptions. CRT treats these postulates as givens, in part because of its self-consciously political project to resist racism. Rather than subject these claims to empirical verification, critical race scholars have made heavy use of narrative, a technique that relies on first-person accounts to reveal the victim’s perspective.

*Id.* at 545–46 (citation omitted).

123. *Id.* at 546.

Carbado and Mitu Gulati, criticized the limitations of both movements.<sup>124</sup> The authors raised as a primary criticism, an issue they later addressed in their own work, that “CRT often ignores the racial productivity of the ‘choices’ people of color make about how to present themselves as racialized persons.”<sup>125</sup>

As for my own concerns, they too suggest that the e-CRT project still has some potential issues to work through. First, even as I called, in 2006, for narrative to be a point of synergy between CRT and the sociolegal scholarship, I also recognized there were dangers attendant in uncritically adopting methods across disciplines. This is especially true for narrative methodology, which has occupied a central locality in CRT discourses.<sup>126</sup> In 2010, in a response I wrote to Richard Lempert’s Law and Society presidential address, I identified such an issue. Professor Lempert included four personal stories in his speech that discussed race in ways that could be viewed as somewhat problematic from a CRT perspective.<sup>127</sup> Moreover, his choice to deploy narrative—which I indicated has been strongly criticized when used by critical

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124. Carbado & Gulati, *supra* note 61. For example, the authors criticized law and economics for ignoring Laura Gómez’s warning regarding treating race as an independent variable and the “failure of its proponents to conceptualize racial discrimination in the workplace as a dialectical process within which race both shapes, and is shaped by, workplace culture.” *Id.* at 1758–59. CRT was similarly criticized, in part, for paying “little attention to the workplace as a site of racial construction.” *Id.* at 1759. Of note, the authors give credit to an earlier article for espousing a commonality between CRT and law and economics. *Id.* at 1761 (citing Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996)).

125. *Id.* at 1760. The authors addressed the construction of race in the workplace through various modes of identity performance in a series of articles that are now published as a book. DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN “POST-RACIAL” AMERICA* (2013). Interestingly, at least one of the authors has described *Acting White* as merging CRT and work from the social sciences. See Carbado & Roithmayr, *supra* note 18, at 162 (The book is described as using “organizational theory, sociology, economics, and social psychology to argue that racial judgments are based in part on how black a person is perceived to be.”).

126. OBASOGIE, *supra* note 27, at 197 (“Critical Race Theory has also been distinguished by its methodological contribution of telling stories—those that are fictitious, drawn from personal experiences, or otherwise—as a way to make broader claims about the nature of race and racism in contemporary society.”); Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby – LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1630–32 (1997); Rachel Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2378–79 (2003); Moran, *supra* note 120, at 546. *But see* Carbado & Roithmayr, *supra* note 18, at 161 (“Storytelling is not necessarily an essential component of CRT (although some CRT scholars would disagree on this point).” (citation omitted)).

127. Barnes, *supra* note 20, at 475–79.

scholars<sup>128</sup>—was not challenged by other reviewers.<sup>129</sup> My critique hence suggested that, just as mastering social science methods requires work by critical scholars, social scientists should study both the history and central premises of CRT<sup>130</sup> prior to engaging in race discourses.<sup>131</sup>

Second, beyond problems related to the use of specific methods, there are possibilities for disagreements to arise. Moving forward, adopting standards for collaborative work may ultimately result in stand-offs where decisions will have to be made about how to handle data or research results that do not support CRT theories or tenets. As the studies of intersectionality presented above suggest, there have been no significant controversies of this type. Not until projects experience a substantial disjuncture between theory and data will better information exist on whether the project is sustainable.<sup>132</sup> A conflict of this type strikes me as representing more than a minor stumbling block. Despite what often should be considered as measured findings,<sup>133</sup> empirical research and outcomes are valorized and viewed as nearly infallible by some. This is true even though data are not self-interpreting.<sup>134</sup> It is difficult to surmise, then, whether researchers would be open to having

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128. *See id.* at 472; *see also* Carbado & Roithmayr, *supra* note 18, at 161 (surmising, “[T]he critique of CRT’s use of storytelling remains common . . . . Indeed, it often anchors the claim that CRT is intellectually deficient, if not bankrupt.”).

129. Ralph Richard Banks, *Commentary on Professor Lempert’s Presidential Address*, 44 *LAW & SOC’Y REV.* 463 (2010); Jeannine Bell, *The Personal, the Political, and Race*, 44 *LAW & SOC’Y REV.* 487 (2010); Kitty Calavita, *The Struggle for Racial Justice: The Personal, the Political, and . . . the Economic*, 44 *LAW & SOC’Y REV.* 495 (2010); Malcolm M. Feeley, *The Personal and the Professional: Assessing the Ambivalent Commitment to Racial Justice in the United States*, 44 *LAW & SOC’Y REV.* 503 (2010).

130. *See* Barnes, *supra* note 20, at 472–73.

131. *Id.*

132. For example, had Rachel Kahn Best et al., determined that there was no empirical proof of the costs of intersectionality to employment discrimination claims, it is doubtful that feminist and critical scholars would have abandoned the theory of intersectionality. Some such scholars, however, likely would have abandoned e-CRT. *See supra* notes 81–82 and accompanying text.

133. *See* Gary Gutting, *What Do Scientific Studies Show?*, *N.Y. TIMES* (Apr. 25, 2013, 8:00 PM), <http://opinionator.blogs.nytimes.com/2013/04/25/what-do-scientific-studies-show/>.

134. CRT co-founder Richard Delgado made this very point in his foreword to a collection of Critical Race Realism writings. Richard Delgado, *Foreword* to *CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW*, *supra* note 51, at xi, xii (“Scientific findings . . . rarely speak for themselves; they require an act of interpretation.”); *see also* Carbado & Roithmayr, *supra* note 18, at 158–59 (suggesting that social science is susceptible to an “interpretation of facts critique”—a critique that “focuses on the way in which the language and theoretical method used to frame an inquiry shape not just the observer’s interpretation of facts but also what the observer perceives to be a fact in the first place.”); *infra* note 146 and accompanying text.

their study designs and results challenged based on what critical scholars believe they know about themselves and the world (however anecdotal). Additionally, even critical scholars generally inclined to trust in the robustness of empirical findings are likely to maintain some skepticism of research methods and outcomes based on a history where scientific research, old and new, has been a tool for propping up racist treatment and ideas.<sup>135</sup>

### B. *The Sociolegal Critique*

Critical scholars are not the only ones to have raised issues about collaborating across disciplines. In their foreword to the 2005 “New Legal Realism Symposium” in the *Wisconsin Law Review*, a group of scholars cautioned that it was imprudent to think easy connections could be maintained across vastly different fields.<sup>136</sup> Speaking both of collaborative projects among social sciences and between social sciences and the law, they claimed parties must remain mindful that “there are important differences of epistemology, methods, operating assumptions and overall goals” that must be addressed.<sup>137</sup>

Some helpful insights can also be found in the work of scholars who are critics of empirical methods more generally. For example, in the introduction to Tukufu Zuberi’s and Eduardo Bonilla-Silva’s edited collection *White Logic, White Methods*, the editors assert that white ideological methodology has tainted almost all aspects of social science research.<sup>138</sup> Consistent with the collection’s theme, they define *white logic* as “a context in which White supremacy has defined the techniques and process of reasoning about social facts”<sup>139</sup> and *white methods* as “practical tools used to manufacture empirical data and analysis to support the racial stratification in society.”<sup>140</sup> The authors are also critical of their own discipline, sociology, finding that

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135. See, e.g., DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY 26–49 (2011); HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT *passim* (2006); Eduardo Bonilla-Silva & Tukufu Zuberi, *Introduction to WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY* 3, 16 (Tukufu Zuberi & Eduardo Bonilla-Silva eds., 2008) (“[T]he physical and social sciences have actively aided in the development of racial stratification as a scientifically legitimate and socially acceptable concept.”).

136. Howard Erlanger et al., *Foreword: Is Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 336, 363.

137. *Id.* at 336.

138. Bonilla-Silva & Zuberi, *supra* note 135, at 15–20.

139. *Id.* at 17.

140. *Id.* at 18.

because the social sciences were part of what Foucault labeled “the sciences of Man,” the knowledge they produced was implicated in the “matrix of domination” (the race, class, gender, and sexual order of things) and fundamentally geared toward “social control.” Hence, from the beginning, sociology—as all the social sciences—produced knowledge about “Others” (workers, people of color, gays and lesbians, etc.) as deviants . . . .<sup>141</sup>

The authors are not completely convinced that the problem of racialized methods is fatal. In fact, they seem to be arguing for attention being paid to context, as they assert that “all scientific endeavors transpire in a world where race, gender, and class are important not only as subjects for investigation, but as structural factors that partly shape researchers and their scientific gaze.”<sup>142</sup> They, however, do call for a specific intervention, which they describe as a “deracialization of our research methods.”<sup>143</sup> Deracialization is described as a social act involving a “modification of social reality” that “privileges the human over the racialized individual.”<sup>144</sup> Embracing deracialization is one method for undermining the racial knowledge derived of white methods, but the ultimate goal is to “decolonize our own sociological imagination; to unlearn received truths about race, ‘racial relations,’ and race research.”<sup>145</sup> Their intervention, however, also still calls for us to be mindful of our potential impact as researchers:

The misuse of methods in the study of race demands our attention. This issue needs deliberate conscious study; we must analyze and provide answers. By recognizing that the researcher is as important as what they study we enhance our ability to contribute to an understanding of society.<sup>146</sup>

Tukufu Zuberi, separately, has spoken specifically to the link between critical theories and social science.<sup>147</sup> He believes a great

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141. Tukufu Zuberi & Eduardo Bonilla-Silva, *Telling the Real Tale of the Hunt: Toward a Race Conscious Sociology of Racial Stratification*, in *WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY*, *supra* note 135, at 329, 330 (footnote omitted) (citations omitted).

142. Bonilla-Silva & Zuberi, *supra* note 135, at 18.

143. Zuberi & Bonilla-Silva, *supra* note 141, at 336.

144. *Id.* at 337.

145. *Id.* at 338 (citation omitted).

146. Bonilla-Silva & Zuberi, *supra* note 135, at 12.

147. Tukufu Zuberi, *Critical Race Theory of Society*, 43 *CONN. L. REV.* 1573, 1575 (2011) (describing his project as “consider[ing] the tradition of critical theories of

number of social scientists conduct their research without seriously considering the implications of race. The resulting studies, then, “often only produce statistics of racial differences, which are used to justify continued racial stratification and denying the humanity of non-Whites.”<sup>148</sup> He, however, does not suggest that there is no hope to rectify this situation. Rather, he posits the need for “[c]ritical social scientists on racial matters [to] provide data, arguments, counter-narratives, and all sorts of intellectual ammunition against dominant representations of racial groups and racial inequality.”<sup>149</sup> This goal is obviously consistent with e-CRT. Whether it can be accomplished remains to be seen.

Finally, some of the risks for e-CRT are related to dangers that exist for anyone conducting or reviewing empirical data with or without a racial component. Sometimes the phenomenon or processes being studied are difficult to measure. For example, D.C. Circuit Judge and New York University Law Professor Harry T. Edwards has questioned the accuracy and efficacy of empirical studies of the effects of extralegal factors on certain judicial decisions.<sup>150</sup> Given the messiness of race, this may also be true for some e-CRT studies. Additionally, in a recent comment about a paper he and Adam Chilton will publish in the *Journal of Legal Studies*, Omri Ben-Shahar claimed that testing legal ideas by looking at data is a welcome growing trend in legal scholarship, but it is also known to carry risks of according authority to dubious and poorly tested claims.<sup>151</sup> Many consumers of published

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race in the social sciences, and how this tradition might be related to the CRT movement that developed in the law”).

148. See *id.* at 1580 (citing TUKUFU ZUBERI, *THICKER THAN BLOOD: HOW RACIAL STATISTICS LIE* 106 (2001)).

149. *Id.* at 1589. He also calls for the social sciences to be more open to critical perspectives:

More recently, scholars have begun to undermine the scientific claims of the social sciences generally by engaging in both the methodological and theoretical dimensions of the disciplines. This critique is also reflected in the theoretical work represented by stratification economics, liberation sociology, Black feminist thought, racial critical theory, and racial formation. These perspectives share a view that modern society must be understood in a broader context than that established by the acceptance of traditional explanations.

*Id.* at 1584–85 (footnotes omitted).

150. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 *DUKE L.J.* 1895, 1905–10 (2009).

151. The comments were posted as introductory remarks to a paper abstract on a popular legal scholarship blog at Ben-Shahar’s request. See Brian Leiter, *Credibility of Empirical Legal Scholarship*, *BRIAN LEITER’S L. SCH. REP.* (Oct. 7, 2015), <http://leiterlawschool.typepad.com/leiter/2015/10/credibility-of-empirical-legal->

empirical scholarship are not adequately trained in empirical sciences to read the reported results critically—results that often pass only lax peer review (if any at all). If these researchers are correct, then their claims are relevant to e-CRT, as well. The concern about law-trained scholars (i.e., empirical diviners) using social science in their work is that they may lack the sophistication to understand it fully. Taken to its logical conclusion, the Ben-Shahar and Chilton description of empirical work, if accurate, may support a proposition that no e-CRT work should be conducted without someone trained in methods being a part of the collaboration.

#### CONCLUSION

*Historically, “[w]omen and people of color might be the objects of study,” but they were “[not] part of the mainstream of the social sciences.” As marginalized scholars, women and people of color often engaged the academy as agents of change. They were concerned with challenging the existing hierarchies and with transforming the perspectives of the social scientists themselves. I make this point so that we recognize that CRT existed before it was named.*

—Tukufu Zuberi<sup>152</sup>

Before there was e-CRT, there was CRT. Like CRT, the creation of e-CRT was facilitated through a series of meetings where values, commitments, and goals for the enterprise were discussed and made a part of the movement’s scholarship. As a function of these meetings and resulting scholarship specifically tied to the conversations that took place, e-CRT now formally exists. Its tenets, however, have not been fully articulated and there are no processes currently in place to pronounce which work is sufficiently representative. Moreover, there has been no decision as to whether there should be an entity that polices the boundaries of this growing movement or e-CRT should just be

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scholarship.html. The paper to which he is referring, titled “‘Best Practices’ in the Design of Privacy Disclosures: An Experimental Test,” is proffered as an attempt to improve the credibility of empirical legal research. Omri Ben-Shahar & Adam Chilton, “Best Practices” in the Design of Privacy Disclosures: An Experimental Test (Oct. 5, 2015) (unpublished manuscript), available at <http://ssrn.com/abstract=2670115>.

152. Zuberi, *supra* note 147, at 1577 (alterations in original) (footnotes omitted) (quoting Tukufu Zuberi, *Sociology and the African Diaspora Experience*, in *A COMPANION TO AFRICAN-AMERICAN STUDIES* 246, 246 (Lewis R. Gordon & Jane Anna Gordon eds., 2006)).

satisfied to be a movement that provides a “big tent.”<sup>153</sup> At this time, all that can be said is that the movement and resulting scholarship persists. At some point, however, conflicts related to content and collaboration will materialize. When there are disagreements, the viability of e-CRT will turn on twin concepts of trust and respect. Not until scholars across discipline-specific aisles respect each other’s commitments and trust each other’s motivations and methods will e-CRT reach stability. Until that stasis occurs, e-CRT may simply be another name for CRT with an occasional dalliance into social science. My hope, however, is that the movement, the methods used, and the work produced grow and become more sophisticated. The best hope for the movement to thrive is to construct what it means to “do” e-CRT as more open than insular, more contextual than fixed, and more collaborative than separate.

Despite any concerns about the project’s efficacy, and consistent with the Tukufu Zuberi’s statement above,<sup>154</sup> even without further working groups or adoption of any precise governing standards, what we now call e-CRT is likely to continue to exist because it always existed in some form, even before it was so named. There has always been interdisciplinary exchange between legal scholars and scholars from other disciplines, which resulted in projects thoughtfully considering race. The goal of e-CRT is to shape those interdisciplinary engagements in a manner that values the insights of CRT and the benefits to be gained from leveraging social science methods. If supportive scholars can do so in a way that honors shared goals and involves sensitivity to, and mutual respect for, differences, the work that comes out of e-CRT may go a long way toward altering how race is understood within this country’s intellectual, political, and social imagination.

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153. This was, according to CRT co-founder Kimberlé Crenshaw, a question that also animated debates among CRT’s organizers. See Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or “A Foot in a Closing Door,”* 49 UCLA L. REV. 1343, 1362–63 (2002) (“Some participants framed the issue as a conflict over whether CRT would have a theoretical ‘line’ or whether as a safe space, it was a big tent open to all comers.”).

154. See *supra* note 152 and accompanying text.