

## RACE AND GENDER IN THE *LAW REVIEW*

*Cynthia Grant Bowman,\* Dorothy Roberts\*\* & Leonard S. Rubinowitz\*\*\**

A number of years ago a noted historian of the American West, Patricia Limerick, addressed the plenary session of the Association of American Law Schools.<sup>1</sup> In her speech, she described how the received history of the West consisted of a narrative in which explorers like Lewis and Clark entered and discovered a vast empty territory. This account was, of course, inaccurate; as Limerick pointed out, the West was populated before the explorers arrived, just not with folks like them. And, she noted, how much more interesting the story has become since we can now see that empty land as populated with diverse peoples.

As important, the traditional narrative obscured the bloody reality of extermination, enslavement, and domination by white settlers that placed them in a position to construct an official history.<sup>2</sup> It deleted as well the resistance of the peoples the settlers tried to subjugate. The story has become both less noble and more complicated once contested by the perspectives of people of color.

Law review literature followed a similar pattern. When you glance back one hundred years, as we have done in preparing for this symposium, the contents of Northwestern's law review reflect a territory inhabited only by white males and their legal problems. Gradually, however, the other populations that have been there all along appear in its pages—African Americans first, then women, then people of color in whom a variety of characteristics intersect, and finally persons of differing sexual orientations. Their appearance initially was provoked by changes in the legal environment, such as the decision in *Brown v. Board of Education* and the passage

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\* Professor of Law and of Gender Studies, Northwestern University School of Law. Professor Bowman would like to thank Judge Elaine Bucklo and Professor Herma Hill Kay for their information about the "old days," and Rachel Julis and Laura Straus for their assistance with research.

\*\* Kirkland & Ellis Professor of Law, Northwestern University School of Law; Faculty Fellow, Institute for Policy Research. Thanks to Haile Arrindell and Laura Straus for excellent research assistance and to the Kirkland & Ellis Research Fund for support.

\*\*\* Professor of Law, Northwestern University School of Law. Thanks to Brett Miller for excellent research assistance.

<sup>1</sup> Patricia Nelson Limerick, Address at the Association of American Law Schools Annual Meeting (Jan. 8, 1993).

<sup>2</sup> See Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

of the Civil Rights Acts; but once they had been acknowledged as appropriate subjects for legal research, a flowering of theory and analysis ensued.

This Essay tells the story of the discovery of race and gender in the pages of the *Northwestern University Law Review* (“the *Law Review*”). It is not a story of theory leading practice. Indeed, the work of activists pursuing social change was the initial impulse for the development of theoretical work on these issues. Now, however, both race and gender are recognized as important themes in the law. The addition of these topics has profoundly affected and improved legal theory, which is today far more complex and nuanced than the men who originally established the *Law Review* would have dreamed.

Because of the critical, and continuing, link between real-world activism on issues of race and gender and academic writing about those issues, our discussion will be set in the historical context that led to the development of theory and, in turn, was influenced by it. We begin by discussing, in Part I, the injection of issues of race into the *Law Review*, against the background of the struggle for civil rights in the United States. Part II then traces the introduction of discussions of gender and sexual orientation. Part III describes the development of critical race theory and critical race feminism, highlighting their virtual absence from these pages. Critical race theorists contested liberal notions of racial progress that dominated civil rights discourse as well as mainstream feminists’ failure to see the intersection of racism and sexism in structures of power. Although the *Law Review* discovered the existence of diverse peoples and included articles *about* them, it has for the most part failed to include their uniquely critical perspective, reflected in critical race theory. This scholarly lacuna highlights the importance of going beyond the analysis of discrimination using traditional legal tools to challenge the central role legal reasoning and institutions have played in perpetuating inequality.

## I. RACE

### A. *The First Half-Century*

When the first volume (1906–1907) of what was then called the *Illinois Law Review* included an article on slavery, that did not signal the beginning of a trend.<sup>3</sup> In the next half-century, the *Law Review* paid little attention to racial questions. When it did so, the arguments and analyses often reflected

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<sup>3</sup> The article discussed Abraham Lincoln’s representation of a Kentucky slave owner who had brought a slave family to Illinois, a free state, in 1845 and then sought to take the family back to Kentucky as slaves, in 1847. The author sought to defend Lincoln’s defense of the slave owner by suggesting that Lincoln argued for his client only on procedural grounds, and, when asked by the judge for his substantive view, Lincoln replied that the family should be declared to be free because their owner had brought them to Illinois. Duncan T. McIntyre, *Lincoln and the Matson Slave Case*, 1 ILL. L. REV. 386 (1907).

the law and ideology of the time, and therefore were as likely to seem egregiously racist to modern sensibilities as to reflect more enlightened views on race.

When the *Illinois Law Review* began publishing a decade after *Plessy v. Ferguson*,<sup>4</sup> it joined the national chorus of silence about that decision.<sup>5</sup> While the journal's lack of attention to *Plessy* may have stemmed in part from its early emphasis on Illinois state law issues, the gap also reflected the fact that the case received little public or scholarly attention for many years after the Supreme Court spoke. The decision that came to be seen as a key symbol of our national shame of racial subordination passed largely unnoticed at the time—a sign of the deeply embedded nature of the racism it reflected.

In fact, the main mention of *Plessy* in the early decades of the *Illinois Law Review* came in a 1926 article by Northwestern Professor Andrew A. Bruce, discussing racial zoning by private contract.<sup>6</sup> Bruce cited *Plessy* as part of the legal context of segregation within which he considered restraints on alienation and restraints on use. He argued against restraints on alienation and in favor of the permissibility of restraints on use—including the exclusion of Blacks from living in white neighborhoods—using *Plessy* to provide support for his argument.<sup>7</sup>

Consistent with much of the thought and rhetoric of the time, the author suggested that the consequence of Blacks moving into white neighborhoods was

usually, and almost inevitably, not merely a lessening of property values but a constant irritation and ultimate moving out of the original inhabitants who are unwilling to have colored neighbors and above all to send their children to the neighborhood district public schools where the children of all classes and nationalities mingle and congregate.<sup>8</sup>

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<sup>4</sup> 163 U.S. 537 (1896).

<sup>5</sup> There was little comment about *Plessy* by scholars and others until the 1940s. Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in CONSTITUTIONAL LAW STORIES 181, 216 (Michael C. Dorf ed., 2004).

<sup>6</sup> Andrew A. Bruce, *Racial Zoning by Private Contract in the Light of the Constitutions and the Rule Against Restraints on Alienation*, 21 ILL. L. REV. 704 (1927).

<sup>7</sup> *Id.* at 711. “Black” is capitalized whenever it refers to Black people, in order to indicate that Blacks, or African Americans, are a specific cultural group with its own history, traditions, experience, and identity—not just people of a particular color. Using the uppercase letter signifies recognition of the culture, as it does with Latinos, Asian Americans, or Native Americans. See MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY (2003); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

<sup>8</sup> Bruce, *supra* note 6, at 704.

He argued that private agreements to restrict use on a racial basis would aid free alienation because “the fear of a negro invasion materially interferes with the profitable sale of almost every homesite.”<sup>9</sup>

Even earlier, in its Editorial Notes, the *Law Review* reported favorably on the resolution of a question of racial exclusion that was before the American Bar Association (“ABA”) in 1912.<sup>10</sup> The Executive Committee had elected three Black members without knowledge of their race. When their race became apparent, southern members protested and the Executive Committee sought to revoke the Blacks’ membership. The *Law Review* commented favorably on the ABA’s racially tainted resolution of this controversy:

That as it has never been contemplated that members of the colored race should become members of this Association, the several local councils are directed, if at any time any of them shall recommend a person of the colored race for membership, to accompany the recommendation with a statement of the fact that he is of such race.<sup>11</sup>

The *Law Review* concluded that it was quite proper that racial information be provided so that future elections could proceed with full knowledge of the relevant facts.<sup>12</sup> The editorial also applauded the “fine spirit” of the Black member who resigned because he had been elected without the members having knowledge of all the relevant facts.<sup>13</sup> In taking this position, the *Law Review* reflected the racial norms of the times and aligned itself with the dominant view within the legal establishment.<sup>14</sup>

While racial discrimination was at times condoned in the pages of the *Law Review*, on other occasions race remained invisible in discussions of topics where a substantial discussion of race might have been expected. A 1918 article, *Justice Holmes and the Fourteenth Amendment*, paid only brief attention to racial discrimination and did not mention *Plessy*.<sup>15</sup> Almost two decades later, in a tribute to Justice Roger Brooke Taney, Dean Acheson did not discuss *Dred Scott*, the Justice’s best known and most notorious opinion.<sup>16</sup> Instead, Acheson referred to that decision only by implication, in the first paragraph of the article, as an unfortunate departure from

<sup>9</sup> *Id.* at 716. Bruce analogized restrictions on Black entry to the prohibition of the sale or use of liquor in an area, since both have “a marked and beneficial tendency to attract purchasers to a residential district.” *Id.*

<sup>10</sup> *The American Bar Association Meeting*, 7 ILL. L. REV. 177, 179 (1912).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> It was not until 1943 that the ABA resolved that “membership in the American Bar Association is not dependent upon race, creed, or color.” 68 A.B.A. REP. 109–10, 168 (1943).

<sup>15</sup> Fletcher Dobyns, *Justice Holmes and the Fourteenth Amendment*, 13 ILL. L. REV. 71 (1918).

<sup>16</sup> Dean G. Acheson, *Roger Brooke Taney: Notes upon Judicial Self Restraint*, 31 ILL. L. REV. 705 (1937).

his otherwise exemplary record of judicial self-restraint—the focus of the article.<sup>17</sup> Even an article on President Truman’s civil rights program said little about race.<sup>18</sup>

In contrast, several student comments in the *Law Review*’s first half-century reflected a more enlightened view on racial matters. As early as 1913–1914, a commentator criticized an Illinois Supreme Court decision permitting a cemetery to discriminate based on race.<sup>19</sup> Similarly, a student case note a decade later criticized a California court’s decision holding valid a racially restrictive covenant.<sup>20</sup> The note argued that the covenant was an impermissible restraint on alienation. Moreover, in the 1930s, two students criticized the United States Supreme Court for leaving claims of racial discrimination in jury selection to the state courts of the South to resolve.<sup>21</sup>

For much of its first half-century, the *Northwestern University Law Review* had “Illinois” in its title and focused substantially on legal developments in the state. Yet it paid relatively little attention to the racial questions that emerged in the state, such as pervasive housing discrimination. Challenges to various aspects of racial exclusion from neighborhoods and communities resulted in significant decisions in state and federal courts, including the United States Supreme Court’s restrictive covenant case, *Hansberry v. Lee*.<sup>22</sup> Like most law schools’ scholarly journals of the time, Northwestern’s law review did not publish any articles about these developments.

The *Law Review*’s first half-century of publication also failed to address important racial questions that arose in the federal courts, the Con-

<sup>17</sup> By way of an apparent apology for Taney, Acheson suggested that

[i]t is the irony of fate that for three-quarters of a century the accepted conception of Roger Brooke Taney has been based upon the occasion when, yielding to the temptation, always disastrous, to save the country, he put aside the judicial self-restraint which was his great contribution to the law and custom of the Constitution.

*Id.* at 705.

<sup>18</sup> Charles Wallace Collins, *Constitutional Aspects of the Truman Civil Rights Program*, 44 ILL. L. REV. 1 (1949). It focused instead on arguing that Truman’s proposals to have the federal government protect individuals’ rights—whatever those rights might be and whoever might be protected—constituted an unconstitutional intrusion into states’ rights.

<sup>19</sup> Alfred W. Bays, *Cemeteries—Discrimination Against Negroes*, 8 ILL. L. REV. 208 (1913). The comment included a reasoned argument challenging the Court’s analysis, as well as an eloquent statement about the injustice of this form of discrimination.

<sup>20</sup> Recent Case, *Conveyances—Restraints Against Alienation to Negroes*, 20 ILL. L. REV. 723 (1925).

<sup>21</sup> Alfred J. Cilella & Irwin J. Kaplan, Comment, *Discrimination Against Negroes in Jury Service*, 29 ILL. L. REV. 498 (1934). The authors characterized the Supreme Court as having “washed its hands of the whole question and transferred its duty of enforcement to the state authorities, who in the light of racial antagonism in the South cannot be expected to be overzealous in the enforcement of the negroes’ right to serve on juries.” *Id.* at 504. They recognized that, “[i]n all fairness, it should be pointed out that negro discrimination is not peculiarly a southern problem.” *Id.* at 499 n.3.

<sup>22</sup> 311 U.S. 32 (1940).

gress, and the executive branch. For several decades, the NAACP and subsequently the NAACP Legal Defense Fund (“LDF”) engaged in a litigation campaign focused on school segregation that resulted in a number of significant decisions by the Supreme Court.<sup>23</sup> A series of successful challenges to racial exclusion by state law schools and segregation within a state graduate school<sup>24</sup> laid the groundwork for civil rights lawyers to embark on a frontal assault on state-imposed segregation in public schools.<sup>25</sup> In the same period, the Supreme Court decided a series of cases involving exclusion of Blacks from the electoral process—the so-called Texas white primary cases;<sup>26</sup> a case holding unconstitutional the judicial enforcement of racially restrictive covenants;<sup>27</sup> and challenges to racial discrimination in the criminal justice system.<sup>28</sup>

The World War II Japanese internment cases represent still another important missed opportunity.<sup>29</sup> In particular, *Korematsu v. United States*, which both established the “strict scrutiny” test in racial discrimination cases and found that the federal government passed this test in interning 120,000 Japanese Americans, received no attention in the *Law Review* at the time.

In addition to largely ignoring significant judicial activity, the *Law Review* during its first half-century paid little attention to the role of Congress and the executive branch in struggles for racial equality. While Congress did not enact any civil rights legislation between 1875 and 1957, civil rights activists—especially the NAACP—pressed that body to address racial discrimination.<sup>30</sup> Much of the lobbying was part of a long, unsuccessful effort to secure federal antilynching legislation, in order to combat the lynchings

<sup>23</sup> The first case was filed in state court in Maryland on behalf of a Black applicant who was denied admission to the University of Maryland Law School because of his race. The Maryland Supreme Court ordered his admission to the law school. *Pearson v. Murray*, 182 A. 590, 594 (Md. 1936); see also MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 11, 14–15 (1994). See generally RICHARD KLUGER, SIMPLE JUSTICE (1976).

<sup>24</sup> See *McLauren v. Okla. State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

<sup>25</sup> In a post-*Brown* article in the *Law Review*, Loyola of New Orleans Law School Dean A.E. Papale referred to this process as the “chipping away” at *Plessy*. A.E. Papale, *Judicial Enforcement of Desegregation: Its Problems and Limitations*, 52 NW. U. L. REV. 301, 306–08 (1957).

<sup>26</sup> See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Nixon v. Herndon*, 273 U.S. 536 (1927). In 1959, a student piece in the *Law Review* discussed these cases as part of a student civil rights symposium. *Elections and Voting Rights*, 54 NW. U. L. REV. 367 (1959).

<sup>27</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>28</sup> *Shepherd v. Florida*, 341 U.S. 50 (1951); *Norris v. Alabama*, 294 U.S. 587 (1935); *Powell v. Alabama*, 287 U.S. 45 (1932); *Moore v. Dempsey*, 209 U.S. 86 (1923).

<sup>29</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

<sup>30</sup> DENTON L. WATSON, LION IN THE LOBBY: CLARENCE MITCHELL, JR.’S STRUGGLE FOR THE PASSAGE OF CIVIL RIGHTS LAWS (2002).

of thousands of Blacks in the South in the first half of the century—with virtually no prosecution of the perpetrators in state courts.<sup>31</sup>

While the executive branch took initiatives to address racial discrimination only sporadically, these efforts also merited comment and analysis by law reviews. Threatened with a massive march on Washington during World War II, President Franklin D. Roosevelt issued an executive order banning racial discrimination by federal defense contractors—thus increasing opportunities for employment of Blacks in those industries.<sup>32</sup> Later, President Truman ordered the racial integration of the armed forces, another significant step on the racial front.<sup>33</sup> None of this activity was discussed in the *Law Review*.

Moreover, if Blacks were barely present in the *Law Review*'s landscape during its first fifty years, other people of color—Asian Americans, Latinos, and Native Americans—were absent entirely. Of course, the *Law Review* had a great deal of company in this regard, in both the scholarly world and the dominant culture.

The first issue of Volume 51 of the *Law Review* (March–April, 1956) began with a congratulatory statement on the *Review*'s 50th anniversary by Chief Justice Earl Warren.<sup>34</sup> The Chief Justice took note of the importance of law reviews to the judiciary in influencing judicial thought. He praised the *Northwestern University Law Review* for its “spirit of critical examination and inquiry, of careful scholarship and devotion to the law . . . .”<sup>35</sup> If the Chief Justice had wanted to identify specific topics that the *Review* had examined carefully over the previous half-century, the burning issues of race would not have merited a place on that list.

### B. The Second Half-Century

The *Law Review*'s 50th anniversary issue also featured comments by Kenneth F. Burgess, President of Northwestern's Board of Trustees, on the role of the law review.<sup>36</sup> He suggested “that the law review renders its greatest contribution when its editors select for discussion those legal issues which have the greatest general interest . . . .”<sup>37</sup> His first example of a subject with “national interest” was the segregation cases.<sup>38</sup> Whether his ad-

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<sup>31</sup> The United States Senate recently issued an apology for failing to pass antilynching legislation. Sheryl Gay Stolberg, *The Senate Apologizes, Mostly*, N.Y. TIMES, June 19, 2005, § 4, at 43.

<sup>32</sup> Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941). Roosevelt also established a Fair Employment Practices Committee (“FEPC”) to monitor implementation of the executive order.

<sup>33</sup> Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

<sup>34</sup> Earl Warren, Preface, *The Northwestern University Law Review Begins Its Fifty-First Year of Publication*, 51 NW. U. L. REV. 1 (1956).

<sup>35</sup> *Id.*

<sup>36</sup> Kenneth F. Burgess, *Law Reviews and the Practicing Lawyer*, 51 NW. U. L. REV. 10 (1956).

<sup>37</sup> *Id.* at 11.

<sup>38</sup> *Id.*

monition is to be taken as prescription or prophecy, shortly after the celebration of its first half-century of publication, discussions of race began to appear on the pages of the *Law Review* in a much more significant way.

The *Northwestern University Law Review* began its second half-century at a time of great civil rights ferment, in the courts, in the streets, and to a lesser extent, in Congress. Not surprisingly, in light of the prominence of *Brown v. Board of Education*, educational inequality received the most attention in the *Law Review*; but other race matters were also examined in scholars' articles and student comments—including race consciousness, housing, economic opportunity, and public accommodations.

In 1959, early in the *Law Review*'s second half-century, the student editors organized a symposium on civil rights law that seemed to suggest that they understood the interrelated nature of the aspects of the system of racial subordination. The symposium consisted of student comments on a broad range of civil rights issues, including federal civil rights legislation,<sup>39</sup> school desegregation,<sup>40</sup> voting rights,<sup>41</sup> federally guaranteed civil rights (public facilities, housing, and transportation),<sup>42</sup> and freedom of association for civil rights organizations.<sup>43</sup> In the introduction to the symposium, the editors acknowledged the courts' critical and difficult role in addressing the problem of "racial supremacy," as well as the initial stirrings in Congress to address civil rights issues for the first time in three-quarters of a century. The symposium set the stage for the significantly increased attention the *Law Review* would pay to racial questions over the following decades.<sup>44</sup>

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<sup>39</sup> *Federal Civil Rights Legislation*, 54 NW. U. L. REV. 332 (1959).

<sup>40</sup> *Racial Desegregation of Public Schools: Application of the Principles of Brown v. Bd. of Educ.*, 54 NW. U. L. REV. 348 (1959); *State Efforts to Circumvent Desegregation: Private Schools, Pupil Placement, and Geographic Segregation*, 54 NW. U. L. REV. 354 (1959).

<sup>41</sup> *Elections and Voting Rights*, *supra* note 26.

<sup>42</sup> *Publicly-Owned Facilities, Housing, and Transportation: Federally Guaranteed Civil Rights*, 54 NW. U. L. REV. 377 (1959).

<sup>43</sup> *Group Action: Civil Rights and Freedom of Association*, 54 NW. U. L. REV. 390 (1959).

<sup>44</sup> Within a few years of the symposium, Northwestern University School of Law offered its first civil rights course taught by Professor Dawn Clark Netsch, who started the race relations course shortly after joining her alma mater's faculty in 1965. The class focused on the Supreme Court's historical role, including the infamous *Dred Scott* decision, *Brown* and the developing Fourteenth Amendment case law, and then-current local civil rights issues, such as the exploitation of Black home buyers in Chicago that led to the Contract Buyers League litigation. *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210 (N.D. Ill. 1969).

The first civil rights course in the country is said to have been taught by James Nabrit, Jr. at Howard University. Nabrit had been the only African American in the Northwestern University Law School Class of 1927, an Honor Student and the first Black at the school to be elected to the Order of the Coif. J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944*, at 349 (1993). Nabrit went on to become dean of Howard Law School, President of Howard University, and a key participant in the civil rights litigation of the NAACP and the NAACP Legal Defense Fund. Telephone Interview by Professor Leonard Rubinowitz with Seth Kronemer, Archivist, Howard Law School (Jan. 11, 2005). However, it was decades before Civil Rights became a staple of the law schools' curriculum.

1. *Education.*—*Brown* triggered as many questions as it answered. Those questions occupied the pages of the *Law Review* in a sustained way over the half-century following the decision.<sup>45</sup> The *Law Review*'s scholarship about race and education exhibited several patterns: (1) it addressed a wide variety of the critical theoretical and practical questions that arose in the fifty years after *Brown*; (2) it made extensive use of empirical data—both quantitative and qualitative—to test the propositions advanced; and (3) it often challenged the conventional wisdom of the time. The *Law Review* thus made a substantial contribution to our knowledge about legal remedies for racial inequality in education.

The post-*Brown* issues included, inter alia, remedy, implementation, violations in the North, and equalization across school districts. Each received attention in the *Law Review*. In *Brown II*, the Supreme Court issued a vague desegregation mandate and assigned the responsibility to district courts to determine what constituted an acceptable desegregation plan.<sup>46</sup> The Court largely left matters in the hands of the district judges until the late 1960s and early 1970s, when it began to spell out the reach and limitations of district courts' remedial powers.<sup>47</sup> In the next few years, the *Law Review* published two articles on school desegregation remedies. Leonard Strickman argued for a definition of the violation in school desegregation cases that permitted certain kinds of interdistrict remedies, notwithstanding the constraints the Court had imposed on this kind of relief in the *Milliken* case.<sup>48</sup> Stephen Kanner sought to explain and rationalize the Court's "controlling principle" concerning the relationship between the violation and the remedy in school desegregation and other equal protection cases.<sup>49</sup>

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Moreover, major casebooks on the law of race did not generally appear until the 1970s. The first edition of Derrick Bell's *Race, Racism, and American Law* in 1973 quickly became the standard text in civil rights courses and was used by Professor Rubinowitz for several years after he succeeded Professors Netsch and Thomas Todd in teaching the course in 1975.

<sup>45</sup> The *Law Review* did not join the scholarly debates that took place in the aftermath of *Brown* about the correctness and the persuasiveness of the decision. See generally Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). However, in a 1979 *Law Review* article, Raoul Berger reiterated his argument that the legislative history of the Fourteenth Amendment demonstrated that the framers did not intend to prohibit school segregation. Raoul Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U. L. REV. 311, 326–31 (1979). The debate about the opinion itself continued with the publication in 2001 of a book in which a number of leading scholars wrote hypothetical opinions in the case. WHAT "BROWN V. BOARD OF EDUCATION" SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001).

<sup>46</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

<sup>47</sup> See *Milliken v. Bradley*, 418 U.S. 717 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

<sup>48</sup> Leonard P. Strickman, *School Desegregation at the Crossroads*, 70 NW. U. L. REV. 725 (1975).

<sup>49</sup> Stephen Barrett Kanner, *From Denver to Dayton: The Development of a Theory of Equal Protection Remedies*, 72 NW. U. L. REV. 382 (1977).

Whatever school desegregation remedies courts adopted, implementation constituted a major challenge.<sup>50</sup> Several articles in the *Law Review* addressed this issue—two focusing on the very early stages of implementation and a third addressing questions related to the termination of decrees decades after *Brown*. In 1957, Dean A.E. Papale of Loyola Law School of New Orleans took note of the opposition that had already arisen to desegregation and made a plea to southern political leaders to be realistic about the future and proceed with peaceful integration pursuant to the Supreme Court's mandate.<sup>51</sup> Decades later, Davison M. Douglas analyzed the early desegregation experience in North Carolina, a state that had not pursued a strategy of complete resistance to the Supreme Court's decision. Douglas argued that the moderate rhetoric employed by North Carolina officials enabled the state to minimize both actual integration and the economic costs incurred by states that acted in open defiance of the Court's mandate.<sup>52</sup>

In a 2000 article, Wendy Parker examined the extent to which school desegregation cases were ending, which might have sounded the death knell for this litigation.<sup>53</sup> She found that in spite of several Supreme Court decisions in the 1990s that discussed the prerequisites for terminating desegregation litigation, there was little movement by defendants to end their cases.<sup>54</sup> Parker concluded that court-ordered desegregation was alive, but not well, since many cases were languishing and in need of more active judicial involvement to achieve their original purposes.

With remedies adopted and implementation stagnating in the South in the 1950s and early 1960s, civil rights lawyers and the courts also turned their attention to school segregation in the North. *Brown* applied directly only to states where state statutes or constitutional provisions required or permitted public school segregation.<sup>55</sup> No such formal rules governed school attendance in the North, yet many school systems experienced a high degree of racial segregation at mid-century.

It was not until its 1973 decision in *Keyes* that the Supreme Court found that *de jure* segregation could exist as a result of school board policies and practices.<sup>56</sup> However, a decade earlier, the *Law Review* published a

<sup>50</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 72–93 (1991).

<sup>51</sup> Papale, *supra* note 25, at 318. The article was based on a Rosenthal lecture that Dean Papale presented at the Law School in the 1956–57 academic year. This is an annual lecture series at Northwestern, funded by the Julius Rosenthal Foundation. Publication of the lectures has contributed to legal scholarship for more than seventy years.

<sup>52</sup> Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. U. L. REV. 92 (1994).

<sup>53</sup> Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157 (2000).

<sup>54</sup> *Id.* at 1162–78 (discussing *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991)).

<sup>55</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 (1954).

<sup>56</sup> *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

series of three articles by John Kaplan examining school desegregation litigation in the North.<sup>57</sup> Two of the articles focused on specific cases—from Gary, Indiana and New Rochelle, New York, an integrated community outside New York City. The third article focused on the northern problem more generally. In these articles, Kaplan probed the facts of northern school segregation and suggested the kind of complicated legal analysis that was necessary to make constitutional determinations in these cases.<sup>58</sup>

Along with pursuing desegregation, activists interested in educational opportunity turned to litigation seeking to achieve “equalization” across school districts. Although these cases focused most directly on wealth inequality, they had important racial implications. After the Supreme Court found no constitutional violation in the existence of vast disparities in resources among a state’s school districts in *San Antonio Independent School District v. Rodriguez*<sup>59</sup> in 1973, proponents of school finance equalization turned to state courts and legislatures to achieve their goals. In a 1976 article in the *Law Review*, Edward A. Zelinsky argued that proponents’ state school aid formulas for reducing disparities would be counterproductive because they favored middle-class suburbs over central cities.<sup>60</sup> He urged revising the formulas to emphasize poverty, in order to ensure that funds would be distributed to more urbanized communities.

Twenty-five years later, Denise Morgan took a different tack on the school finance litigation. She argued that disparities in school funding constituted a form of systemic racial discrimination because disparities in resources caused racial disparities in educational outcomes.<sup>61</sup> Remedies under Title VI of the 1964 Civil Rights Act therefore should include educational initiatives that research has shown to have a positive impact on student achievement, such as smaller class size and smaller schools.<sup>62</sup>

The *Law Review*’s scholarship related to race and education was marked by a heavy emphasis on both quantitative and qualitative empirical research. Zelinsky’s article on educational equalization applied a variety of state aid formulas to Connecticut school districts in order to reach the conclusion that the school districts with the largest population of poor and mi-

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<sup>57</sup> John Kaplan, *Segregation Litigation and the Schools—Part I: The New Rochelle Experience*, 58 NW. U. L. REV. 1 (1963); John Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. U. L. REV. 157 (1963); John Kaplan, *Segregation Litigation and the Schools—Part III: The Gary Litigation*, 59 NW. U. L. REV. 121 (1964). Kaplan taught at Northwestern when he began these articles and moved on to a long career at Stanford Law School during that period.

<sup>58</sup> Since much of the discussion of the limits on courts’ remedial powers came in northern cases, Kanner discussed the northern cases that followed *Keyes*. Kanner, *supra* note 49.

<sup>59</sup> 411 U.S. 1 (1973).

<sup>60</sup> Edward A. Zelinsky, *Educational Equalization and Suburban Sprawl: Subsidizing the Suburbs Through School Finance Reform*, 71 NW. U. L. REV. 161 (1976).

<sup>61</sup> Denise C. Morgan, *The New School Finance Litigation: Acknowledging that Race Discrimination in Public Education Is More than Just a Tort*, 96 NW. U. L. REV. 99 (2001).

<sup>62</sup> *Id.* at 188.

nority people—Bridgeport, Hartford, and New Haven—would be “losers” under each of those formulas.<sup>63</sup> Parker carried out a very substantial quantitative analysis of school desegregation cases to determine the status of those cases and the extent to which efforts had been made to terminate them or to move them toward the relief to which plaintiffs were entitled.<sup>64</sup>

On the qualitative side, Kaplan undertook significant research on the communities and the school districts in Gary and New Rochelle as part of his exploration of the desegregation litigation in those communities.<sup>65</sup> Similarly, Douglas examined the desegregation experience of North Carolina in depth to analyze the impact of the use of moderate rhetoric in response to *Brown*.<sup>66</sup>

Finally, several of the education articles challenged the conventional wisdom of the time. While most research on “massive resistance” made no distinctions among southern states’ strategies, Douglas argued that there were significant differences among the states in their responses, and that those differences had important outcomes for the states involved.<sup>67</sup> Zelinsky’s analysis of the impact of state aid formulas directly confronted the widely shared view among equalization proponents that their formulas would accomplish their purpose.<sup>68</sup> Moreover, Parker’s analysis of the status of desegregation cases put the lie to the consensus that the Supreme Court’s termination decisions made desegregation remedies a thing of the past.

2. *Race Consciousness*.—The Supreme Court first addressed the legality of state-sponsored affirmative action in the *Bakke* case in 1978, upholding a challenge to the University of California at Davis Medical School’s use of racial/ethnic quotas in its admissions process.<sup>69</sup> More than a decade earlier, well before the term “affirmative action” came into vogue, the *Northwestern University Law Review* published an article by Kaplan that anticipated much of the debate that has garnered so much attention since that time.<sup>70</sup> His 1966 article, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, was one of the first in-depth examinations of this complex and controversial subject.<sup>71</sup> Kaplan discussed many of the theoretical and practical arguments in sup-

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<sup>63</sup> Zelinsky, *supra* note 60.

<sup>64</sup> Parker, *supra* note 53.

<sup>65</sup> See *supra* note 57.

<sup>66</sup> Douglas, *supra* note 52.

<sup>67</sup> For example, North Carolina’s reputation as a “moderate” state on race helped it attract industry and develop economically. *Id.* at 96.

<sup>68</sup> Zelinsky, *supra* note 60, at 203.

<sup>69</sup> Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

<sup>70</sup> John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—the Problem of Special Treatment*, 61 NW. U. L. REV. 363 (1966).

<sup>71</sup> *Id.*

port of, and in opposition to, the use of racial preferences in three important areas of social life—employment, housing, and education.

The debate about race consciousness surfaced periodically in the *Law Review*. In a 2004 symposium on the Rehnquist Court, Nelson Lund<sup>72</sup> strongly criticized the Court's continued approval of race-conscious admissions in higher education in the 2003 *Grutter* decision.<sup>73</sup> Lund suggested that the precedent to which *Grutter* bore "the greatest formal resemblance" was *Plessy*, because both decisions deferred to what the Justices deemed to be "reasonable" measures to achieve goals that proponents viewed as important to society.<sup>74</sup>

In contrast, Christopher Bracey's review essay of economist Glen Loury's book, *The Anatomy of Racial Inequality*, took as its starting point that color blindness did not characterize the American past or present.<sup>75</sup> Bracey ended by supporting Loury's call for race-conscious measures to address the pervasive racial disparities resulting in part from deeply embedded racial stereotyping.<sup>76</sup>

3. *Housing*.—While housing discrimination is closely related to the problem of educational inequality, housing received far less attention in the *Law Review* in its second half-century. During that time, the *Law Review*'s entire body of work on housing consisted of an article by Professor Leonard Rubinowitz, one of the authors of this piece, and Elizabeth Trosman, and three substantial student comments.<sup>77</sup> Each of these papers owes a debt to Kaplan's early article on race consciousness, since they propose race-conscious measures to achieve goals of expanding "choice" for Blacks in seeking housing or achieving residential racial integration. Each argues for race consciousness as a way of remedying the effects of racially discrimina-

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<sup>72</sup> Nelson Lund, *The Rehnquist Court's Pragmatic Approach to Civil Rights*, 99 NW. U. L. REV. 249, 279–87 (2004).

<sup>73</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>74</sup> Lund, *supra* note 72, at 283–85.

<sup>75</sup> In a 1998 article, Stephen Siegel argued that an originalist analysis shows that the Constitution did not bar the federal government from enacting affirmative action statutes, such as the one the Supreme Court had struck down in the *Adarand* case. Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>76</sup> Christopher A. Bracey, *Thinking Race, Making Nation*, 97 NW. U. L. REV. 911 (2003). As Bracey pointed out, Loury had been a longtime outspoken opponent of race consciousness and a theoretician of color blindness. This book represented a major change in Loury's thinking about race in America.

<sup>77</sup> Leonard S. Rubinowitz & Elizabeth Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*, 74 NW. U. L. REV. 491 (1979); David Blair-Loy, Comment, *A Time to Pull Down, and a Time to Build Up: The Constitutionality of Rebuilding Illegally Segregated Public Housing*, 88 NW. U. L. REV. 1537 (1994); Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874 (1988); Joseph Seliga, Comment, *Gautreaux a Generation Later: Remediating the Second Ghetto or Creating the Third?*, 94 NW. U. L. REV. 1049 (2000).

tory policies and practices—public, private, or both—that have long characterized metropolitan housing markets.

The Rubinowitz and Trosman article analyzed the provision in the 1968 federal Fair Housing Act that requires the United States Department of Housing and Urban Development to administer its programs affirmatively to further fair housing.<sup>78</sup> The authors argued that this mandate requires race-conscious efforts to provide home ownership opportunities for Black home seekers on a broader geographical basis than had been available in the past.<sup>79</sup> Richard Sander's comment emphasized racial integration rather than expanded options for Blacks as the goal of housing reform and proposed several race-conscious measures designed to produce stable integration.<sup>80</sup> He suggested that, in addition to the conventional explanations focusing on racial discrimination and income disparities, there is a dynamic process that perpetuates segregation.

The other two student comments examined remedial aspects at different points in the life of Chicago's forty-year-old landmark public housing desegregation case—the *Gautreaux* case.<sup>81</sup> While this case has been the subject of voluminous literature, these comments examined aspects of the case that had not been fully explored previously.<sup>82</sup> Each proposed race-conscious remedies that seemed both principled and pragmatic to the respective authors in light of the circumstances at the time they were writing. In 1994, David Blair-Loy argued that it would be unconstitutional to rehabilitate the existing segregated public housing without having in place other initiatives to provide public housing residents with opportunities to move into predominantly white areas.<sup>83</sup> By 2000, much of Chicago's public housing had been demolished, and much of his argument had become moot. In revisiting the remedial possibilities at that point, Joseph Seliga argued that both redevelopment of public housing sites and mobility initiatives should be employed to produce racial integration and avoid creating another ghetto.<sup>84</sup>

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<sup>78</sup> 42 U.S.C. § 3601 (2000).

<sup>79</sup> Rubinowitz & Trosman, *supra* note 77, at 615.

<sup>80</sup> Sander, *supra* note 77, at 919–21.

<sup>81</sup> *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969), *order outlining the remedy*, 304 F. Supp. 736 (N.D. Ill. 1969); *see also Hills v. Gautreaux*, 425 U.S. 284 (1976).

<sup>82</sup> *See generally* LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* (2000). The lead counsel for the plaintiffs has written a memoir of the case. *See* ALEXANDER POLIKOFF, *WAITING FOR GAUTREAU* (forthcoming Jan. 2006). Stephen Barrett Kanner discusses *Gautreaux* through the Supreme Court's examination of the remedial powers of the district court. Kanner, *supra* note 49, at 395–403. Richard H. Sander also discusses *Gautreaux* as he searches for models of the kind of mobility he proposes. Sander, *supra* note 77, at 907–13, 917–21.

<sup>83</sup> Blair-Loy, *supra* note 77.

<sup>84</sup> Seliga, *supra* note 77.

4. *Economic Opportunity*.—The Civil Rights Movement of mid-century and the Civil Rights Act of 1964 addressed racial discrimination in employment in all kinds and levels of jobs. Once again, the focus was largely on the South although employment discrimination was widespread throughout the country. With time, a broader understanding of economic opportunity and wealth disparities broadened the agenda to include entrepreneurial opportunities and access to other forms of wealth, including home ownership.

A few articles in the *Law Review* addressed important but isolated aspects of economic inequality. In 2001, Thomas Mitchell pushed the scholarly envelope by examining a problem facing southern Blacks that had received little attention in the law reviews—the dispossession of land from African-American families. While the United States had never made good on its Reconstruction-era promise of “forty acres and a mule” for former slaves, many Blacks had managed to acquire farm land in the rural South in the late nineteenth century. Mitchell demonstrated in great detail the complex of legal and practical forces that had caused an involuntary loss of much of this land, focusing primarily on partition sales of Black-owned land held under tenancies in common. He also proposed innovative legal reforms and practical steps that could reduce future losses of this important economic resource.<sup>85</sup>

Other *Law Review* articles looked at more conventional aspects of Blacks’ economic opportunities, such as the courts’ reluctance to address the present effects of past employment discrimination in the early days of Title VII of the 1964 Civil Rights Act,<sup>86</sup> the applicability of the National Labor Relations Act to racial discrimination by both unions and employers,<sup>87</sup> and the application of Title VII to upper-level jobs.<sup>88</sup> This scholarship confronted some of the important basic questions in what was then an emerging field of federal employment discrimination law.

5. *Public Accommodations and Transportation*.—Civil rights activists—Montgomery citizens boycotting buses, sit-in demonstrators, and freedom riders—coupled with litigation and civil rights legislation dramatically changed policies and practices of public accommodation and transpor-

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<sup>85</sup> Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001). Mitchell spoke of Blacks losing land involuntarily, which in some ways is analogous to the displacement of urban Blacks as a result of public housing demolition that began in the 1990s. Mitchell also argued that land ownership was positively related to community and democratic participation, so that addressing the land loss problem would have positive spillover effects.

<sup>86</sup> William B. Gould, *The Emerging Law Against Racial Discrimination in Employment*, 64 NW. U. L. REV. 359 (1969).

<sup>87</sup> Richard J. Boyce, *Racial Discrimination and the National Labor Relations Act*, 65 NW. U. L. REV. 232 (1970).

<sup>88</sup> Earl M. Maltz, *Title VII and Upper Level Employment—A Response to Professor Bartholet*, 77 NW. U. L. REV. 776 (1983).

tation, especially in the South. This is a story of the efficacy of both activism and law reform and, sometimes, the synergy between the two. In a context in which so much of the effort to challenge racial subordination has produced mixed results at best, the campaign to end discrimination in public accommodations and transportation stands out as a success.

However, only one *Law Review* article addressed racial discrimination in public accommodations. Rather than focusing on traditional “public accommodations,” such as restaurants, hotels, theaters, or public transportation, this major, book-length article examined a novel arena untouched by most scholarship. In 1995, Joseph Singer argued, in *No Right to Exclude: Public Accommodations and Private Property*, that the law should prohibit, in a clear way, racial discrimination by retail stores.<sup>89</sup> Title II of the 1964 Civil Rights Act regulated so-called public accommodations, like hotels and restaurants. Moreover, the scope and the reach of the post-Civil War Civil Rights Acts remained uncertain. Singer argued that the law should be clarified to conform to social expectations that businesses will serve the public unless they have good reasons not to do so. His persuasive argument was particularly important and timely in light of the continuing claims of Blacks that retail stores treat them as security risks by excluding them and by using unusually aggressive surveillance measures because of their race.

6. *Criminal Justice*.—The questions related to race and the criminal justice system changed dramatically during the *Law Review*’s second half-century. In the era of Jim Crow, civil rights advocates challenged the racial bias that permeated the criminal justice system of the South, from not prosecuting whites who lynched Blacks or assassinated civil rights leaders and workers to exclusion of Blacks from juries, which led both to acquittal of whites in crimes against Blacks and conviction of innocent Blacks.

As some progress was made in addressing these historical problems, new modes of racial injustice emerged that were national in scope. The last third of the twentieth century witnessed the mass incarceration of Blacks and Latinos, the racially disproportionate implementation of the death penalty, dramatic disparities in sentencing along racial lines, and widespread wrongful convictions in cases involving defendants of color, especially in capital cases.

The *Law Review* paid some attention to the earlier set of problems, but did not address the modern issues related to race and the criminal justice system. Its consideration of the criminal justice system was limited to two articles focusing on discrimination in the South in the 1960s and 1970s. One argued for limits on states’ ability to exclude volunteer out-of-state lawyers, especially where local lawyers were unwilling to represent Black

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<sup>89</sup> Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1995).

defendants.<sup>90</sup> It demonstrated that Black defendants routinely went without representation in misdemeanor cases. Most white lawyers refused to handle their cases, and Blacks were extremely underrepresented in the legal profession as a result of discrimination at all levels of the educational system. The author also showed persuasively how southern states had used their ability to exclude out-of-state lawyers to ensure the lack of legal representation. Lawyers from the North were poised to go to the South in greater numbers if these bars could be removed, so the article's proposal had important potential practical consequences.

The other article entered the ongoing federalism debates by arguing for federal intervention in the southern courts to protect against discrimination by the police, prosecutors, and judges. The author proposed providing injunctive remedies for patterns of discrimination, taking the position that some states' systems were so tainted that federal judicial intervention was necessary to ferret out the systematic racism.<sup>91</sup> Advocates for "states' rights" would have found this kind of proposal anathema, since it suggested substantial federal intervention into the southern states' court systems.

In sum, starting in mid-century, civil rights activism, litigation, and legislation all provided a new level of visibility to critical questions of race, and the *Law Review* responded to the challenge of examining these crucial and controversial issues.<sup>92</sup> At the same time, there is a degree of continuity in the scholarship across the two periods. The many difficult questions involving public education received by far the most attention in the *Law Review*; but other important racial matters were discussed as well. However, there continued to be significant gaps in the aspects of the system of racial subordination that received serious attention, such as participation in the political process, economic opportunity, and contemporary inequities in the criminal justice system. Moreover, in the second half-century, as in the

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<sup>90</sup> David S. Mann, *Not for Lucre or Malice: The Southern Negro's Right to Out-of-State Counsel*, 64 NW. U. L. REV. 143 (1969).

<sup>91</sup> Andrew B. Weissman, *The Discriminatory Application of Penal Laws by State Judicial and Quasi-Judicial Officers: Playing the Shell Game of Rights and Remedies*, 69 NW. U. L. REV. 489 (1974).

<sup>92</sup> The *Law Review* also published a number of articles on broader subjects with racial implications. Raoul Berger argued that the legislative history of the Fourteenth Amendment was not intended to reach suffrage, in support of his critique of the Court's reapportionment decisions. Berger, *supra* note 45. William Marshall used a case of gender discrimination to examine the balance between discrimination and the right of association. William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68 (1986). Robert Bennett used the Supreme Court's decision requiring proof of racial motivation in *Washington v. Davis* as a springboard for a theoretical inquiry into the role of motivation in equal protection jurisprudence, generally. Robert W. Bennett, *Reflections on the Role of Motivation Under the Equal Protection Clause*, 79 NW. U. L. REV. 1009 (1985). Similarly, Erwin Chemerinsky argued for a reconsideration of the "state action" doctrine and proposed that values such as equality should be protected against private actors as well. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985). William Marshall responded to Chemerinsky's argument in *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 NW. U. L. REV. 558 (1985). Chemerinsky responded in *More Is Not Less: A Rejoinder to Professor Marshall*, 80 NW. U. L. REV. 571 (1985).

first, other people of color, such as Latinos, Asian Americans, and Native Americans, remained virtually invisible in the pages of the *Law Review*.

## II. GENDER AND SEXUAL ORIENTATION

Prior to the 1970s, anyone perusing law reviews would have thought that only men had legal issues worthy of discussion. The introduction of gender and sexual orientation into law review literature began with the entry of women into law schools and the legal profession. Law schools began to admit women in substantial numbers only after passage of the federal civil rights laws and under threat of litigation in the late 1960s and early 1970s.<sup>93</sup> There were, for example, a total of 46 women and 329 men at Northwestern University School of Law in 1970.<sup>94</sup> The new group of students brought with them concerns about issues that affected their lives, and legal discussions of those issues began to appear first in student notes and comments. Women entered legal academia as teachers in some, albeit small, numbers about a decade later.<sup>95</sup> Their presence resulted in a flowering of theoretical writing about women's issues. These developments, as they are reflected in the pages of the *Law Review*, can be divided into the following historical periods: (1) the 1970s, the era of formal equality thinking about sex equality; (2) the 1980s, when many schools of feminist theory developed; (3) the 1990s, when feminist legal theory had become well established; and (4) the present.

### A. *The 1970s: The Era of Formal Equality*

The development of legal theory about women is one of the many children of the so-called Second Wave of the women's movement, sometimes dated from the publication of Betty Friedan's book *The Feminine Mystique* in 1963.<sup>96</sup> Women formed consciousness-raising groups and began to discuss the many issues that affected their lives: rape, child sex abuse, sexual harassment, domestic violence, illegal abortions, and exclusion from educational and employment possibilities as well as from places of public accommodation—all issues that had essentially been ignored by the law during the period when it was dominated by men. After private discussions

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<sup>93</sup> The number of women law students increased from 3.7% in 1963–64, to 8.6% in 1970–71, to 34% in 1980–81. ABA, OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 456 (Rick L. Morgan & Kurt Snyder eds., 1999).

<sup>94</sup> Compiled from Programs from the 112th, 113th, and 114th Commencements (on file with Registrar, Northwestern University School of Law). In 1957, by contrast, there were 288 men and two women. Compiled from Programs from the 99th, 100th, and 101st Commencements (on file with Registrar, Northwestern University School of Law).

<sup>95</sup> Although 41% of law students were women by 1986, only about 20% of full-time law faculty were. Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799, 801, 803 (1988).

<sup>96</sup> See MARY BECKER, CYNTHIA GRANT BOWMAN & MORRISON TORREY, FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 20 (2d ed. 2001).

revealed how common these problems were in the lives of women, activist women sought law reform. With the passage of Title VII of the Civil Rights Act in 1964, formal equality of women in the workplace became a possibility at last.

By 1969, the first course on Law and Women was taught, at NYU School of Law.<sup>97</sup> While the first generation of legal activists litigated cases, they also began to write, and they and their students created much of the theory which then informed legal practice.<sup>98</sup> The activities of these women during the 1970s, the results of their litigation campaigns, and their teaching and theorizing were central to the development of sex equality in the United States. As one historian has commented, “the 1970s can be seen as a constitutional moment of enormous significance—a time of major change in understandings of equality in the U.S. . . . In those years women citizens framed their demands for social equality as legal demands . . . .”<sup>99</sup>

The first article on gender issues appeared in the *Law Review* in the 1970–1971 volume—a student note about an Illinois case denying a husband’s claim for survivor benefits under the state workmen’s compensation statute.<sup>100</sup> The Illinois Supreme Court had upheld the discriminatory legislation because it gave preferential treatment to (rather than discriminating against) women, but the student author predicted that Title VII would soon be interpreted by the Supreme Court to find that such “protective” legislation was impermissible sex discrimination—which is exactly what happened.<sup>101</sup> At this time, student-written articles were published without the author’s name, so it is impossible to tell whether this note was by a male or female student.

We do know that the second article on gender was written by a female student, Elaine Bucklo, now a judge on the federal district court in Chicago.<sup>102</sup> This comment, written before the first Supreme Court case to develop the constitutional standard on sex,<sup>103</sup> advocates applying a strict scrutiny standard to sex classifications, pointing out that this would obviate the need for an Equal Rights Amendment by striking down sex discriminatory laws under the Fourteenth Amendment instead.<sup>104</sup> The only legally

<sup>97</sup> Linda K. Kerber, *Writing Our Own Rare Books*, 14 *YALE J.L. & FEMINISM* 429, 431 (2002).

<sup>98</sup> See Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Law-making, and the Legal Profession*, 67 *FORDHAM L. REV.* 249, 250–51 (1998).

<sup>99</sup> Kerber, *supra* note 97, at 448.

<sup>100</sup> Comment, *Workmen’s Compensation: Equal Protection and Protective Legislation for Women*, 65 *NW. U. L. REV.* 1024 (1971).

<sup>101</sup> *Id.* at 1026, 1029; see also *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973) (striking rule giving benefits to spouses of men but only to economically dependent spouses of women).

<sup>102</sup> E-mail from Elaine E. Bucklo, District Judge, Northern District of Illinois, to Cynthia Bowman, Professor of Law, Northwestern University (Mar. 21, 2005, 09:13:33 CST) (on file with authors).

<sup>103</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>104</sup> Comment, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 *NW. U. L. REV.* 481, 500–01 (1971).

significant differences between men and women, declared the author, are physical strength and the ability to bear children.<sup>105</sup> This comment, in short, pointed to the manner in which the law did in fact develop in the litigation campaigns of the 1970s, although the strict scrutiny standard was never attained.

The debate over the Equal Rights Amendment (“ERA”) dominated the articles about gender issues in the *Law Review* during the 1970s. The campaign to pass the ERA, which would have made sex a suspect class under the Constitution, spanned the decade, until the amendment expired for lack of ratification by a sufficient number of states in 1982.<sup>106</sup> Given the dearth of women teaching in law schools at that time, it is not surprising that the two articles about the ERA in the *Law Review* were written by male professors. The first, by Northwestern law professor Jordan Jay Hillman, analyzed the probable impact of the ERA on employment law, discussing areas such as maternity leave, the employment of married women, fringe benefits, protective legislation, and even sex-segregated bathrooms.<sup>107</sup> His treatment of these issues was very sympathetic to equal rights for women, but Hillman concluded that the EEOC Guidelines passed under Title VII were already sufficient to satisfy the ERA.<sup>108</sup> Again, this was the direction the law in fact took, as interpretation of Title VII by the courts largely obviated the need for an ERA.

The second non-student-written article about gender was written by Emeritus Professor Max Rheinstein of the University of Chicago Law School. It addressed the effect the ERA would have on the law of marriage, including surnames, residence, interspousal disputes, and the management of marital property.<sup>109</sup> Rheinstein pointed to German, French, and Scandinavian law as possible models for changing U.S. family law in the direction of sex equality; he also wrote sympathetically about the need to protect long-term housewives in the event of divorce, a theme that would become important in feminist legal writing of the following decade.<sup>110</sup>

In 1972, Title IX, the Education Amendments, were added to the Civil Rights Act, guaranteeing equal opportunity to men and women in public (or publicly funded) educational institutions and ensuring that the number of women in law schools would continue to increase. A 1978 student comment discussed whether a private right of action should be implied under Title IX while the decisive case, *Cannon v. University of Chicago*, was

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<sup>105</sup> *Id.* at 498 n.117.

<sup>106</sup> BECKER, BOWMAN & TORREY, *supra* note 96, at 21.

<sup>107</sup> Jordan Jay Hillman, *Sex and Employment Under the Equal Rights Amendment*, 67 NW. U. L. REV. 789 (1973).

<sup>108</sup> *Id.* at 840–41.

<sup>109</sup> Max Rheinstein, *The Transformation of Marriage and the Law*, 68 NW. U. L. REV. 463 (1973).

<sup>110</sup> *Id.* at 472–73, 477–79.

pending certiorari in the Supreme Court.<sup>111</sup> The student concluded, contrary to the ultimate outcome of *Cannon*, that implication of a private right would be inconsistent with the statutory scheme of enforcement.<sup>112</sup>

In the spring of 1973, a year after she graduated from Northwestern University School of Law, Elaine Bucklo taught the first course on Women and Law at her alma mater while working as a judicial clerk on the Seventh Circuit.<sup>113</sup> There were seven students in the class, all women.<sup>114</sup> In 1974, the course was taken over by Helen Hart Jones, an adjunct professor who was an employment lawyer in Chicago, and was taught on an annual basis to increasing numbers of students; in 1979, eight of the fifteen students in the course were men.<sup>115</sup> The course on Law and Women at Northwestern was offered on a regular basis from 1973 until 1989, when it was replaced by the current course on Feminist Jurisprudence, first taught by Cynthia Bowman, one of the authors of this piece, who went on to co-author a casebook for West Publishing on the topic.<sup>116</sup>

The authors of the first generation of textbooks on women and law were instrumental in changing the law. Ruth Bader Ginsburg directed the Women's Rights Project at the New York office of the ACLU, which instigated a litigation campaign modeled on the civil rights campaign of the 1950s and 1960s, seeking to invalidate sex discriminatory laws under the Equal Protection Clause of the Fourteenth Amendment. This campaign resulted in a series of major successes, striking down barriers to women's entry into the professions and allowing them access to benefits in the public sphere, but ultimately failed to achieve strict scrutiny of classifications

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<sup>111</sup> Barry S. Levin, Comment, *Implication of a Private Right of Action Under Title IX of the Education Amendments of 1972*, 73 NW. U. L. REV. 772, 773 (1978). By 1978, the name of the student authoring a note or comment was added at the end of the piece.

<sup>112</sup> *Id.* at 800. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979) (implying a private right of action under Title IX).

<sup>113</sup> E-mail from Elaine E. Bucklo, District Judge, Northern District of Illinois, to Cynthia Bowman, Professor of Law, Northwestern University (Mar. 21, 2005, 08:49:02 CST) (on file with authors).

<sup>114</sup> Grade Reporting File (Spring 1973) (on file with Registrar, Northwestern University School of Law).

<sup>115</sup> Grade Reporting File (Spring 1979) (on file with Registrar, Northwestern University School of Law). By that time, two casebooks had been published by activist women lawyers who went on to illustrious careers—including one who became a Supreme Court justice, another who was the first full-time woman professor at Stanford Law School, and another who served as dean at Boalt Hall, the University of California at Berkeley's law school. KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA HILL KAY, *SEX-BASED DISCRIMINATION* (2d ed. 1974); BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* (1975).

<sup>116</sup> BECKER, BOWMAN & TORREY, *supra* note 96. Another of the three authors of this Essay occasionally teaches seminars related to feminist jurisprudence as well, and is the co-author of another text on the subject. JUDITH G. GREENBERG, MARTHA L. MINOW & DOROTHY E. ROBERTS, MARY JOE FRUG'S *WOMEN AND THE LAW* (3d ed. 2004).

based on gender.<sup>117</sup> The litigation campaign also failed to establish pregnancy as sex discrimination under the Constitution, resulting in the famous, and oft-ridiculed, footnote 20 in *Geduldig v. Aiello*, distinguishing between “pregnant women and nonpregnant persons.”<sup>118</sup> Some commentators attribute the subsequent flowering of feminist thinking about the law to these failures.<sup>119</sup> The 1970s had been dominated by liberal feminists and the goal of formal legal equality—for women to be treated in the public sphere just the same as men are. Women’s continuing inequality in the private sphere (for example, their unequal responsibility for the care of children) and the undeniable differences between men and women with respect to pregnancy and childbirth demonstrated the limitations of formal equality thinking in the law, calling for fresh approaches.

*B. The 1980s: The Flourishing of Feminist Theory in the Law*

The critique of the liberal feminist approach and of formal equality thinking called forth a number of “schools” of feminist legal theory. The first, and still very influential, theory to emerge was that of Catharine MacKinnon, who published her seminal book, *Sexual Harassment of Working Women*, in 1979. In her subsequent work MacKinnon developed her critique of formal equality theory as based upon a male norm and proposed an alternative, dominance theory, which focuses upon the structures of power that make men’s characteristics (e.g., nonpregnancy) the norm.<sup>120</sup> Another influential theory, often dated from the publication of Carol Gilligan’s *In a Different Voice* in 1982, emphasized the need to take account of the differences between men and women and to value the “female” approach, which Gilligan described as based upon an ethic of care rather than of rights. In feminist jurisprudence, this approach is often called relational feminist theory.

The pages of the *Law Review* took some account of these developments in feminist legal theory during the 1980s, but for the most part did not publish theoretical pieces. A 1980 student comment about the failure of the Equal Pay Act to address female job segregation into low-paid jobs may be seen as a critique of the formal equality approach. Its author, Melinda P. Chandler, pointed to the systematic undervaluation of work done by women, criticizing early Title VII case law in this respect, and argued that the only solution to this problem was a theory of comparable worth, under

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<sup>117</sup> *Craig v. Boren*, 429 U.S. 190, 197, 204 (1976) (establishing the intermediate-scrutiny standard for sex classifications, requiring that a sex-classificatory law or regulation be substantially related to an important governmental purpose).

<sup>118</sup> 417 U.S. 484, 497 n.20 (1974).

<sup>119</sup> Kerber, *supra* note 97, at 440 (attributing this opinion to Professor Martha Chamallas).

<sup>120</sup> See CATHERINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 40 (1987).

which equal pay would be required not for identical jobs but for those requiring equivalent skills.<sup>121</sup>

The only piece of original feminist legal theory published in the *Law Review* during this decade was Deborah Rhode's influential article, *Association and Assimilation*, in 1986.<sup>122</sup> A chapter in her larger book on gender discrimination, the article addressed sex-segregated institutions such as single-sex clubs and schools, showing how they have both empowered and excluded women historically. Rhode emphasized the need for a contextual analysis, distinguishing situations where sex differences translate into social disadvantage and recommending an approach under which institutions that perpetuate disadvantage on the basis of sex might be prohibited, while others might be maintained.<sup>123</sup> Thus, unlike the approach of formal equality thinkers, under Rhode's approach, associations of disadvantaged or subordinated groups might be treated differently from associations of those in power who are attempting to exclude those disadvantaged groups.

Deborah Rhode's article is the only foray the *Law Review* made into the world of feminist legal theory in the 1980s. Major theoretical developments in legal thinking about women were taking place during this decade, but these developments were noted in the *Law Review* only in a series of book review essays. A lengthy and reflective book review essay about MacKinnon's second book, *Feminism Unmodified*, written by another prominent feminist legal scholar, Lucinda M. Finley, appeared in the *Law Review* in 1988.<sup>124</sup> A book review essay by Marie Ashe about Mary Ann Glendon's *Abortion and Divorce in Western Law* appeared in the same issue.<sup>125</sup> (Indeed, Glendon's book first took shape as the 1986 Rosenthal lectures at the Northwestern University School of Law.) It was not until 1993 that relational feminism found its way into these pages in an article criticizing its implications for the debate over abortion and arguing that "masculinist" theories based on autonomy, not relation, were necessary to defend women's rights in this respect.<sup>126</sup>

The feminist issue that dominated the pages of the *Law Review* in the 1980s was abortion, yielding a total of five major articles, three of them by men. The first two, by Northwestern Professor Robert W. Bennett and by Yale Law Professor Thomas I. Emerson, were directly related to the au-

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<sup>121</sup> Melinda P. Chandler, Comment, *Equal Pay for Comparable Work Value: The Failure of Title VII and the Equal Pay Act*, 75 NW. U. L. REV. 914, 933-37, 941 (1980).

<sup>122</sup> Deborah Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106 (1986).

<sup>123</sup> *Id.* at 109.

<sup>124</sup> Lucinda M. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 NW. U. L. REV. 352 (1988) (reviewing CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987)).

<sup>125</sup> Marie Ashe, *Conversation and Abortion*, 82 NW. U. L. REV. 387 (1988) (reviewing MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987)).

<sup>126</sup> Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858 (1993).

thors' active participation in the controversy over abortion. Bennett's 1981 article drew upon his (losing) argument to the Supreme Court in favor of funding abortions under Medicaid.<sup>127</sup> Professor Emerson's article was derived from his own testimony to Congress against the then-pending Human Life Amendment, which would have overturned *Roe v. Wade* by finding that human life began at conception.<sup>128</sup> In addition, in a 1989 article about a Canadian abortion decision, Professor Glendon argued, as she had in *Abortion and Divorce in Western Law*, against the American model of grounding abortion in a theory of individual rights and establishing it through courts rather than the legislature.<sup>129</sup>

One of the articles about abortion in the *Law Review* did constitute a major contribution to feminist literature about reproduction, however, and reflected the explosion of theoretical writing on this issue in books, law reviews, and amicus briefs during the 1980s. Andrew Koppelman's article, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, joined the search for an alternative constitutional provision on which to ground the right to abortion, alternative to the privacy-based approach in *Roe v. Wade*.<sup>130</sup> Privacy, of course, is a double-edged sword for women, shielding as it had a great deal of violence against women from public view and legal remedy. Koppelman, who joined the Northwestern Law School faculty in 1997, suggested grounding the right to abortion in the Thirteenth Amendment instead, arguing that compelling a woman to carry and to bear a child constituted involuntary servitude. Koppelman's article is the *Law Review*'s only example of the creative thinking characteristic of feminist legal theory on reproductive issues during this decade.

### C. The 1990s: Gender Theory Established in the Academy

By the 1990s, gender theory was well established in law schools. Almost every school had a course on women and law—or feminist jurisprudence, as many of the more theoretical courses were now styled. The *Law Review*, as legal literature all over, was full of articles on feminist theory and on legal problems unique to women. Ten major articles on these topics appeared during this decade, and women's legal problems had become a favored topic for student notes and comments as well. Not one but two symposia on feminist topics were published in the *Law Review*. The first annual Feminist Symposium was held in 1993; prominent feminist legal

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<sup>127</sup> Robert W. Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 NW. U. L. REV. 978 (1981); see *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment, which denied public funding for medically necessary abortions).

<sup>128</sup> Thomas I. Emerson, *The Power of Congress to Change Constitutional Decisions of the Supreme Court: The Human Life Bill*, 77 NW. U. L. REV. 129 (1982).

<sup>129</sup> Mary Ann Glendon, *A Beau Mentir Qui Vient de Loin: The 1988 Canadian Abortion Decision in Comparative Perspective*, 83 NW. U. L. REV. 569 (1989).

<sup>130</sup> Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

theorists were invited to speak, and the proceedings appeared in the 1993 issue in their entirety.<sup>131</sup> Another symposium, on the topic of child sex abuse, was organized by Michelle Landis, then-Articles Editor at the *Law Review* and now a law professor at Stanford, and published as an entire issue in 1998.<sup>132</sup>

At least one major article on a feminist topic was published in every volume of the *Law Review* during the 1990s. A number of generalizations can be made about these articles. First, the vast majority—nine out of ten—were written by women, reflecting their entry in more substantial numbers into the legal academy. Does this make a difference to the topics and their treatment? A review of the articles written by men over the period from 1992 to 2004 seems to indicate that it does. Their topics included: a legislative history of the Fourteenth Amendment concluding that sex was never intended to be covered by it, an article about disparate impact claims by white males, therapeutic fetal surgery (ultimately coming out against it but rather sympathetic to the rights of the fetus), and a critique of the reasonable woman standard.<sup>133</sup> Even though the authors by and large reached conclusions that are consistent with sex equality, these topics are very dissimilar from those chosen by the female authors.

Apart from one theoretical (and not tremendously persuasive) article attempting to locate MacKinnon's dominance theory within the liberal tradition,<sup>134</sup> the women law professors publishing in the *Law Review* in the 1990s chose to focus their attention on practical issues that have engaged the reform efforts of feminist legal activists since the 1970s. As mentioned above, one product of Second Wave feminism was a flurry of activity aimed at reforming the law in the areas of rape, child sex abuse, domestic violence, sexual harassment, equal educational opportunity, abortion, and other reproductive issues. As the activists sought social change, their practice informed theory, which then informed practice.

This practice-theory-practice spiral can be easily illustrated by the development of the law concerning sexual harassment in the workplace. MacKinnon's 1979 book on the subject was derived in part from the at-

<sup>131</sup> Symposium, *Introduction: Third Wave—Can Feminists Use the Law to Effect Social Change in the 1990s?*, 87 NW. U. L. REV. 1252 (1993) (including, for example, a debate between feminist scholars Ruth Colker and Jennifer Nedelsky over whether feminist lawyers should use only feminist methods in their efforts to change the law).

<sup>132</sup> Symposium, *Throwing away the Key: Social and Legal Responses to Child Molesters*, 92 NW. U. L. REV. 1197 (1998).

<sup>133</sup> Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229 (2000); Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505 (2004); David C. Blickenstaff, Comment, *Defining the Boundaries of Personal Privacy: Is There a Paternal Interest in Compelling Therapeutic Fetal Surgery?*, 88 NW. U. L. REV. 1157 (1994); Robert Unikel, Comment, *"Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 NW. U. L. REV. 326 (1992).

<sup>134</sup> Cynthia V. Ward, *The Radical Feminist Defense of Individualism*, 89 NW. U. L. REV. 871 (1995).

tempts of women litigators (herself included) to create a cause of action for the harms of sexual harassment; in it she analyzed those harms, discussed how and why they were not cognized by current law, and proposed a new way of conceptualizing sexual harassment as a violation of women's civil rights.<sup>135</sup> Her analysis became the basis for the EEOC guidelines that laid the foundation for modern sexual harassment law and were approved by the Supreme Court in the *Meritor* case in 1986.<sup>136</sup> By 1991, when the Clarence Thomas confirmation hearings focused national attention upon the subject of sexual harassment, more than a decade of feminist writing had developed legal theory on the topic, which now reached the public as feminist law professors commented on sexual harassment law on television.<sup>137</sup> After the televised hearings, the number of complaints to the EEOC increased dramatically, and numerous open issues about the legal standard, employer liability, and application of the law to same-sex harassment were litigated—and in turn analyzed in the law review literature, continuing the spiral.<sup>138</sup>

The women law professors writing in the *Law Review* during the last fifteen years have participated in a similar theory-practice spiral. Susan Stefan contributed a major article analyzing and criticizing Rape Trauma Syndrome, an evidentiary concept coming out of first-generation rape reform and used in court to explain women's counterintuitive reactions to rape.<sup>139</sup> Stefan argued that this characterization of women's reactions to violence pathologized them, making women reacting in a rational fashion to violence appear to be crazy and in need of "adjustment," thereby silencing a more appropriate anger over a problem that was social and political, rather than individual. At the same time, Stefan pointed out that silence over sexual abuse can indeed *make* women crazy, as evidenced by the statistics about childhood sexual abuse among women in psychiatric institutions.<sup>140</sup> This article is a wonderful example of second-generation feminist legal thinking—it analyzes experience under the rape reform laws, points out their shortcomings, and recommends changes in both the legal and mental health systems as a result.

Domestic violence, another focus of the women's movement in the last decades, was the subject of three main articles and one student comment over the five-year period from 1996 to 2001. Women authors discussed, in light of feminist legal theory, the problems posed by spousal immunity privileges in domestic violence prosecutions, the inadequacy of provisions of the Violence Against Women Act ("VAWA") to remedy the legal prob-

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<sup>135</sup> See Bowman & Schneider, *supra* note 98, at 251, 254–55.

<sup>136</sup> See 29 C.F.R. § 1604.11 (2004); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

<sup>137</sup> See Bowman & Schneider, *supra* note 98, at 254.

<sup>138</sup> See BECKER, BOWMAN & TORREY, *supra* note 96, at 903.

<sup>139</sup> Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1274 (1994).

<sup>140</sup> *Id.* at 1312–19.

lems of abused immigrant women, domestic violence as a ground for asylum, and the difficulty of implementing the interstate enforcement of orders of protection under VAWA's full faith and credit provision.<sup>141</sup> All of these are fine examples of engaged feminist legal scholarship. They are at the same time good examples of scholarship in the line of traditional law review articles, which analyze the operation of the law in a particular area, point to its shortcomings, and make recommendations for reform.

Women authors have also continued a major theme of feminist legal theory and reform from the 1980s—one that is close to their personal experience: discrimination against women in law schools. In addition to publishing articles about bias against women in law school and in the law school curriculum, women law professors in the 1980s had turned their attention to deconstructing the image of women in the casebooks from which all lawyers are instructed.<sup>142</sup> A 1993 article in the *Law Review* by Ann Althouse is an excellent example of this scholarship. Choosing evidence casebooks as her subject, Althouse's extensive and detailed analysis shows how women appear in evidence law courses as disturbed or vindictive liars, and men as innocent victims, especially in discussions of rape shield statutes.<sup>143</sup>

Some of the most interesting recent work by feminist legal theorists is in the field of family law. This is ironic in a sense, because articles on family law were the only ones arguably about women's issues published in the first half-century of the *Law Review*. In the 1970s, the impact of the formal equality approach upon family law was, predictably, to erase ways in which women were treated differently from men—to make alimony gender-neutral, for example, and to do away with the presumption of maternal custody of children.<sup>144</sup> The 1980s and 90s saw extensive criticism of these reforms by feminist legal scholars, who pointed out how they had harmed women.<sup>145</sup>

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<sup>141</sup> Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665 (1998); Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827 (2004); Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032 (1996); Haley Schaffer, Note, *Domestic Violence and Asylum in the United States: In re R- A-*, 95 NW. U. L. REV. 779 (2001).

<sup>142</sup> See, e.g., Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137 (1988); Mary Irene Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); Catherine Weiss & Louise Melling, Essay, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988).

<sup>143</sup> Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914 (1994).

<sup>144</sup> See, e.g., *Orr v. Orr*, 440 U.S. 268, 271 (1979) (holding that requiring only husbands to pay alimony violated the Equal Protection Clause).

<sup>145</sup> See, e.g., MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991); Lenore J. Weitzman, *The Economics of Divorce: Social and*

In 1996 and 1998, the *Law Review* published two major contributions to this debate, both by the same author, Katharine B. Silbaugh. In the first, *Turning Labor into Love: Housework and the Law*, Silbaugh detailed the economic value of housework performed by women without compensation, and demonstrated its pervasive undervaluation by the law—in premarital contracts, social security law, the law of consortium, tax law, upon divorce, in the welfare system, and in labor law. Denying the productive nature of housework, she argued, harms those who perform this work: women.<sup>146</sup>

Silbaugh's second article built upon this analysis to reach the revisionist conclusion that marital contracts should not be enforced.<sup>147</sup> This conclusion was directly opposed to the increasing trend by courts to uphold contracts between married couples upon divorce, but only as to monetary terms. In light of the fact that women's nonmonetary contributions are more significant than those of men, Silbaugh argued that monetary and nonmonetary contributions should be treated alike, because the selective enforcement regime harmed women. Rather than concluding that both should be enforced, however, she concluded that neither should be, because to enforce many nonmonetary provisions would harm the welfare of children and lead to commodification of marital exchanges.<sup>148</sup> These two articles are immensely important contributions to the current—and lively—debate about the nature of marriage. Like so much of the other writing by feminist legal theorists during this decade, they deepen our understanding of the law, of equality, of the nature of the public and private spheres, and of the differential relationship of men and women to the law.

#### D. *Where Have We Been and Where Are We Now?*

Feminist articles appear to have become less frequent in the *Law Review* during the first years of the new millennium. An article by one feminist legal scholar, Kimberly A. Yuracko, now a professor at the Law School, has continued the tradition of blending doctrinal scholarship with feminist theoretical analysis. In *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, she examined Title IX's requirement that schools provide varsity athletic opportunities to male and female students in proportion to their numbers in the undergraduate population.<sup>149</sup> After surveying a number of value-neutral justifications for the proportionality requirement, Yuracko

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*Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981).

<sup>146</sup> Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

<sup>147</sup> Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65 (1998).

<sup>148</sup> *Id.* at 122–35.

<sup>149</sup> Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731 (2003).

concluded that none of them can justify it. Instead, she concluded, the proportionality requirement is derived from a value-based commitment to cultivate traits in women that are valued socially.<sup>150</sup>

The majority of articles on feminist topics in the recent issues of the *Law Review*, however, have been written by student authors. The connection between legal analysis and legal reform described above has been particularly appealing to women law students, who have written case notes and comments on feminist topics in large numbers. Their topics are those that have provoked feminist legal activism—for example, liability standards in school sexual harassment cases under Title IX, single-sex education and constitutional equality law, domestic violence and asylum law, and abuse against mail-order brides as a form of sex trafficking or involuntary servitude.<sup>151</sup> Some of these authors had taken the course in Feminist Jurisprudence and studied from the casebooks developed by first-generation feminist legal scholars.

The student pieces also demonstrate how the reevaluation and promotion of student articles in the *Law Review* has contributed to the lively debate taking place in its pages. In the early years of the *Review*, student authors wrote (and probably were assigned to) case notes on recent Illinois Supreme Court cases; the work was predictably lifeless and dull, and it was not attributed to them by name. Today, however, students pursue subjects that interest them personally; many of those topics have to do with gender and with issues that touch them in some way (the author of the piece on mail-order brides, for example, was Filipina). Not only has the *Law Review* become much more interesting as a result, but legal research has been profoundly enriched by this change.

Legal writing about gender has not all been about heterosexual women. The 1980s and 1990s saw the growth of interest in legal topics affecting gay, lesbian, bisexual, and transsexual persons as well as theorizing about gender from a queer perspective. The first courses on sexuality and gay rights were taught during the 1980s, and the first casebooks on the subject appeared in the 1990s.<sup>152</sup> Except for a seminar taught once or twice by an adjunct professor, however, courses on sexuality and the law have not been available at Northwestern's law school, although the topic is included to some extent in Feminist Jurisprudence.

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<sup>150</sup> *Id.* at 788–800.

<sup>151</sup> Meghan E. Cherner-Ranft, Comment, *The Empty Promise of Title IX: Why Girls Need Courts to Reconsider Liability Standards and Preemption in School Sexual Harassment Cases*, 97 NW. U. L. REV. 1891 (2003); Pherabe Kolb, Comment, *Reaching for the Silver Lining: Constructing a Nonremedial yet "Exceedingly Persuasive" Rationale for Single-Sex Educational Programs in Public Schools*, 96 NW. U. L. REV. 367 (2001); Schaffer, *supra* note 141; Vanessa B.M. Vergara, Comment, *Abusive Mail-Order Bride Marriage and the Thirteenth Amendment*, 94 NW. U. L. REV. 1547 (2000).

<sup>152</sup> See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* (1997); WILLIAM B. RUBENSTEIN, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* (1997); Kerber, *supra* note 97, at 442.

The *Law Review*, through the efforts of its student authors, published an article in this area even before literature on gay rights was at all common. A 1986 student case note dealt with the treatment of transsexuals under Title VII, criticizing the Seventh Circuit for failing to find that a post-operative male transsexual was legally a female for purposes of employment law.<sup>153</sup> It was twelve years before another article in the area of gay rights law appeared, a 1998 case note about gay-bashing in a public school.<sup>154</sup> The student lauded the Seventh Circuit for holding a school district liable for discrimination against a gay student, finding that he had stated a claim for sex discrimination.

By the year 2000, feminist jurisprudence was a field with many competing theories—formal equality, dominance theory, relational feminism, critical race feminism, queer theory, and postmodern feminism. The most recent comment published in this field by a Northwestern student author combines the last two of these theories, rather an unusual feat for a student. Megan Bell's 2004 comment on *Transsexuals and the Law* is an interdisciplinary piece that uses Foucauldian analysis of the legal system and social control, along with postmodern feminist analysis by authors such as Judith Butler, to criticize the outcome in a case involving the validity of the marriage of a transsexual for purposes of a Wrongful Death Act.<sup>155</sup> The author goes on to discuss the variety of legal contexts in which gender definition may determine important rights, such as employment law, marital dissolution, and the like. The article clearly demonstrates how much more interesting legal doctrine and law reviews have become now that the academy has discovered, like historians of the West, that all these diverse people have been there all along.

### III. THE OVERLOOKED FRONTIER: CRITICAL RACE THEORY AND CRITICAL RACE FEMINISM

Although the *Law Review*'s articles on civil rights law, feminist jurisprudence, and sexual orientation acknowledged the presence of diverse peoples and issues that concerned them, the *Law Review* virtually ignored legal theorizing based on the perspectives of people of color. It is one thing to use traditional or even feminist approaches to analyze legal issues affecting communities of color, but quite another to fundamentally integrate racial inequality and resistance into legal analysis. As Berkeley law professor Angela Harris observed about legal scholarship two decades ago, "there was, seemingly, no language in which to embark on a race-based, system-

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<sup>153</sup> D. Douglas Cotton, Note, *Ulane v. Eastern Airlines: Title VII and Transsexualism*, 80 NW. U. L. REV. 1037 (1986).

<sup>154</sup> Alycia N. Broz, Note, *Nabozny v. Podlesny: A Teenager's Struggle to End Anti-Gay Violence in Public Schools*, 92 NW. U. L. REV. 750 (1998).

<sup>155</sup> Megan Bell, *Transsexuals and the Law*, 98 NW. U. L. REV. 1709 (2004).

atic critique of legal reasoning and legal institutions themselves.”<sup>156</sup> Since then, a movement created primarily by minority law professors has provided the missing language to challenge the legitimacy of law by exposing its complicity in the preservation of white supremacy and racial subordination.

In the late 1970s, scholars of color began to contest the colorblind stance and victorious tone of the liberal approach that dominated civil rights discourse. A decade later they had founded a branch of legal scholarship called critical race theory (“CRT”) that put racism at the center of United States law and policy and defined it as a systemic practice rather than a bad attitude. Among critical race scholars were feminists who revised mainstream feminist theorizing to reveal the inextricable connection between racism and patriarchy in the lives of women of color as well as in legal institutions that support hierarchies of power. Today, CRT is an established, though controversial, discipline: several books collecting the movement’s key articles as well as a critical race casebook have been published,<sup>157</sup> critical race scholars have written hundreds of books and articles, and courses on these topics are taught at leading law schools across the country. Their influence now extends beyond the law school walls to a variety of disciplines in universities across the globe.<sup>158</sup> The renowned Princeton theologian Cornel West calls CRT “the most exciting development in contemporary legal studies.”<sup>159</sup>

Yet the *Law Review*, as well as the Northwestern University School of Law’s curriculum, has paid little attention to this important theoretical perspective. With the exception of one article, the few pieces addressing critical race theory and critical race feminism published in the *Law Review* have been book reviews. To the *Law Review*’s credit, most of these publications were authored by one of the leading figures in the CRT movement, Richard Delgado, and deserve special attention. A discussion of Delgado’s contribution to the *Law Review* gives a glimpse of the exciting frontier of critical scholarship on race that the *Law Review* failed to explore.

#### A. Critical Race Theory

Two prominent articles by then-Harvard law professor Derrick Bell served as a bridge between traditional civil rights scholarship and critical

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<sup>156</sup> Angela Harris, *Foreword* to RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* xvii, xix (2001) [hereinafter CRT: AN INTRODUCTION].

<sup>157</sup> See, e.g., KIMBERLÉ W. CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1995); *CRITICAL RACE FEMINISM* (Adrien Katherine Wing ed., 2d. ed. 2003); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 2d. ed. 2000) [hereinafter CRT: THE CUTTING EDGE]; *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (Juan F. Perea et al. eds., 2000).

<sup>158</sup> See, e.g., *Special Issue on Critical Race Theory*, 11 INT’L J. QUALITATIVE STUD. EDUC. 1 (1998).

<sup>159</sup> Cornel West, *Foreword* to CRENSHAW ET AL., *supra* note 157, at xi.

race theory. Part of Bell's 1976 *Yale Law Journal* article, *Serving Two Masters: Integration Ideals and Serving Client Interests in School Desegregation Litigation*, adopted the traditional mode of civil rights scholarship centered on the doctrinal analysis of race-related court decisions and conventional interpretation of civil rights statutes.<sup>160</sup> Bell examined the Supreme Court's approach to the practice of soliciting clients in civil rights cases.<sup>161</sup> But Bell went further to critique this traditional analysis by examining the dilemma of civil rights lawyers who attempted simultaneously to serve their ideological purposes and the conflicting educational interests of their clients which were no longer furthered by integration ideals.<sup>162</sup> Bell's audacious challenge to the dominant integration strategy, focused on the actual interests of Black people, set the stage for CRT, both conceptually and chronologically.

Four years later, Bell published another pivotal article, *Brown v. Board of Education and the Interest Convergence Dilemma*,<sup>163</sup> which introduced a second, more devastating blow to the liberal understanding of civil rights progress. Bell's concept of "interest convergence" asserted that whites were willing to support gains for Blacks when and only when these gains also benefited whites. In other words, racial progress occurred strictly in line with whites' self-interest. Bell illustrated his point with the most heralded of civil rights victories, the *Brown* decision. He claimed that the Supreme Court issued its guarded desegregation mandate only because it gave whites an advantage in the Cold War battle with communists for the Third World's allegiance.<sup>164</sup> Moreover, Bell argued that whites had historically sacrificed Black people's interests to maintain white supremacy and would continue to do so. These realizations led Bell to become a "racial realist,"

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<sup>160</sup> See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Serving Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

<sup>161</sup> *Id.* at 495-97.

<sup>162</sup> *Id.* at 504.

<sup>163</sup> Derrick A. Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). Professor Bell's *Yale Law Journal* and *Harvard Law Review* articles are often credited as formative works of critical race theory, even before the existence of a formal scholarly movement. See, e.g., CRENSHAW ET AL., *supra* note 157, at xx. Other intellectual precursors to CRT include Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978), and Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984). Derrick Bell also authored the first law school casebook on race. See DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW (1st ed. 1973).

<sup>164</sup> Bell's thesis has been confirmed by Mary Dudziak's extensive archival research on the ties between federal support for desegregation and U.S. Cold War interests. See MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

recognizing that racial progress in America would always be slow, sporadic, and incomplete.<sup>165</sup>

Bell's pathbreaking articles ushered an outpouring of writing by scholars of color that confronted the failure of conservative, liberal, feminist, and critical legal studies approaches to address the law's central role in racial subordination. In the summer of 1989, thirty-five legal scholars gathered at a convent outside Madison, Wisconsin, to participate in the first workshop on critical race theory.<sup>166</sup> They shared their ideas for addressing the inadequacy of prevailing legal theory to grasp the more subtle and systemic forms of racism that persisted despite the gains of the civil rights movement.<sup>167</sup> Building on critical legal studies, radical feminism, nationalism, and other critical theories, these scholars incorporated their own experiences and understandings of racism into the legal canon.

Rather than treating racism as an aberration that contradicts American ideals, CRT holds that racism is systematically embedded in United States institutions and culture and is commonly experienced by people of color.<sup>168</sup> As Derrick Bell so powerfully argued, whites have a huge material and psychological stake in discounting racism in order to hold on to the privileges they reap from it.<sup>169</sup> CRT therefore rejects colorblind solutions to racial inequality, recognizing that only aggressive, race-conscious remedies can reverse the centuries-old institutionalization of white privilege and non-white disadvantage.<sup>170</sup>

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<sup>165</sup> Bell elaborated the concepts of interest convergence and racial realism in a number of articles and books. See, e.g., DERRICK A. BELL, JR., *FACES AT THE BOTTOM OF THE WELL* (1992); DERRICK A. BELL, JR., *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987).

<sup>166</sup> See CRENSHAW ET AL., *supra* note 157, at xxvii; Harris, *supra* note 156, at xix. Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas provide the historical background and intellectual genealogy of the first CRT workshop. See CRENSHAW ET AL., *supra* note 157, at xix–xxvii. For a helpful primer on CRT, discussing its history, basic tenets, and distinctive themes, see DELGADO & STEFANCIC, *CRT: AN INTRODUCTION*, *supra* note 156.

<sup>167</sup> See CRENSHAW ET AL., *supra* note 157, at xiv–xvi (discussing CRT's "deep dissatisfaction with traditional civil rights discourse"); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theory of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990) (criticizing critical legal studies for its "myopic preoccupation with the limited role of theoretical deconstruction" and discussing Martin Luther King, Jr.'s theology as model of reconstructive vision); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (critiquing both neoconservative and critical legal studies approaches to civil rights and advocating a "distinctly progressive outlook that focuses on the needs of the African American community" and "is informed by the actual conditions of black people").

<sup>168</sup> See DELGADO & STEFANCIC, *CRT: AN INTRODUCTION*, *supra* note 156, at 7; Crenshaw, *supra* note 167.

<sup>169</sup> See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

<sup>170</sup> See CRENSHAW ET AL., *supra* note 157, at xxix–xxx; see also LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994); Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1 (1991); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

Critical race scholars have also contested the very notion of race. They contend that races are not natural, biological classes of people, but socially—and legally—constructed divisions that have been used to legitimate domination by one so-called race over others. In his book *White by Law: The Legal Construction of Race*, for example, Berkeley professor Ian F. Haney Lopez demonstrates how legal definitions of whiteness changed over time in support of prevailing power arrangements.<sup>171</sup> The dominant society has deployed stereotypes and policies to racialize minority groups at different points in history in response to labor market needs and political developments.<sup>172</sup> Although most of the early CRT writings concerned African Americans, some CRT scholars have critiqued the “black-white binary” for its simplistic focus on discrimination against African Americans,<sup>173</sup> and CRT has grown to encompass studies of diverse groups.<sup>174</sup> LatCrit theory, for example, emerged as a branch of CRT to investigate issues of particular concern to Latinos, such as immigration, language rights, bilingual schooling, and identities based on multiple statuses and heritages.<sup>175</sup>

Critical race scholarship departs from conventional legal analysis in methodology as well as theory. Its authors reject the dominant method of applying supposedly neutral legal principles to arrive at answers, preferring to seek out the perspectives and experiences of the most disadvantaged victims of racism.<sup>176</sup> In keeping with their attention to voices from “the bottom,” critical race theorists incorporated multidisciplinary research, such as historical and sociological studies, before it became trendy and frequently

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<sup>171</sup> IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); *see also* DAVID ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA’S NEW IMMIGRANTS BECAME WHITE* (2005); NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995).

<sup>172</sup> *See* DELGADO & STEFANCIC, *CRT: AN INTRODUCTION*, *supra* note 156, at 8.

<sup>173</sup> *See id.* at 67–74; Juan F. Perea, *The Black/White Binary Paradigm of Race*, 85 CAL. L. REV. 1213 (1997). *But see* Mari Matsuda, *Beyond, and Not Beyond Black and White: Deconstruction Has a Politics*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 393 (Francisco Valdez et al. eds., 2002) (cautioning that deconstructing the black-white paradigm may hinder the struggle for racial justice).

<sup>174</sup> Key CRT writings about Latinos, Asian Americans and Native Americans include: ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW AND THE NATION STATE* (1999); *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN AMERICA* (Juan Perea ed., 1997); IAN F. HANEY LOPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003); ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); ERIC K. YAMAMOTO, *RETHINKING ALLIANCES: AGENCY, RESPONSIBILITY AND INTERRACIAL JUSTICE* (1999).

<sup>175</sup> *See* Symposium, *LatCrit: Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997). Progressive white scholars have also contributed significantly to CRT, especially on the topic of white privilege and the failure of most whites to see it. *See, e.g.*, BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW* (1998); STEPHANIE WILDMAN ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996).

<sup>176</sup> An early and important defense of “looking to the bottom” as a methodology is Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

use narrative, or “legal storytelling,” to support their arguments.<sup>177</sup> In addition, CRT is as much a movement as a mode of analysis in that many of its adherents are activists who are dedicated to ending the unjust racial order that they study.<sup>178</sup> Critical race scholars share “an ethical commitment to human liberation.”<sup>179</sup> Thus, they eschew the pretense of neutrality both in legal doctrine and in their intellectual pursuits.

Many CRT professors have applied their critical praxis to the classroom by examining the role of teachers of color in academia and exploring new pedagogies that train students to think more critically about law and racial power.<sup>180</sup> As CRT scholarship flourished, courses on CRT became regularly available to students at about twenty law schools across the country, including the University of Michigan, Georgetown, and the University of Iowa.<sup>181</sup> UCLA School of Law offers a concentration in Critical Race Studies, recognizing that “[t]o understand the deep interconnections between race and law, and particularly the ways in which race and law are mutually constitutive, is an extraordinary intellectual challenge with substantial practical implications.”<sup>182</sup> While students at Northwestern have been introduced to CRT scholarship in courses on Race Relations Law,

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<sup>177</sup> See DELGADO & STEFANCIC, *supra* note 156, at 37–49; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). A classic example of legal storytelling is Columbia law professor Patricia Williams’s interweaving of personal stories and legal analysis in her 1991 book, *Alchemy of Race and Rights*. For a debate about critical race scholars’ use of narrative and storytelling, see DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993).

<sup>178</sup> See, e.g., DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* (1994). Among his many acts of activism, Derrick Bell resigned his tenured position at Harvard Law School in protest against the school’s failure to hire an African American woman to its tenure-track faculty. He currently teaches at New York University. (In 1998, Lani Guinier became the first and only woman of color among Harvard Law School’s tenured faculty.)

<sup>179</sup> CRENSHAW ET AL., *supra* note 157, at xiii (noting that CRT scholars share a common desire “not merely to understand the vexed bond between law and racial power but to *change* it”); see also DELGADO & STEFANCIC, *supra* note 156, at 3 (stating that CRT “sets out not only to ascertain how society organizes itself along racial lines and hierarchies, but to transform it for the better”).

<sup>180</sup> See, e.g., Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. (1989); Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding Me in the Legal Academy*, 77 VA. L. REV. 539 (1991); Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992); Margaret Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263 (2000).

<sup>181</sup> See Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1216 (2002).

<sup>182</sup> See UCLA School of Law Concentration in Critical Race Studies, <http://www.law.ucla.edu/home/index.asp?page=1084> (last visited Sept. 18, 2005).

Law and Social Change, and a Constitutional Law Colloquium, the law school's curriculum has never included a course devoted to CRT.<sup>183</sup>

The *Law Review* also largely overlooked CRT scholarship. Its pages contain only one article written from a CRT perspective. Richard Delgado's *Campus Antiracism Rules: Constitutional Narratives in Collision*, an important contribution to the debate about the constitutionality of hate speech regulation, was published in 1991.<sup>184</sup> In 1998 and 2005, the *Law Review* also published book reviews by Delgado.<sup>185</sup> In addition, a 1998 essay by University of Chicago Law Professor Tracey Meares reviewed *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*, by Dorothy Roberts, a critical race scholar and one of this piece's authors.<sup>186</sup> Finally, Christopher Bracey's review of *The Anatomy of Racial Inequality* by Glenn Loury embraced CRT's rejection of colorblindness and admonition that race-conscious remedies are needed to dismantle systemic racial disadvantage.<sup>187</sup>

The conspicuous inclusion of Richard Delgado's work in the *Law Review* bears special consideration. A professor and Derrick Bell fellow at University of Pittsburgh School of Law, Delgado is a giant in the CRT movement and one of the nation's most prolific legal scholars. His 1984 article, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, provided a crucial intellectual underpinning of CRT.<sup>188</sup> The article proceeds from Delgado's discovery at the outset of his teaching career that all of the twenty leading law review articles on civil rights were written by white males.<sup>189</sup> Delgado identified a scholarly tradition consisting of "white scholars' systematic occupation of, and exclusion of minority scholars

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<sup>183</sup> As a visiting associate professor, Christopher Bracey, now a professor at Washington University in St. Louis, taught a race relations course that included discussions of CRT, as well as other theoretical approaches, but focused primarily on legal history. E-mail from Christopher Bracey, Associate Professor of Law, Washington University School of Law, to Dorothy Roberts, Professor of Law, Northwestern University (July 11, 2005, 14:57:42 CST) (on file with authors).

<sup>184</sup> See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991).

<sup>185</sup> See Richard Delgado, *Rodrigo and Revisionism: Relearning Lessons of History*, 99 NW. U. L. REV. 805 (2005) (reviewing IAN F. HANEY LOPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003)) [hereinafter Delgado, *Rodrigo and Revisionism*]; Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 NW. U. L. REV. 215 (1998) (reviewing STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997), and CHARLES MURRAY, *WHAT IT MEANS TO BE A LIBERTARIAN: A PERSONAL INTERPRETATION* (1997)) [hereinafter Delgado, *Rodrigo's Roadmap*].

<sup>186</sup> See Tracey L. Meares, *The Increasing Significance of Genes: Reproducing Race*, 92 NW. U. L. REV. 1046 (1998) (reviewing DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997)).

<sup>187</sup> See Bracey, *supra* note 76.

<sup>188</sup> See Delgado, *supra* note 163.

<sup>189</sup> *Id.* at 561. Delgado updated his research a decade later in Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outside Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992).

from, the central areas of civil rights scholarship.”<sup>190</sup> And he concluded that this exclusion mattered: white scholars promoted a view of racism as isolated, aberrational, and outmoded acts that could be remedied without disturbing whites’ privileged position.<sup>191</sup> *The Imperial Scholar* issued a powerful condemnation of mainstream civil rights scholarship that highlighted the need for minority perspectives to gain greater prominence in law reviews. Ironically, Delgado stands out as an exception to the *Law Review*’s failure to heed his admonition that student editors should pay more attention to minority scholarship on racial issues.

Delgado went on to author or co-author more than one hundred books, law review articles, book reviews, and essays that have contributed significantly to every key theme of CRT.<sup>192</sup> His 1991 *Northwestern University Law Review* article *Campus Antiracism Rules: Constitutional Narratives in Collision* was an early example of CRT intervention in the battle over the constitutionality of state and university regulations of hate speech.<sup>193</sup> In response to arguments that racial epithets and insults are protected by the First Amendment, CRT writers described the concrete harms caused by assaultive speech and developed original theoretical defenses for protecting its victims.<sup>194</sup>

In *Campus Antiracism Rules*, Delgado cast the constitutionality of campus codes that punish racist speech as a choice between protecting equality or protecting speech.<sup>195</sup> Delgado pointed out that both approaches were plausible and could not be balanced against each other; rather, prevailing constitutional analyses of hate speech regulation produced an indeterminate answer because they provided no way to prefer one paradigm over the other. After discussing the competing speech and equality paradigms and reviewing other nations’ failure to resolve the dilemma, Delgado offered a novel solution based on a “post-modern insight.”<sup>196</sup> Delgado argued that racist speech is distinctively harmful because it “constructs” a shared, stigmatized image of minorities that helps to perpetuate racial subordination by strengthening racist ideology and disempowering minority groups.<sup>197</sup>

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<sup>190</sup> Delgado, *supra* note 163, at 566.

<sup>191</sup> *Id.* at 576.

<sup>192</sup> See, e.g., DELGADO & STEFANCIC, CRT: AN INTRODUCTION, *supra* note 156; DELGADO & STEFANCIC, CRT: THE CUTTING EDGE, *supra* note 157; RICHARD DELGADO & JEAN STEFANCIC, CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (1997); RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995).

<sup>193</sup> See Delgado, *supra* note 184.

<sup>194</sup> See, e.g., RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE FIRST AMENDMENT (1997); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

<sup>195</sup> Delgado, *supra* note 184, at 345–49.

<sup>196</sup> *Id.* at 383.

<sup>197</sup> *Id.* at 383–86.

In a 1992 *Yale Law Journal* article, *Rodrigo's Chronicle*, Delgado introduced Rodrigo, the fictional son of an African-American serviceman and Italian mother, who returns to the United States from Italy, where he was educated, to pursue an LL.M. degree.<sup>198</sup> The brilliant Rodrigo's intense discussions with an unnamed professor of color about burning racial issues have become the ingredients for dozens of law review articles and a book nominated for a Pulitzer Prize.<sup>199</sup> Delgado's two book reviews published in the *Law Review* are part of this literature featuring Rodrigo and the professor.

*Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?* critiqued the law-and-economics approach to civil rights law by examining two 1997 books that opposed affirmative action and antidiscrimination laws, respectively—Stephan and Abigail Thernstrom's *America in Black and White: One Nation, Indivisible* and Charles Murray's *What It Means to Be a Libertarian: A Personal Interpretation*.<sup>200</sup> The essay is set in a hotel restaurant where the professor retires during a break from an academic conference and encounters Rodrigo, now a law professor himself, and Rodrigo's politically conservative colleague, Lazlo (“Laz”) Kowalski. As the three professors spar over the free market's capacity to cure racism, Delgado weaves together a compelling four-part argument for race-conscious remedies.<sup>201</sup> Using cultural texts and social science data, Delgado shows that the human impulse to suppress others is ubiquitous; other species use similar strategies to exclude competitors; people often irrationally refuse to help or trade with those of another race; and highly formal settings elicit the least racism.<sup>202</sup> “Racism does present a unique challenge to free market philosophy,” Laz concedes.<sup>203</sup>

In *Rodrigo and Revisionism: Relearning the Lessons of History*, Delgado addresses a topic that has preoccupied much of his recent writing—Latino civil rights. Delgado is one of the chief critics of the black-white binary paradigm that focuses on discrimination against African Americans and that uses their struggle for civil rights as the model for other

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<sup>198</sup> Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992).

<sup>199</sup> For a survey of Delgado's main writings featuring Rodrigo and the professor, see Delgado, *Rodrigo and Revisionism*, *supra* note 185, at 806 n.2.

<sup>200</sup> See Delgado, *Rodrigo's Roadmap*, *supra* note 185.

<sup>201</sup> Delgado challenged free market approaches to racial discrimination in several of *Rodrigo's Chronicles*. See, e.g., Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993); Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995).

<sup>202</sup> See Delgado, *Rodrigo's Roadmap*, *supra* note 185, at 234–42.

<sup>203</sup> *Id.* at 242.

ethnic groups.<sup>204</sup> Delgado has helped to illuminate the particular history of anti-Latino oppression<sup>205</sup> and to make a case for expanding civil rights discourse and struggle to include Latinos on their own terms.<sup>206</sup>

*Rodrigo and Revisionism* reviews *Racism on Trial: The Chicano Fight for Justice*, published in 2003 by another leading CRT scholar, Ian F. Haney Lopez.<sup>207</sup> The essay opens with a nod to CRT's social constructionist view of race as Rodrigo explains to the professor his newly discovered Latino identity. Although Rodrigo previously emphasized his African roots, he has decided to acknowledge more his mother's Latin origins and the Spanish-language heritage he acquired from his father, Lorenzo, who grew up in the Dominican Republic.<sup>208</sup> Through the dialogue between Rodrigo and the professor, Delgado praises *Racism on Trial* for its contribution to the legal literature about the history of Chicano mistreatment and protest, but laments that Haney Lopez and the 1960s activists he describes missed an opportunity to further contest the black-white paradigm by distinguishing between the Chicano and African-American liberation struggles.<sup>209</sup> Delgado suggests conquest and internal colonization of Chicanos in the Southwest, in contrast to slavery, as the defining historical event in Chicano history and the distinctive source of Chicano political disenfranchisement.<sup>210</sup> Conquest and the subsequent racialization of Latinos, Delgado argues, requires particular remedies that need not be patterned after the Black civil rights model.<sup>211</sup>

### B. Critical Race Feminism

One of the most revolutionary branches of both critical race theory and feminist theory is critical race feminism. Critical race feminists have highlighted the failure of mainstream civil rights and feminist paradigms alike to see the intersection of racism and sexism in hierarchies of power and in the experiences of women of color.<sup>212</sup> Like traditional legal doctrines, these ap-

<sup>204</sup> See Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997); *supra* note 185 and sources cited therein.

<sup>205</sup> See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *THE LATINO/A CONDITION: A CRITICAL READER* (1998).

<sup>206</sup> Richard Delgado, *Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion*, 83 TEX. L. REV. 489 (2004) (reviewing GEORGE YANCY, *WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE* (2003)).

<sup>207</sup> See Delgado, *Rodrigo and Revisionism*, *supra* note 185.

<sup>208</sup> See *id.* at 807.

<sup>209</sup> See *id.* at 823.

<sup>210</sup> See *id.* at 824–26.

<sup>211</sup> See *id.* at 827–32.

<sup>212</sup> See *infra* notes 214–218. Queer-crit theorists of color have similarly demonstrated the role of racism in maintaining sexual norms while criticizing homophobia within communities of color. See, e.g., Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103 (1994); Darren Lenard Hutchinson, *Out yet Unseen: A Racial Critique of Gay and*

proaches also “permitted women of color to fall through the cracks.”<sup>213</sup> The racial critique of feminism’s focus on gender as the primary locus of oppression has inspired an ongoing reconstruction of a feminist jurisprudence that includes the historical, economic, and social diversity of women’s lives. Critical race feminists have not only criticized feminist thought; they have transformed it.

In an influential 1989 article, *Demarginalizing the Intersection of Race and Sex*, published in 1989 in *University of Chicago Legal Forum*, Columbia and UCLA Professor Kimberlé Williams Crenshaw coined the term “intersectionality” to denote the various ways in which race and gender interact to shape Black women’s experiences of subordination.<sup>214</sup> Crenshaw’s 1991 *Stanford Law Review* article, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, expanded this analysis in the context of domestic violence and rape.<sup>215</sup> Both articles demonstrated how dominant civil rights discourse focused on male interests and feminism based on the experiences of white women erased Black women altogether and forced them to choose between identities.

Angela Harris’s *Race and Essentialism in Feminist Legal Theory* confronted the shortcomings of dominant feminist jurisprudence more directly.<sup>216</sup> Harris demonstrated that white feminist scholars were guilty of “essentialism” by highlighting sexism as the most significant form of oppression in women’s lives and by implying that “there is a monolithic ‘women’s experience’ that can be described independently of other facets of experience like race, class, and sexual orientation.”<sup>217</sup> Feminist essentialism made white women the norm and led to the fragmentation of nonwhite women’s identities. Like Crenshaw, Harris concluded that under the prevailing feminist approach “black women will never be anything more than a crossroads between two kinds of domination, or at the bottom of a hierarchy

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*Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

<sup>213</sup> CRITICAL RACE FEMINISM: A READER 2 (Adrien Katherine Wing ed., 2nd ed. 2003) [hereinafter CRITICAL RACE FEMINISM].

<sup>214</sup> Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. CHI. LEGAL F. 139 (1989).

<sup>215</sup> Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). Other writings on violence against women of color include Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN’S L. REV. 69 (1995); Elizabeth Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869 (1996).

<sup>216</sup> Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

<sup>217</sup> *Id.* at 588.

of oppression; we will always be required to choose pieces of ourselves to present as wholeness.<sup>218</sup>

Critical race feminists, including Asian, Latina, and Native American scholars, have dramatically altered feminist legal theorizing by placing at its center women's multiplicity of identities and forms of oppression and resistance.<sup>219</sup> They have examined a broad range of legal concerns particular to women of color that previously remained invisible in existing legal approaches.<sup>220</sup> Critical race feminists have also examined the particular histories of oppression various groups of women experienced, along with the disparaging, racialized images of minority women's sexuality and motherhood that legitimize their subordination.<sup>221</sup> And they have studied nonwhite women's resistance against oppression, which has often differed from white women's struggles, and advocated incorporating their visions of liberation in feminist and antiracist initiatives.<sup>222</sup>

Finally, critical race feminists have highlighted the unique battles of minority women to gain entry and respect in the legal academy and profession.<sup>223</sup> Veteran Northwestern University law professor Joyce Hughes, the first African American woman to gain tenure at a predominantly white law school, made important contributions to this literature.<sup>224</sup> These battles were especially visible when the vilification of two Black law professors became the focus of national attention. In 1991, when University of Oklahoma law professor Anita Hill, now at Brandeis, revealed that U.S. Supreme Court nominee Clarence Thomas had sexually harassed her, the ensuing media campaign to impugn *her* character revived stereotypes of Black female li-

<sup>218</sup> *Id.* at 589. Another pivotal article on Black women's experience of multiple oppressions is Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

<sup>219</sup> On women's multiple identities, see, for example, Margaret E. Montoya, *Mascaras, Trenzas, y Grenas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1 (1994); Berta Esperanza Hernandez-Truyol, *Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex*, 53 U. MIAMI L. REV. 811 (1999).

<sup>220</sup> See, e.g., CRITICAL RACE FEMINISM, *supra* note 157 (collecting critical race feminist writings on mothering, criminality, domestic violence, and working).

<sup>221</sup> See, e.g., Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 (1997); Sumi Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER, RACE & JUST. 177 (1997).

<sup>222</sup> See *infra* notes 231-234 and accompanying text.

<sup>223</sup> See, e.g., LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1998); Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN'S L.J. 46 (1991).

<sup>224</sup> See Joyce A. Hughes, *Different Strokes: The Challenge Facing Black Women Law Professors in Selecting Teaching Methods*, 16 NAT'L BLACK L.J. 27 (1999); Joyce A. Hughes, *Neither a Whisper nor a Shout*, in *REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS* (J. Clay Smith, Jr. ed., 1998). Professor Hughes, hired in 1975, and Professor Roberts, hired in 1998, are the only women of color on the Law School's tenure-track faculty.

centiousness, deceit, and disloyalty to the Black community.<sup>225</sup> As University of Iowa law professor Adrien Katherine Wing observes, “there was no national precedent for dealing with or understanding the worldview of a Black female law scholar and teacher.”<sup>226</sup> Two years later, University of Pennsylvania law professor Lani Guinier, now at Harvard, was subjected to similar disparagement when President Bill Clinton nominated her to head the U.S. Justice Department Civil Rights Division. Alluding to the derogatory myth of the “Welfare Queen,” the conservative media labeled Guinier a “Quota Queen” while distorting her writings on affirmative action.<sup>227</sup>

Professor Wing attributes her motivation to create the first collection of critical race feminist writings to these disturbing events involving Black female law professors. In 1997, she published *Critical Race Feminism: A Reader*, now in its second edition.<sup>228</sup> Wing’s *Global Critical Race Feminism: An International Reader* expanded on the issues covered in the prior work to include international and comparative law, global feminism, and postcolonial theory.<sup>229</sup> Another important anthology, dealing with Black men’s relationship to the feminist project, is *Black Men on Race, Gender, and Sexuality: A Critical Reader*, edited by UCLA professor Devon Carbado.<sup>230</sup>

The *Law Review*’s sole account of critical race feminism was the publication of a 1998 essay by Tracey Meares reviewing *Killing the Black Body: Race Reproduction and the Meaning of Liberty* by Dorothy Roberts.<sup>231</sup> *Killing the Black Body* recounts the history of regulation of Black women’s reproductive lives and exposes a resurgence of policies that devalue Black motherhood, including the disproportionate prosecution of Black women for using drugs while pregnant, state-sponsored programs to encourage use of risky, long-term contraceptives by Black teenagers, and welfare reforms designed to deter women receiving public assistance from having children. Noting that mainstream theories of reproductive rights ig-

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<sup>225</sup> See RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992); Emma Coleman Jordan, *Race, Gender and Social Class in the Thomas Sexual Harassment Hearings: The Hidden Fault Lines in Political Discourse*, 15 HARV. WOMEN’S L.J. 1 (1992).

<sup>226</sup> Adrien Katherine Wing, *Introduction* to CRITICAL RACE FEMINISM, *supra* note 213, at 2.

<sup>227</sup> See Clint Bolick, *Clinton’s Quota Queens*, WALL ST. J., April 30, 1993, at A12.

<sup>228</sup> See CRITICAL RACE FEMINISM, *supra* note 213. Professor Wing teaches a course on Critical Race Feminism at University of Iowa College of Law.

<sup>229</sup> ADRIEN KATHERINE WING, *GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER* (2000).

<sup>230</sup> Devon Carbado answers the question, “Can a black man be a feminist?” in the affirmative and suggests that the male feminist project should include a commitment to expose and question male heterosexual privilege. See Devon W. Carbado, *Straight out of the Closet: Men, Feminism, and Male Heterosexual Privilege*, in *BLACK MEN ON RACE, GENDER, AND SEXUALITY* 417 (Devon W. Carbado ed., 1999).

<sup>231</sup> See Meares, *supra* note 186.

nored these violations, Roberts argued that “the meaning of reproductive liberty must take into account its relationship to racial oppression.”<sup>232</sup>

*Killing the Black Body* belongs to the struggle by feminists of color to transform the meaning of reproductive freedom in America. Women of color have long advocated a more complicated understanding of reproductive rights that extends beyond legalized abortion to encompass a broad right to reproductive control, including the right to bear children.<sup>233</sup> They have placed reproductive rights in a social context that made government provision of family planning contingent on improvements in general health and living conditions. An emerging literature on the history of the reproductive rights movement not only includes the long-neglected activism by women of color but highlights its pivotal position in the movement.<sup>234</sup>

Professor Meares commends *Killing the Black Body* for its critical analysis of the racial politics surrounding reproductive health policy that “excavates” easy assumptions and reveals new ways of understanding these policies.<sup>235</sup> “It is impossible to read this book without thinking critically about what Roberts has said—and possibly changing your thinking as a result of the enterprise,” Meares writes.<sup>236</sup> Meares faults the book, however, for failing to uncover the heterogeneity of Black public opinion and Black politics on these issues.<sup>237</sup> She suggests that greater attention to class inequities is necessary to implement Roberts’s vision of reproductive liberty, in part because such attention will render the vision “more politically acceptable.”<sup>238</sup>

#### CONCLUSION

In 1926, the *Law Review*’s main discussion of race relations law appeared in a Northwestern law professor’s article that supported racial zoning by private contract because “the fear of a negro invasion materially interferes with the profitable sale of almost every homesite.”<sup>239</sup> For the most part, the *Law Review*’s first half-century of publication simply ignored women and people of color as well as the important questions of race and gender that were swirling in the world around it. In the next fifty years, however, the *Law Review* took account of the flourishing of legal theorizing on race and gender that reflected the entry of minorities and women into the

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<sup>232</sup> ROBERTS, *supra* note 186, at 6.

<sup>233</sup> See ELENA GUTIERREZ ET AL., UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE (2004); JENNIFER NELSON, WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT (2003).

<sup>234</sup> GUTIERREZ ET AL., *supra* note 233; NELSON, *supra* note 233.

<sup>235</sup> Meares, *supra* note 186, at 1049–50.

<sup>236</sup> *Id.* at 1049.

<sup>237</sup> *Id.* at 1050.

<sup>238</sup> *Id.* at 1067.

<sup>239</sup> Bruce, *supra* note 6, at 716.

legal academy and responded to activists' efforts to use the law for social change. The recognition of race and gender as important themes in the law has produced more complex, interesting, and useful legal theories that no doubt would shock the sensibilities of the white men who dominated the *Law Review's* early pages.

The *Law Review's* discovery of race and gender was incomplete, however. Acknowledging the presence of people of color is important, but it leaves too pretty a narrative of race and other forms of social injustice in the United States and the law's central complicity in maintaining them. Like the period when Lewis and Clark "discovered" the American West, the past one hundred years constituted "a barbaric century for the legal academy, which has, wittingly or not, [provided] the justificatory framework for shameful social practices that continue to this day."<sup>240</sup> In the last two decades, critical race theorists have produced a radical body of scholarship that highlights the failure of traditional civil rights and mainstream feminist approaches to see the law's central role in "shameful social practices" involving race. Their analyses of systemic racism and visions for achieving social justice vitally changed existing legal paradigms. "Critical Race Theory is a gasp of emancipatory hope that law can serve liberation rather than domination," writes Cornel West.<sup>241</sup> The failure to fully explore this important frontier of legal thought significantly limited the *Law Review's* discovery of the field of race and gender.

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<sup>240</sup> West, *supra* note 159, at xii.

<sup>241</sup> *Id.*