

# INTRODUCTION

## Constructing LatCrit Theory: Diversity, Commonality, and Identity

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The *U.C. Davis Law Review* is an especially appropriate venue for this LatCrit Symposium. The *Law Review* recognized early on the significance of legal discourse focused on Latinos and published some of the early LatCrit works.<sup>1</sup> It seems appropriate to acknowledge the pioneering work of law reviews, just as Kevin Johnson has suggested in the Foreword to this issue that it is important to recognize the path-breaking pre-1996<sup>2</sup> LatCrit work.<sup>3</sup> This cluster of essays continues the *Law Review's* fine work in this area and is titled: Diversity, Commonality, and Identity.

One of the major themes of LatCrit theory has been to critically scrutinize the evolution of law.<sup>4</sup> Leti Volpp's contribution fits nicely within this tradition. In her piece, she provides a history of the California laws that prohibited marriages between Filipinos and whites.<sup>5</sup> She describes how such laws were motivated by concerns that such unions would create a new type of racial hybrid — an

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<sup>1</sup> See, e.g., Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937 (1994); George A. Martínez, *Legal Indeterminacy, Judicial Discretion, and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994); Carlos Villareal, *Culture in Lawmaking: A Chicano Perspective*, 24 U.C. DAVIS L. REV. 1193 (1991).

<sup>2</sup> The first annual LatCrit Conference — LatCrit I — took place in 1996.

<sup>3</sup> See Kevin R. Johnson, *Foreword — Celebrating Lat Crit Theory: What Do We Do When the Music Stops?*, 33 U.C. DAVIS L. REV. 753 (2000).

<sup>4</sup> See, e.g., George A. Martínez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997) (analyzing how courts constructed race of Mexican Americans).

<sup>5</sup> See Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795 (2000).

“American Mestizo.”<sup>6</sup> In defending these laws in court, the attorneys for the state argued that without such laws, the United States would suffer the “evil effects” of “race mixture” that had already been experienced by Mexico.<sup>7</sup> The legal authorities tended to classify Filipinos as “Mongolians” and, therefore, Filipinos fell within the statute that outlawed marriages between whites and Mongolians.

Volpp’s piece provides another piece of the puzzle regarding mainstream society’s concern about racial mixture. Indeed, Lat-Crit theory has been at the forefront of addressing and analyzing such “mestizaje” or racial mixture.<sup>8</sup> In addition, Volpp points out that the conventional view is that Latinas/os were not covered by the miscegenation laws. With so many Mexican Americans in California, one might wonder why. The answer seems to be this. Mexican Americans were legally classified as white, largely because of the Treaty of Guadalupe Hidalgo<sup>9</sup> that ended the war between the United States and Mexico.<sup>10</sup> Thus, the miscegenation laws did not extend to Mexican Americans. Beyond this, it made good business sense for Anglos to marry the daughters of rich Mexican landowners in California.<sup>11</sup> Given this incentive, there were prudential reasons not to craft laws to prohibit intermarriage between Anglos and Mexican Americans.

Victor Romero also addresses the situation of Filipinos.<sup>12</sup> In particular, he uses the history of Filipinos to emphasize the impor-

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<sup>6</sup> *Id.* at 809.

<sup>7</sup> *Id.* at 815.

<sup>8</sup> See KEVIN R. JOHNSON, *HOW DID YOU GET TO BE MEXICAN: A WHITE/BROWN MAN’S SEARCH FOR IDENTITY* (1999); IAN HANEY LÓPEZ, *WHITE BY LAW* (1996); Tanya K. Hernández, “Multiracial” Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97 (1998); Jean Stefancic, *Multiculturalism: A Bibliographic Essay and Critique in Memory of Trina Grillo*, 81 MINN. L. REV. 1521 (1997).

<sup>9</sup> There is recent LatCrit analysis of the Treaty of Guadalupe Hidalgo. See Christopher David Ruiz Cameron, *One Hundred and Fifty Years of Solitude: Reflections on the End of the History Academy’s Dominance of Scholarship on the Treaty of Guadalupe Hidalgo*, 5 SW. J. L. & TRADE AM. 83 (1998); Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties*, 5 SW. J. L. & TRADE AM. 121 (1998); Guadalupe T. Luna, *En El Nombre de Dios Todopoderoso: The Treaty of Guadalupe Hidalgo and Narrativos Legales*, 5 SW. J. L. & TRADE AM. 45 (1998); George A. Martínez, *Dispute Resolution and the Treaty of Guadalupe Hidalgo: Parallels and Possible Lessons for Dispute Resolution Under NAFTA*, 5 SW. J. L. & TRADE AM. 147 (1998).

<sup>10</sup> See Martínez, *supra* note 4, at 326.

<sup>11</sup> See LEONARD PITT, *DECLINE OF THE CALIFORNIOS: A SOCIAL HISTORY OF THE SPANISH SPEAKING CALIFORNIANS, 1846-1890* (1966).

<sup>12</sup> See Victor C. Romero, “Aren’t You Latino?”: *Building Bridges upon Common Misperceptions*, 33 U.C. DAVIS L. REV. 837 (2000).

tance of coalitions among minority groups. It is, of course, a fundamental principle of LatCrit theory that the various subordinations are interrelated in complex ways.<sup>13</sup> Thus, he contends that the Filipino community was shortsighted when it challenged the California statute outlawing marriages between whites and blacks or Mongolians on the ground that Filipinos were not Mongolian.<sup>14</sup> He suggests it would have been better for the affected minority groups to unite and attack the law's premise. He then employs narrative — an important critical tool<sup>15</sup> — to provide a contemporary example to illustrate the importance of minority coalitions. He tells a story arising out of his experience as an immigrant from the Philippines. During the immigration process, he experienced insensitivity at the hands of a Latina INS agent during his citizenship interview in 1995. As a result, he urges minorities not to treat each other as the "Other."<sup>16</sup> Instead, he urges them to reach out to one another and avoid "minority on minority oppression."<sup>17</sup> He believes that such coalitions are particularly important in light of recent efforts to roll back the gains of minority groups, such as the current attack on affirmative action.

Romero's point that members of minority groups must establish coalitions is well taken. LatCrit theorists have consistently called

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<sup>13</sup> See Kevin R. Johnson, *Racial Hierarchy, Asian Americans, and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347 (1997); George A. Martínez, *African-Americans, Latinos and the Construction of Race: Toward an Epistemic Coalition*, 19 CHICANO-LATINO L. REV. 213 (1998).

<sup>14</sup> Romero, *supra* note 12, at 840.

<sup>15</sup> See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISCIPLINARY L.J. 611 (1998); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988); Alex Johnson, *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994); Pedro A. Malavet, *Literature and Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production: The Confessions of an Accidental Crit*, 33 U.C. DAVIS L. REV. 1293 (2000); George A. Martínez, *Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L.J. 683 (1999). There are many examples of LatCrit narrative. See, e.g., Elvia Arriola, *Welcoming the Outsider to an Outsider Conference: Law and the Multiplicities of Self*, 2 HARV. LATINO L. REV. 397 (1997); Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); Yxta Maya Murray, *Merit-Teaching*, 23 HASTINGS CONST. L.Q. 1073 (1996); Michael Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990); Laura M. Padilla, *Single-Parent Latinas on the Margin: Seeking a Room with a View, Meals and Built-In Community*, 13 WIS. WOMEN'S L.J. 179, 180-81 (1998).

<sup>16</sup> Romero, *supra* note 12, at 840-41.

<sup>17</sup> *Id.* at 841.

for coalition building,<sup>18</sup> recognizing that mainstream society often seeks to divide minority groups in an effort to perpetuate subordination. In this regard, it is important for LatCrit theorists to establish more than political coalitions, but also epistemic coalitions in order to learn the complex truth about and the interconnections among the various minority groups.<sup>19</sup>

LatCrit theorists recognized early on, the importance of exploring the connection between Native peoples and Latinas/os.<sup>20</sup> In her essay, Berta Hernández-Truyol employs narrative to explore her native heritage.<sup>21</sup> In so doing, she embraces her “own *mestizaje*.”<sup>22</sup> At the same time, she recounts that her exploration of her native roots provoked some criticism from those who argued that “you cannot claim a tribe, the tribe has to claim you” and that “tribal existence is inextricably tied to land.”<sup>23</sup> This unexpected response caused her to wonder whether she “was wrong to have claimed [her] native heritage.”<sup>24</sup> In the end, she concludes that it is important for LatCrit theorists to continue to explore their native origins.

It seems to me that Hernández-Truyol is certainly correct to claim that it is important for Latinas/os to acknowledge their indigenous roots. To offer formalistic slogans and barriers to doing so seems unproductive and counter-intuitive. It seems clear that

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<sup>18</sup> See, e.g., Elizabeth M. Iglesias & Francisco Valdes, *Religion, Gender, Sexuality, Race and Class In Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503, 516 (1998) (calling for LatCrit “to organize its coalitional politics”); Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 66-67 (1995) (calling for coalitions); Rachel F. Moran, *Neither Black Nor White*, HARV. LATINO L. REV. 61, 87 (1997) (“Latinos need build coalitions with other civil rights groups to forge effective reforms.”); Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 28-30 (1996) (calling for coalitions among subordinated groups); see also Deborah Waire Post, *The Salience of Race*, 15 TOURO L. REV. 351, 360 (1999) (discussing importance of sustaining coalitions).

<sup>19</sup> See Martínez, *supra* note 13, at 221-22.

<sup>20</sup> See, e.g., Luz Guerra, *Lat Crit y La Des-Colonizacion Nuestra: Taking Colon Out*, 19 CHICANO-LATINO L. REV. 351 (1998); Luis Angel Toro, “A People Distinct from Others”: *Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH L. REV. 1219 (1995).

<sup>21</sup> See Berta Esperanza Hernández-Truyol, *LatIndia II — Latinas/os, Natives, and Mestizajes — A LatCrit Navigation of Nuevos Mundos, Nuevas Fronteras, and Nuevas Teorias*, 33 U.C. DAVIS L. REV. 851 (2000).

<sup>22</sup> *Id.* at 867.

<sup>23</sup> *Id.* at 868.

<sup>24</sup> *Id.*

one could be of native descent without knowing one's tribal origins or being claimed by a tribe.

In her conference presentation, Rebecca Tsosie also discussed indigenous peoples.<sup>25</sup> She explained the significance of time and place to Native Americans. She also described the effort of Native Americans to preserve their cultures in the face of pressure to assimilate. In this regard, she explained that a tribe can preserve its right to exist as a separate political entity only to the extent that a tribe resists assimilation into mainstream society. She closed by discussing intersections between Native American identity and Chicana/o identity. She saw Chicana/o identity as a function of time and place just as with Native Americans. In particular, she noted that the mythical Chicana/o homeland — Aztlán — and “la Frontera,” or the borderlands, are key aspects of Chicano identity. Thus, she saw “rich parallels” between the Chicana/o experience and the Native American experience.<sup>26</sup>

To be sure, racial identity is a complex notion.<sup>27</sup> Nevertheless, I believe that Rebecca Tsosie is correct that there are certain parallels between Native American and Chicano experience regarding issues of identity. LatCrit theorists, for example, have discussed the importance of retaining Latina/o culture and resisting pressure to assimilate.<sup>28</sup> Similarly, I have argued elsewhere that there is a special connection between the American Southwest and Chicanas/os. It is there that Chicanas/os “belong.”<sup>29</sup> Thus, in some ways Chicano identity can be connected to place. Another interesting parallel is found in the way that American courts have formulated the

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<sup>25</sup> See Rebecca Tsosie, Native Cultures, Comparative Values and Critical Intersection Presentation at LatCrit IV (Apr. 30, 2000) (notes on file with author).

<sup>26</sup> See *id.*

<sup>27</sup> See e. christi cunningham, *The “Racing” Cause of Action and the Identity Formerly Known as Race: The Road to Tamazunchale*, 30 RUTGERS L.J. 707, 709 (1999) (observing that the “construct of race, as one dimension of identity is multi-layered and multifaceted”); Darren L. Hutchinson, *Out yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 566 (1997) (arguing that racial identity is multidimensional). Perhaps these complexities have led some to want to transcend the idea of race. See, e.g., Reginald Robinson, *Race Consciousness: A Mere Means of Preventing Escapes from the Control of Her White Masters?*, 15 TOURO L. REV. 401 (1999).

<sup>28</sup> See, e.g., Kevin R. Johnson, “Melling Pot” or “Ring of Fire”?: *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997), 10 LA RAZA L.J. 173 (1998); George A. Martínez, *Latinos Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1 (1999); Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1530-34 (1998) (discussing assimilation mandate).

<sup>29</sup> See Martínez, *supra* note 28.

identity of Chicanas/os and Native Americans. In this regard, Tsosie pointed out that American courts determine whether an "Indian community" exists by reference to whether they are discriminated against by whites.<sup>30</sup> In *Hernandez v. Texas*,<sup>31</sup> the U.S. Supreme Court also took the position that Chicano identity is a function of whether they are the target of local prejudice.<sup>32</sup> Because of this legal definition, both Native Americans and Chicanos apparently would lose their legal identity to the extent that they achieved assimilation.

In his piece, Eric Yamamoto analyzes the notion of "cultural frameworks."<sup>33</sup> As he uses the term "cultural frameworks," which are the lens through which people understand the world.<sup>34</sup> He argues that cultural frameworks influence the way that judges decide cases. He suggests that such frameworks will influence the U.S. Supreme Court as it decides the important Hawaiian rights case *Rice v. Cayetano*.<sup>35</sup> He closes by suggesting that it is possible to transform cultural frameworks, for example through a hula dance program, in a way that influences legal decisionmakers in a positive way.

In my view, Yamamoto's notion of "cultural frameworks" is useful. It seems to be consistent with what other theorists have called "mindset,"<sup>36</sup> "conceptual schemes or frameworks"<sup>37</sup> or "paradigms."<sup>38</sup> I agree that it is possible to provoke paradigm shifts or transformation in cultural frameworks.<sup>39</sup>

As Frank Valdes has explained, LatCrit theory seeks to produce knowledge, transform society, exhibit connections between the

<sup>30</sup> See Tsosie, *supra* note 25.

<sup>31</sup> 347 U.S. 475 (1954). For more on *Hernandez*, see Richard Delgado & Vicky Palacios, *Mexican-Americans as a Legally Cognizable Class under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME L. REV. 393 (1975), and Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997), 10 LA RAZA L.J. 57 (1998).

<sup>32</sup> See *Rice*, 347 U.S. at 477-79.

<sup>33</sup> Eric K. Yamamoto, *Practically Reframing Rights: Culture, Performance, and Judging*, 33 U.C. DAVIS L. REV. 875 (2000).

<sup>34</sup> *Id.* at 881.

<sup>35</sup> 146 F.3d 1075 (9th Cir. 1988), *rev'd*, 120 S. Ct. 1044 (2000).

<sup>36</sup> Delgado, *supra* note 15, at 2413.

<sup>37</sup> Martínez, *supra* note 15, at 683, 688-91.

<sup>38</sup> THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10-11 (2d Enlarged 1970).

<sup>39</sup> See Martínez, *supra* note 15, at 700-02; see also George A. Martínez, *Race and Immigration Law: A Paradigm Shift?*, 2000 U. ILL. L. REV. (forthcoming).

various subordinations, and construct coalitions.<sup>40</sup> The essays contained in this cluster help advance all of these goals. As LatCrit realizes these important goals, LatCrit will be in a better position to withstand any external<sup>41</sup> challenges that might arise.

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<sup>40</sup> See Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1093-94 (1997), 10 LA RAZA L.J. 1, 7-8 (1998).

<sup>41</sup> In this regard, LatCrit theorists should take note of the current external attack on Critical Race Theory. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997). A leading Critical Race theorist wrote a powerful response to this attack. See John O. Calmore, *Random Notes of an Integration Warrior — Part 2: A Critical Response to the Hegemonic “Truth” of Daniel Farber and Suzanna Sherry*, 83 MINN. L. REV. 1589 (1999).

