

CONTEMPORARY RACIAL REALITIES

Kulturkampf Revelations, Racial Identities and Colonizing Structures

*Guadalupe T. Luna*¹

INTRODUCTION

Kul*tur“kampf\, n. [G., fr. kultur, cultur, culture + kampf fight.] (Ger. Hist.)Lit., culture war;—a name, originating with Virchow (1821— 1902), given to a struggle between the Roman Catholic Church and the German government, chiefly over the latter’s efforts to control educational and ecclesiastical appointments in the interest of the political policy of centralization.

While much time has passed since the era of Virchow and the conflicts between the Catholic Church and German government, the Kulturkampf template remains in full force. Presently tethered to the politics of ultra-conservatism, politicians,² jurists³ and government officials,⁴ engender Kulturkampf angst to repel racial identity

¹ Professor of Law, Northern Illinois University, College of Law. The author thanks the Conference hosts and the Seton Hall Law Review for its immeasurable contribution and engagement of law.

² See generally Patrick J. Buchanan, *The Death of the West, How Dying Populations and Immigrant Invasions Imperil our Country and Civilization* (2000). Compare with *Plyler v. Doe*, 457 U.S. 202 (1982) which recounts the financial contributions of immigrants in Texas with tremendous economic gain to the State. Notwithstanding their contributions, Texas, sought to deny its children an education.

³ See e.g., *Romer v. Evans*, 517 U.S. 620, 635 (1996). Justice Scalia’s dissent states: “The Court has mistaken a Kulturkampf for a fit of spite.” This language illustrates how name-calling is employed to belittle discrimination rather than focusing on the jurisprudence of the doctrine at issue. Compare with Maureen Dowd, *Nino’s Opera Bouffe*, N.Y. TIMES, June 29, 2003, § 4, at 13 (“[Scalia] is the last one to realize that his intolerance is risibly out-of-date.”).

⁴ For example, for some individuals the separation of church and state has collapsed at the political level. *Christian Soldiers*, NAT’L J., Dec. 4, 2004 (describing how current U.S. President George W. Bush “has given members of the Religious Right unparalleled access to the White House.”); Jannell McGrew, *Parker Prepares For*

politics.⁵ The strategists of their campaign employ capricious and illogical attacks against the present socio-economic conditions of dispossessed communities, or their advocates, while ignoring the violence of racial animosities.

In efforts to control the political or educational spheres “in the interest of political policy of centralization,” conservative zealots accordingly promote dangerous eclectic policies and strategies that are proving harmful to the nation.⁶ The zeitgeist of the day, and its evangelical thrust, moreover, create legal⁷ and extra legal barriers⁸ against those pursuing justice, equity, and fairness for their communities.⁹ In contrast, less attention—if any—focuses on the

Bench, MONTGOMERY ADVERT. (Ala.), Nov. 4, 2004, at 1 (recounting Judge Parker’s removal from the bench for “defying a federal court order to remove a 5,280-pound ten commandants display from the rotunda of the Alabama Judicial Building”). LatCrit has wrestled with the influences of the Church and its influences on our communities. See e.g., Margaret E. Montoya, *Religious Rituals and LatCrit Theorizing*, 19 CHICANO-LATINO L. REV. 417 (1998).

⁵ For example, note the California gubernatorial recall election its overriding obsession with race that spawned innumerable false characterizations against one contestant while disregarding a lethal laundry list of extramarital affairs, sexual misconduct and reported support of the Nazi regime. Notwithstanding this litany of ethical lapses, the non-person of color succeeded against his opponent of Mexican descent. From a LatCrit perspective see generally Keith Aoki, et al., *Race and the California Recall: A Top Ten List of Ironies* (publication forthcoming).

⁶ The intensity of book banning cabals in various communities underscores one effort. See e.g., *Texas OKs Books With New Marriage Wording*, AUGUSTA CHRON., Nov. 6, 2004, at A3 (changes made to “depict marriage as the union of a man and a woman.”); Natalie Gott, *Only Man, Woman Can Be Married in Texas Books*, CHICAGO SUN-TIMES, Nov. 6, 2004, at 9. Disallowing the full realm of much appreciated diversity across the nation and replacing it with narrow interpretations shows a retrenchment to periods in which diversity in education remained primarily absent. In other words, only a few short years separate when the nation’s communities of color and their histories were absent from grade school, high school and in higher education programs much less employed as educators and administrators. In California in the 1960s and 1970s, for example, only after Chicano and Chicana students protested against the status quo did some changes occur in the educational institutions of the State. See *El Plan de Santa Bárbara, Manifiesto* in LITERATURA CHICANA, TEXTO Y CONTEXTO, CHICANO LITERATURE TEXT AND CONTEXT 85-86 (ANTONIA CASTENEDA SHULAR, TOMÁS YBARRA FRAUSTO & JOSEPH SOMMERS, EDS, 1972). It is the rejection of arguments for inclusion that renders imperative the measure of work LatCrit faces.

⁷ See for example the agenda of conservative Christians. Janet Jacobs, *Same-Sex Marriage A Major Issue for Christian Voters*, COX NEWS SERVICE, Nov. 6, 2004 (“Conservative Christians stood in long lines Tuesday to help re-elect President Bush, and they expect results.”).

⁸ For example, compare the assault against affirmative action with poll taxes, the forced segregation of communities, or the concerted and ongoing challenges to equal treatment. These comprise but a few examples that disallow the full participation of communities.

⁹ Compare the present Texas redistricting battle with its legal antecedents. See,

hunger, poverty or other harmful socio-economic conditions plaguing the nation.¹⁰ This Cluster, Contemporary Racial Realities, of the LatCrit IX Symposium accordingly focuses on the class warfare directed against racial politics while also addressing a broad realm of social, economic, physical and violent harms communities of color witness.

Specifically, this Cluster is grounded in several of the innumerable political, racial and spiritual identities that span across the nation's past and present political violence. The authors raise difficult questions and observations that further advance alternative visions of justice pedagogy for communities confronting law's structural influences and marginalizing forces. This Cluster's base thereby casts doubt on Kulturkampf tactics and in sum expands our base of knowledge relevant to the LatCrit journey.

I. CONSTRUCTING RACE, IDENTITY AND ALTERNATIVE VISIONS

In misdirecting cultural and political enlightenment and the reality of the human conditions in communities facing disparate times, Kulturekampf strategy seeks a centralization in which one voice governs to the exclusion of diversity. Accordingly it favors strict adherence to the status quo. Yet in one instance following another, the status quo invokes a return to a time in which white supremacy ruled with unmitigated restraint.¹¹ Accordingly, the divisiveness and harmful fissures that orthodox zealots present would disallow this Cluster's scrutiny of racial identity politics.

Notwithstanding the few gains made against heinous treatment, segregation, rabid discrimination, and disenfranchisement, a tremendous amount of socio-economic and class based harms remain today. This Cluster provides formidable counterarguments against

e.g., *White v. Regester*, 412 U.S. 755 (1973) and its progeny in Texas politics.

¹⁰ The data on the impoverishment of Latina/o communities is harsh and defies comprehension. U.S. DEPT. OF COMMERCE, U.S. CENSUS BUREAU, *THE HISPANIC POPULATION IN THE UNITED STATES: MARCH 2002, CURRENT POPULATION REPORTS, P20-545* (June 2003).

¹¹ *See generally* *Missouri v. Jenkins*, 515 U.S. 70 (1995) in which the Court describes Jim Crow practices: "In the past" the Court stated, the State had placed its "imprimatur on racial discrimination." Laws from the Jim Crow era created "an atmosphere in which . . . private white individuals could justify their bias and prejudice against blacks," with the possible result that private realtors, bankers, and insurers engaged in more discriminatory activities than would otherwise have occurred. Jim Crow legislation is but one example of the law's use as a tool to enact heinous injuries against people of color. *See generally Segregation Vote Reopens Racial Wounds in Alabama; Constitution: An Amendment to the State Constitution That Would Have Eliminated Anti-Black Language Was Defeated*, WASH. POST, Nov. 28, 2004.

those that would deny the rich diversity of the nation's cultural heritage as well as ignoring the legal structures that define class distinctions. As an offset against "culture war" charges, this Cluster thus encompasses unmitigated identity assertions that extend into the political, historical and spirituality realities of communities of color.

From a political, historical and spirituality basis, the authors expose the elusive legal disparities directed against their specific communities. Without advocating for legal parity, the legal and extra-legal injuries that subordinate communities and correspondingly privilege the status quo remain in full force.

A. *Alternative Observations and Visions*

Professor Jacquelyn L. Bridgeman, in her article, "*Defining Ourselves for Ourselves*" asks why "Clarence Thomas and others within the black community who hold similar views are so soundly rejected by so many within the community."¹² She next tethers her assertions to claims that socio-economic success draws from status closely aligned as "white." As the author provides:

In fact, in my experience, the privilege of receiving one or more of those labels is reserved either for those who appear (in varying degrees) to have achieved or been working toward some kind of mainstream success or achievement or who like Clarence Thomas express views that stray far from those perceived to be held by the vast majority of the black community.¹³

The author further explains that: "Throughout American history what it means to be black has largely been defined in opposition to what it means to be white." She extends her thesis with arguments that assert notwithstanding:

the negative qualities and attributes that have been ascribed to African Americans as a result of this oppositional defining, a lot of that definition still defines for many what it means to be black. If we are successful in our quest to become equal members of this society, such that such oppositional defining loses its force or becomes obsolete, the question becomes who will black people be then, or perhaps more scary, will there still be black people? I am of the opinion, that there will still be black people but our notion of who they are and what that means will necessarily have to change.¹⁴

¹² Jacquelyn L. Bridgeman, *Defining Ourselves for Ourselves*, 35 SETON HALL L. REV. 1261 (2005).

¹³ *Id.*

¹⁴ *Id.*

She drives her query further and asks “whether we do not hinder our ability to see problems in new ways or seek innovative solutions when we summarily reject and ostracize those within our community who do not share our views.”¹⁵ As she contends “when viewed in the context of black conservatism, Justice Thomas’ jurisprudence has a coherency and consistency that is distinctly black and is informed by his lived experience as a self-identified black man.”¹⁶ She thus proposes, “there may be value in looking seriously at what those we tend to ignore might have to say, that may help us gain insight or a new perspective on the work that we endeavor to do.”

Professor Bridgeman’s essay furthers LatCrit’s objectives by examining labels and how they could, as they have in past instances, detract not only from forms of self-identification but also diminish coalition building efforts. LatCrit’s record of self-introspection has often raised sensitive questions and painful moments, as Professor Bridgeman’s piece does, but strives for advancing and promoting new theoretical structures to improve the human condition and justice parity for their communities. The author reminds us that without engaging oppositional considerations imprecise models can gather steam and become false norms without the requisite causation factors.

Yet while Professor Bridgeman offers an invaluable and brave tool for understanding a range of complexities to “define ourselves,” a brief discussion of the Thomas appointment could have provided additional leverage in her investigation and arguments. For example, the jurist’s confirmation involved a divisive battle that left wounds, which for many, have yet to heal. The appointment experience divided not only African Americans but also injured other communities of color from various angles. An additional remedy would thus have assisted Professor Bridgeman’s essay as well as adding to the jurisprudence of LatCrit theory. Yet another example includes the false claims that surrounded the red-baiting McCarthy

¹⁵ Demonstrating this principle is the method used to extend invitations to present at LatCrit a conference. Invitees, whether in keynotes, plenaries or workshops, are chosen from the broad LatCrit community after a series of successive conference calls, and emails. Once a conference theme is identified, whether through a retreat or general recommendation, the conference organizers facilitate the possibilities identified. This process takes several extensive weeks, and is underscored by a careful and exhaustive consideration of the candidates, ensuring gender parity and other balances are achieved at the conference. Notwithstanding the inordinate amount of work involved, even the best of plans are waylaid due to cancellations, illness, and which at times have interfered with the purpose and goals of the LatCrit project.

¹⁶ *Supra* note 12.

period that bore false witness against the efforts of activists and advocates. Numerous other examples also surface against individuals of color who faced charges of being “communists” or labeled as terrorists as whole communities in the present are facing.

Still another path, perhaps for future possibilities includes adding to the LatCrit record that has promoted healing during times of disparate treatment. For example, LatCrit has long promoted healing as the rich scholarship of many critical proponents illustrate in their quest to offset the disparities witnessed in their communities.¹⁷ In sum, the author’s essay fearlessly blends cogent arguments that promote self-identification on their own terms and not as defined by others.

In much appreciated detail, Aya Gruber, “*Coalition Building, Navigating Diverse Identities: Building Coalitions Through Redistribution of Academic Capital, An Exercise in Praxis*,”¹⁸ concisely incorporates LatCrit insights while also connecting a critical component of praxis to its theoretical base. She thus extends beyond the narrow confines of theory by including and linking the praxis needed to address the “cultural wars” in the present. From an interesting perspective, the author, who is of Asian and Russian descent illustrates how fighting against systems of subordination applied to her own struggle of finding her voice. Professor Gruber’s experience of being raised in Miami “where there are few Asian Americans and even fewer mixed Asians” underscores her questions about advancing the empowerment of “bi-racial folks or Asian Americans.” She describes how attending LatCrit IX allowed her to realize that “racial politics and progressive efforts were not about self-serving and essentialist agendas but rather about fighting against subordination and unfair privilege in whatever forms they might take.” Professor Gruber delineates her efforts in overcoming “essentialism and privilege traps.”

Her caution thus challenges the kulturkampf ideal that espouses narrowly defined universalism at the expense of diverse communities. Her proposal “that groups embrace their uniqueness but nonetheless find ways to reach out to groups that do not share their attributes” adds to the aims of Professor Gruber’s essay, but the additional message where she links her theory directly to specific examples adds

¹⁷ See generally Eric Yamamoto, *Racial Reparations Japanese Americans Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477 (1998)

¹⁸ Aya Gruber, *Navigating Diverse Identities: Building Coalitions Through Redistribution of Academic Capital, An Exercise in Praxis*, 35 SETON HALL L. REV. 1201 (2005).

an bonus to her arguments. Specifically, as she asserts that we must “find concrete ways in which anti-subordination work can be done in the face of a multiplicity of identities.” This essay underscores that theoretical constructs must jointly address the struggles of our communities to challenge the politics of the present. In sum, her essay incorporates invaluable theoretical insights of not only past LatCrit struggles but also future possibilities. Because the author jumps outside narrow formalistic renderings of law she accomplishes inclusion of a more realistic account of the struggles our widely diverse communities witness. In sum, this grounding shows Professor Gruber is promoting building coalitions against subordination and the forced marginalization of communities that cross class differences.

Next, Professor Carla Pratt’s, *“Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity,”* grapples with law’s one drop rule, which structured racial identities and deprived the liberty interests of banished tribal members identified as Black.

Federal law held tribes hostage to newly defined memberships and thus mandated difficult choices. Caught between scylla and charybdis, tribes faced forced removal from their land and witnessed unbearable losses with attendant gain to the federal sector from the land the government accrued from former tribes. The difficult circumstances that federal law imposed on tribes thereby imposed a whirl of difficult circumstances for tribes that sought to survive newly imposed federal definitions.

Professor Pratt describes the use of law as a weapon in redefining long held relationships, that subjected communities of color to slavery, and social, economic and educational subjugation. The tribes, faced with incomprehensible challenges, faced extinction unless they denounced their Black members. The message of her essay evolves from this structural account of law and its re-definition of the relationship between American Indians and the Black members of their communities. Yet the author’s account of this legal history illustrates how the rule of hypo-descent remains in force today as “covertly operating to construct Native American identity.”

The essay ultimately recounts how Native American tribes were forced to “subscribe[] to the basic assumptions of the dominant culture” as a survival tool. Native American tribes have long endured a highly conflicted relationship with federal law and Professor Pratt’s essay highlights one aspect of law’s colonizing force. Thus, while federal law defines what constitutes a tribe, internal tribal relationships are also impacted. This essay ultimately refutes kulturkampf in clear terms that federal law drives in significant part

racial identity and politics. The author addresses how as a survival tactic Indians were forced to adopt the legal dictates imposed by the federal government in excluding their Black members. Its attendant consequences thus sacrificed and deprived the tribes of their former Black members in order to survive as tribe.

Professor Pratt's extensive account additionally moves this history into the present and shows through contemporary rulings of the present that the "one drop rule" remains in defining tribal membership. Against the backdrop of *Davis v. United States*,¹⁹ the author's focus on the "politics of racial identity" and offers further primary evidence of law's structural force.

The *Davis* decision involves law's colonizing brutality in its treatment of the Dosar-Barkus and Bruner bands of the Seminole Nations. The Seminole nations, in their early history included Black members that had fled to Florida, a non-slavery territory under Spanish governance, from slavery inflicted surrounding territories. Eventually, Blacks and Indians joined forces and engaged in common endeavors. These coalitions, however, were rendered vulnerable during the colonization and federal governance of the newer territories. Federal law thereafter imposed the banishment of Black members without sacrificing the survival of the tribes. The consequences of this legal tool, moreover, subjected its former tribal members into the incomprehensible world of slavery.

This history of exclusion ultimately led to the litigation in *Davis*. As Professor Pratt explains, "they sought to participate in certain tribal programs which are funded by a judgment paid by the United States for tribal lands taken by the U.S. government in 1823 when the tribe was in Florida."²⁰

In a model of pure legal formalism, the United States Supreme Court rejected the merits of their claims by relying on the rules of civil procedure.²¹ As Professor Pratt declares, "most Americans still perceive anyone with known African ancestry and their skin coloration, hair texture or facial features that serve as evidence of African ancestry, to be 'black' or African American." Yet as she illustrates, the legal influences of hypo-descent remain in "federal law and the law of some Native American tribes" and thereby construct Native American identity. Accordingly legal formalism in its purest

¹⁹ *Davis v. United States*, 199 F. Supp.2d 1164 (W.D. Okla. 2002), *aff'd*, 343 F.3d 1282 (10th Cir. 2003), *cert denied*, 124 S. Ct. 2907 (2004).

²⁰ Carla D. Pratt, *Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity*, 35 SETON HALL L. REV. 1241 (2005).

²¹ *Id.*

sense disallowed what is perceived as “black” from Native American communities and its heritage. The decision and attendant federal law thus forces the adoption of an “assumption that whiteness is to be prized and non-whiteness devalued on a scale relative to the degree of color of one’s skin, with blackness constituting the most devalued state of being.” It further transformed a previous relationship and cast off its excluded members into a subordinated class and thus raised yet even further formidable challenges for its community.

The author’s lesson thus provides primary evidence of the law’s colonizing force in showing how law is employed to challenge identity. It demonstrates how subordination is the child of legal formalism. Its unlawful progeny is the lesson of the present, and underscores that critical advocacy must remain diligent against the kulturkampf of the season.

CONCLUSION

The authors of this Cluster advance long grounded theory, purpose and goals of LatCrit. The common themes center on proclaimed identities against the maligned forces that seek to collapse their communities into a universal false norm. The essays enable LatCrit coalition building, engagement of alternative forms of pedagogy, and plead for new directions. They also speak to the future of the LatCrit project with a contribution from a newer generation of critical thinkers. In sum, the essays take a stand against the onslaught of neo-conservatives who are attacking our diversity with newer and more sophisticated weapons that “seek to rollback”²² or “check the civil rights and human rights gains that helped democratize some regions... during the Twentieth Century.”

Against the rabid turmoil of the present, this Cluster’s insights fearlessly address the danger of kulturkampf’s charging tactics that lack requisite specificity and causal connections. The authors engage critical issues, provide negative externalities on diverse communities confrontations with law, and in bringing them to the forefront consciously engage kulturkampf on their own terms.

²² LatCrit IX, Program and Schedule, Current Affairs and Critical Theory: Opening Roundtable.