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Latcrit Introduction: Methods

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Methodology

LATCRIT INTRODUCTION: METHODS

REGINALD OH*

IN introducing the following cluster essays, I find it appropriate to paraphrase the political slogan made famous by the 1992 Bill Clinton presidential campaign: "It's the method, stupid."¹ Both authors emphasize the centrality of method in any critical project seeking to transform present inegalitarian social structures. The goal of liberating society of its hierarchies, subordinations and oppressions can only succeed if critical scholars have the appropriate methods of inquiry. Specifically, if we have methods of inquiry that help us to rethink and reconceptualize seemingly intractable social problems, we then can create and develop novel and innovative solutions to effectively confront such problems. The authors in the following cluster pieces argue forcefully and convincingly that LatCrit scholars need to pay serious attention to developing critical legal methods to achieve this transformation of society.

First, Professor Mary Romero's essay is a call to LatCrit scholars to take method seriously.² She critiques what she believes is the propensity among critical scholars to engage in analyses that are "overly psychological" and that fail to "illuminate circumstances or issues, but rather distort material realities and legal structures that exist."³ Professor Romero characterizes the focus on psychological answers to problems of subordination as one of "psychological reductionism."⁴ Under this approach, racism is reduced to a phenomenon created by the individual state of mind. Thus, scholars employing that method focus on concepts such as unconscious racism, and interrogate how human cognitive processes "reveal and illuminate unconscious racism" in white people.⁵ Moreover, such scholars tell

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1. See Gwen Ifill, *The 1992 Campaign: Political Memo; Clinton's 4-Point Plan to Win the First Debate*, N.Y. TIMES, Oct. 9, 1992, at A21 (discussing then-candidate Bill Clinton's campaign strategy for 1992 presidential election, which was centered around slogan "It's the economy, stupid.").

2. Mary Romero, *Revisiting Outcasts with a Sociological Imagination*, 50 VILL. L. REV. 925 (2005).

3. *Id.* at 925 (criticizing overly psychological analysis of LatCrit).

4. *Id.* (arguing "[i]ndividual focus and psychological explanations to racism contradict proposals for structural change and undermines the significance of collective action in the struggle against inequality").

5. *Id.* at 933 (identifying shift in critical race theory from institutional to psychological).

narratives describing the personal biographies of socially marginalized persons, giving personal accounts in rich detail without linking their struggles to the larger structural forces creating the conditions for their struggles.

For Romero, the psychological method is problematic because it focuses our critical attention solely on issues of individual motivation, personal identity and personal empowerment and self-esteem, and diverts our attention away from the larger structural, political, economic and cultural circumstances that cause and contribute to subordination.⁶ Her answer to the pitfalls of psychological analysis is the “sociological imagination.” Drawing on the theories of sociologist C. Wright Mills, Professor Romero urges critical scholars to adopt a sociological imagination, a method that seeks to locate personal stories of social struggle within the larger structural transformations taking place in society.⁷ A sociological imagination would help scholars link “biography to history,” and aid them in “identifying the causes of subordination and developing anti-subordination praxes.”⁸

A sociological imagination would also divert our focus away from the narrow issue of unconscious racism and onto the broader issue of institutional racism. The move from analyzing unconscious racism to analyzing institutional racism, argues Romero, “brings us back to the central issues of power and privilege.”⁹ A focus on institutional racism gets away from the useless attempt to change “the hearts and minds of white folks,” and puts our emphasis back on “the consequences of bureaucratic and other everyday practices that transcend hateful attitudes and individual racist acts. Institutional racism gets us out of the psychological swamp of white guilt and lets us focus on the irrationalities built into supposedly rational institutions.”¹⁰

Professor Imani Perry boldly asserts that “[f]or scholars, method is paramount. How one asks the question and pursues the answer are perhaps the two greatest choices to be made”¹¹ She then argues that LatCrit theorists should incorporate cultural analysis into their critiques of race and the law.¹²

6. *See id.* (indicating that racism is “so underground and subtle” that it becomes unconscious).

7. *See id.* at 926-28 (arguing sociological imagination is more consistent with LatCrit’s commitment to inclusiveness).

8. *Id.* at 931.

9. *Id.* at 936 (identifying concept of institutional racism).

10. *Id.* at 937 (citing Mary Romero, *Brown is Beautiful*, 39 LAW & SOC’Y REV. 211 (2005)).

11. Imani Perry, *Cultural Studies, LatCrit, and Methodological Harmony*, 50 VILL. L. REV. 915, 915 (2005).

12. *Id.*

For Professor Perry, the cultural method is one in which the “world is read as a series of texts.”¹³ She contends that all aspects of cultural production and practices can be viewed as text, and that critical scholars ought to “read” social practices as texts and relate them to structural aspects of law and racism to show how culture and structure reinforce one another. Specifically, Professor Perry argues that reading social practices as text is a useful method for understanding how values and messages are transmitted and reproduced through various social practices, and how those transmitted values and messages then shape and influence the ideological underpinnings of law, which in turn shape and influence social practices.¹⁴

In her essay, Professor Perry provides a brief but illuminating example of her cultural method at work. She analyzes (“reads”) one particular cultural text, the television talk show topic of “paternity tests.” On these shows, young women of color go on national television, reveal to the audience that they are not sure who the father of their children are and then proceed to invite men on the show and subject them to paternity tests to try to identify the real father of the child. Professor Perry notes that each individual “paternity test” show is “no more than a personal saga, interesting, heartbreaking, compelling.”¹⁵ Upon repeated viewings of countless talk shows that repeat the same theme with different women of color, she contends that these shows are evidence of a larger cultural narrative that rationalizes the plight of impoverished single mothers. This narrative justifies the subordination of poor, single mothers who “deserve” their plight because their problem has been caused by their own “licentious and promiscuous” behaviors—by having sexual relations with so many different men that they cannot even be sure who is the real father of their child.¹⁶ Thus, based on her cultural analysis of “paternity test” talk shows, she concludes that “it is in the systematic observation, in the cultural fabric, that we see how the shows affirm and recodify stereotypes already existing in American culture.”¹⁷

Utilizing Professor Perry’s cultural analysis can help to uncover and reveal social patterns, values and beliefs embedded within seemingly, minor, discrete, individualized, personal and isolated acts of individuals. In keeping with Professor Romero’s call to LatCrit scholars to link the personal to the political, Professor Perry’s cultural analysis links the personal issue of sexual relations to the larger political-economic issue of the subor-

13. *Id.* at 916 (noting cultural production is text read in relation to other texts).

14. *See id.* at 915 (identifying LatCrit as scholarly movement that emerged from political movement, which is designed to encourage individuals to critique ideological underpinnings of injustice and marginalization).

15. *Id.* at 916 (describing how subjects on television talk shows create discourse about sexuality of young women of color and arguing such shows reinforce racial stereotypes).

16. *See id.* at 917.

17. *Id.* at 918.

dination of poor, single mothers of color. Both essays require attention, as they emphasize the importance of thinking critically about *how* we engage in our critical analysis. To put it another way, the essays call on us to think critically about our critical thinking.

I want to conclude this introduction by re-examining the issue raised by Professor Romero regarding the need to move away from analyzing unconscious racism and instead towards analyzing institutional racism.¹⁸ While I agree generally with her call to locate personal struggles within the larger structural context, I believe, consistent with her call for critical scholars to adopt a sociological imagination, that there is a way to link unconscious racism with institutional racism. I do not view the phenomenon of unconscious racism as something separate and distinct from that of institutional racism. Instead, I view unconscious racism as an *integral aspect* of the institutional structures that reinforce and perpetuate racial subordination. To explain this connection, I will briefly discuss the issues of unconscious racism and institutional racism in the context of employment discrimination law.

Professor Michael Selmi wrote a recent essay entitled *Why Are Employment Discrimination Cases So Hard to Win?*¹⁹ He notes statistics showing that only about fifteen percent of claims filed with the Equal Employment Opportunity Commission (EEOC) result in some sort of relief being provided to plaintiffs.²⁰ A substantial number of employment discrimination claims filed in federal court are dismissed at the pretrial litigation stage, and of those cases dismissed by pretrial motion, ninety-eight percent are won by defendants.²¹ Those cases that do make it to trial suffer lower success rates when compared to other civil cases.²² Although in his essay he examines the difficulties inherent in bringing any employment discrimination claim, whether based on race, sex, age or disability, he emphasizes that race discrimination claims are the most difficult cases to win.²³

The question arises: why are claims of employment discrimination on the basis of race so difficult to win? In larger measure, the reason is because the courts are simply hostile to race discrimination claims and apparently believe that claims of racial discrimination are presumptively

18. See Romero, *supra* note 2, at 933-37 (discussing pitfalls of using psychological foundation).

19. See generally Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555 (2001) (examining trend in federal courts to find for employers in majority of employment discrimination cases).

20. See *id.* at 558 (comparing success rate of employment discrimination plaintiffs to that of other civil plaintiffs).

21. See *id.* at 560 (collecting statistics for employment discrimination, insurance and personal injury claims and success rate of plaintiff at various stages of litigation).

22. See *id.* at 560-61.

23. See *id.* at 562 (discussing reasons why race discrimination claims are more difficult to win than other types of employment discrimination claims).

frivolous.²⁴ When it comes to race cases, “courts often seem mired in a belief that the claims are generally unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way.”²⁵

Are courts and employers right? Are plaintiffs unsuccessful because they raise unsubstantiated, frivolous claims of racial bias? The answer is no, and I argue the reason why courts and employers fail to see racism in the workplace, and instead blame victims for essentially playing the race card, is because they use an outmoded conception of discrimination to analyze employment discrimination claims. To use Professor Romero’s terminology, they fail to see the unconscious and institutional biases at work in the employment context because they are operating under the premises of “psychological reductionism,” and thinking of racism solely in terms of intentional psychological motivation.²⁶

Thus, in deciding Title VII claims, the courts miss and obscure the racism taking place in the workplace because judges continue to use a formalistic, psychologically simplistic and unrealistic model of intentional discrimination that fails to address the subtle or unconscious racism operating in the workplace. Under the psychologically reductionist view of racism, the assumption is that there are certain people in society who are racists by nature and who, if they had the chance, would invidiously discriminate against people of color and would deliberately exclude them from the workforce.

The reductionist view, therefore, assumes that racism is a character trait, and the people who possess this trait then are categorized as “racists.” Like an aspect of personality, an actor’s racist characteristic is believed to be stable and to express itself consistently over time and in different situations.²⁷ Under this model of racism, racist decision-makers are conscious of their racism, and if permitted, would openly discriminate against persons of color based on their race. However, given that Title VII employment discrimination law prohibits explicit racial discrimination, the racist decision-makers, if they want to act on their racist impulses, must engage in covert racism to avoid legal liability. In other words, racist employers, when they act upon their racism, in order to avoid Title VII liability, must hide their true racist motives under a facially neutral rationale.

24. *See id.* at 556 (outlining reasons for plaintiffs’ difficulties in employment discrimination claims in general, and in those based on race specifically).

25. *Id.*

26. *See Romero, supra* note 2, at 925 (“Individual focus and psychological explanations to racism contradicts proposals for structural change and undermines the significance of collective action in the struggle against inequality.”).

27. *See* Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1022-23 (2004) (noting many people tend to ignore influence of particular situations on actor’s response in racially-charged situations, and instead focus on actor’s character).

Thus, relying on this conventional model of racism, Title VII legal doctrine has been constructed in order to uncover the "true" racist motives of an employer. Under the disparate treatment test from *McDonnell Douglas Corp. v. Green*,²⁸ when an employee seeks to prove that his/her employer racially discriminated against him/her using indirect or circumstantial evidence, the plaintiff's claim is determined through a three part analytical framework.²⁹ First, the employee must make out a prima facie case of racial discrimination or disparate treatment. Once the employee makes out a prima facie case, then an inference of racial discrimination will arise.³⁰ Second, once the plaintiff makes out a prima facie case, the employer then has the burden of production to produce evidence of a legitimate, nondiscriminatory reason for the adverse employment decision.³¹ Third, the employee has the burden of proving that the legitimate reason proffered by the employer is merely "pretext," a false reason given to hide the real or true racist motive for the adverse employment decision.³² Under Title VII disparate treatment doctrine, a plaintiff's prima facie showing of racially differential treatment can be overcome by an employer who proffers a legitimate, race-neutral reason for the adverse employment decision.³³ Therefore, under the doctrine, the presence of a legitimate reason for the adverse employment decision is proof that racial discrimination did not occur.

What is the problem with the conventional model of racial discrimination and the disparate treatment test that is based on that model? The conventional model of racism just does not seem to square with or explain the acts of racism occurring in the workplace. Deliberate, self-consciously aware racists are not the norm in today's workplace. There is widespread public and social consensus that racial discrimination and bigotry is wrong, and most people desire to maintain an "egalitarian, nonracist self-image."

The problem today is not the existence of deliberate racists in the Jim Crow segregationist mold. Instead, the problems in today's workplace are unconscious racial bias and subtle racism, which actually operate outside of the conscious awareness of the "racist" actor.³⁴ In today's post-civil

28. 411 U.S. 792, 802-04 (1973) (establishing test by which all Title VII employment discrimination claims based on theory of disparate treatment are analyzed).

29. See *St. Mary's Honor Ctr. v. Hopkins*, 509 U.S. 502, 506-07 (1993) (clarifying burdens of parties in employment discrimination claims).

30. See *id.* at 506 (discussing first step of burden-shifting structure applied to Title VII cases).

31. See *id.* at 506-07 (discussing second step of burden-shifting structure applied to Title VII cases).

32. See *id.* at 507-08 (discussing final step of burden-shifting structure applied to Title VII cases).

33. See *id.* at 507.

34. See generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L.*

rights world, racism operates not through deliberate acts of racial discrimination, but through seemingly facially race-neutral acts.³⁵ Thus, because courts and employers fail to recognize and understand how racism really operates today, they dismiss allegations of unconscious or subtle racism as merit-less and frivolous.

Social psychologists contend that today, much racism takes the form of what they call aversive racism. Aversive racism “represents a subtle, often unintentional, form of bias that characterizes many white Americans who possess strong egalitarian values and who believe that they are non-prejudiced.”³⁶ People who engage in aversive racism do not wish to discriminate against people of color; rather, they honestly and consciously believe and affirm notions of racial equality, and often act positively upon their egalitarian beliefs.³⁷

Many studies have been conducted to show aversive racism at work. A number of experimental studies have focused on examining the helping behavior of people. In these studies, researchers create scenarios to see how people respond to others in need of help and whether or not their helping responses are affected by the race of the victims. Studies on helping behavior have found that white people would discriminate against black victims and refuse to help them when it appeared that the black victims created their own problems.³⁸ On the other hand, the studies showed that white people treated and helped black victims favorably or even more favorably than white victims when it was perceived that the black victims’ plight was caused by factors outside of their control.³⁹

What implications may we draw from these studies? One critical finding is that the studies show that aversive racism is a *situational* phenomenon. In other words, contrary to the conventional model of racism, a person does not possess and act upon racist impulses consistently in different places and times. Rather, studies show that certain situations and contexts trigger aversively racist behavior in white people, while certain situations and contexts actually promote race-neutral, egalitarian behavior

REV. 1161 (1995) (analyzing workplace situations and current Title VII trends and cultures); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing role of discriminatory motive in equal protection claims).

35. See Wang, *supra* note 27, at 1045 (describing situations that seem racially neutral, but can be affected by subconsciously-held racial stereotypes).

36. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 97 (2003) (quoting John J. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 3 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998)).

37. See *id.* (explaining that aversive racism is not conscious, but rather results from unconscious negative feelings).

38. See Wang, *supra* note 27, at 1039 (describing results of studies conducted to research behavior of people in racially-neutral situations).

39. See *id.*

in white people. In other words, whether a person acts in a racially biased manner depends, not so much on his/her personality, ideology or beliefs, but on the nature and circumstances of the situation.

Specifically, social psychologists suggest that unconscious racial biases are triggered in situations that are normatively ambiguous.⁴⁰ A normatively ambiguous situation is one in which morally appropriate behavior has not been clearly identified.⁴¹ In such a context, negative behavior against a person of color can be justified on some other basis besides race and thus provides a legitimate, nonracial reason for the negative behavior towards a person of color. Thus, under certain situations, even such persons with conscious egalitarian beliefs may unknowingly act on unconscious stereotypes and negative beliefs.

Numerous social psychology studies have demonstrated the power of the normatively ambiguous situation to induce persons to act upon unconscious biases. In one helping study, whites would help black victims in situations of normative clarity when it was clear that in order to avoid the perception of racism they needed to help the black victim.⁴² In these normatively clear situations, whites are not likely to act upon their unconscious biases, and instead, they may act in ways more favorable and helpful to persons of color.⁴³ On the other hand, whites would not help black victims when the situation was normatively ambiguous—when they could refuse to help the black victim, and in doing so still maintain their egalitarian self-image by attributing their decision not to help another, nonracial, neutral reason.

Second, the situational nature of aversive racism has enormous implications for Title VII specifically, and for anti-discrimination law in general. As discussed earlier, under Title VII disparate treatment doctrine, a plaintiff's prima facie showing of racially differential treatment can be overcome by an employer who proffers a legitimate, race-neutral reason for the adverse employment decision. Under the doctrine, the presence of a legitimate reason for the adverse decision-making is proof that racial discrimination did not occur; and thus, an employer can escape liability by putting forth a legitimate reason for a decision adversely affecting a racial minority.

The social psychology findings, however, strongly suggest that the disparate treatment doctrine has it completely backwards. The *McDonnell Douglas* disparate treatment test is based on the conventional model of racism. Under the conventional view of racial discrimination, the racist

40. See *id.* at 1036 (“[S]ocial psychologists who study contemporary discrimination have discovered, much as Milgram did, the power of *ambiguity* or the lack of definitional clarity in a situation to open a channel to behavior that otherwise would seem clearly wrong.”).

41. See *id.* at 1035-36 (discussing normatively ambiguous racial situations).

42. See *id.* at 1037 (describing results of social psychology experiments involving situations when it was clear what moral, egalitarian people should do).

43. See *id.* at 1037.

employer first decides to act on his/her racial bias, and then comes up with a nonracial, pretextual reason to “cover up” the true, racist reason for firing a person of color. The racist motive precedes the pretextual reason.

According to the research on aversive racism, however, the causal relationship between the racist reason and the pretextual reason is reversed. When aversive racism is in operation, the presence or existence of a legitimate, nonracial reason for an adverse employment decision exists prior to the racially biased action. The legitimate reason triggers or “causes” an otherwise egalitarian decision-maker to be influenced by his/her unconscious racial biases.

Counter-intuitively, then, the situational research hypothesis suggests that the presence of a legitimate reason for an adverse employment decision makes it *even more likely*, not less likely, that racial bias was a factor in a negative decision against a person of color. The helping studies discussed above actually suggest that racially biased treatment and legitimate, non-discriminatory justifications are likely to coexist with allegations of racism because the presence of a legitimate reason may have produced a normatively ambiguous situation which then triggered unconscious biases in the decision-maker.

Thus, Title VII might actually be encouraging employers to construct workplace situations that promote rather than deter racially biased decision-making. If employers can avoid Title VII liability by proffering a legitimate reason for an adverse employment decision, they are likely to continue to structure decision-making in such a way that employers can always assert a legitimate reason to justify an adverse decision. To the extent that such situations actually encourage racially biased decision-making, Title VII doctrine is actually giving employers an incentive to construct racially biased workplace situations that produce biased decision-making. The law itself, in other words, may be playing a significant role in producing the sort of behavior it is purportedly seeking to eliminate.⁴⁴

In addition to having implications for rethinking Title VII doctrine, the aversive racism studies have implications for the general discussion of critical method concerning the analysis of racism and the law. First, aversive racism and social psychology research in general may provide the link in connecting unconscious racism with institutional racism. To confront unconscious racism, social psychology informs us that it is not useful to try to “change the hearts and minds of white folk.” Rather, the key is to focus

44. A recent Supreme Court decision on Title VII may have significantly altered the Court's disparate treatment doctrine. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (holding direct evidence is not required to trigger the *Price Waterhouse* mixed motive analytic framework). Some commentators suggest that the *Desert Palace* test has supplanted the *McDonnell Douglas* test and that it has created a unitary mixed motive framework for all disparate treatment cases. See, e.g., Michael Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887 (2004).

on changing the workplace *situations and contexts* that facilitate and encourage people to act upon their unconscious racial biases.⁴⁵ A focus on workplace situations necessarily requires an examination of the institutional practices that structure workplace situations that produce racially biased decision-making and interactions. In other words, from a social psychology perspective, to deal with unconscious racism requires directly confronting and challenging the institutional structures of the workplace, and challenging how legal doctrine itself may be reinforcing racially biased institutional practices.

Second, it is also necessary for critical scholars to heed the call of Professor Perry and interrogate the cultural narratives that reinforce and perpetuate racially biased workplace situations. The unconscious biases that are triggered by normatively ambiguous workplace situations do not come from thin air, nor are they the product of internal cognitive processes of various individuals. Rather, unconscious biases and stereotypes are transmitted through ubiquitous cultural practices, and it would be enlightening and informative to be able to link the workings of unconscious bias in the workplace to the transmission of values, stereotypes and biases through cultural texts.

The critical engagement with method is a crucial endeavor for critical scholars. In a postmodern world where all that is solid seems to instantly melt into air, it is even more vitally important that we continually think and rethink our methods of critical analysis in order to ensure that our work effectively establishes "the connections between the micro level of personal narratives, the institutional structures and historical circumstances."⁴⁶

45. See generally Green, *supra* note 36 (arguing for disparate treatment theory that takes into account workplace situations that create racially discriminatory employment decisions).

46. Romero, *supra* note 2, at 938 (summarizing how sociological imagination can assist LatCrit).



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