RACE AND IMMIGRATION LAW: A PARADIGM SHIFT?

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I. INTRODUCTION

For many years, controversies impacting many areas of legal scholarship have left the field of immigration law virtually untouched. Thus, although other areas of law have felt the critique advanced by critical scholars, immigration law has proceeded as a virtually self-contained unit. In doing so, immigration law has developed a paradigm for legal research. As Thomas Kuhn uses the term, a paradigm, or normal science, "suppl[ies] the foundation" for research in the area.[1] Scholars who participate in a shared paradigm "are committed to the same rules and standards" for research,[2] and the paradigm "define[s] the legitimate problems and methods of a research field."[3] Normal science does not seek to "call forth new sorts of phenomena."[4] Indeed, phenomena that do not fit the paradigm "are often not seen at all."[5]

In his pioneering article,[6] which has provoked varied responses also published in this issue of the *University of Illinois Law Review*, Professor Kevin Johnson calls the immigration law scholarship paradigm into question. He contends that mainstream immigration law scholars have failed to "confront squarely the reality of the influence of race."[7] In addition, he maintains that those scholars have marginalized or ignored race-sensitive immigration scholarship.[8] Johnson's article signals that immigration law scholarship is on the brink of a paradigm shift—that is, close to integrating a racial critique into immigration law and policy. In this foreword to the special issue, I use Kuhn's theoretical framework to describe the normal science of immigration law and offer some reasons to believe,

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1. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10 (2d ed. 1970).
2. *Id.* at 11.
3. *Id.* at 10.
4. *Id.* at 24.
5. *Id.*
6. *See* Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525.
7. *Id.* at 527.
8. *See id.* at 547.

like Johnson does, that a paradigm shift may be at work in immigration law scholarship.

II. THE NORMAL SCIENCE OF IMMIGRATION LAW SCHOLARSHIP

The normal science of immigration law scholarship excludes consideration of race in just the way Kuhn would predict. More specifically, members of the dominant group tend to see the world as a place where racism has been overcome.[9] Consistent with a conceptual framework that does not see race as presenting a significant problem, the paradigm that mainstream immigration law scholars have developed fails to see the relevance of race to immigration law. For instance, their scholarship has not considered the racial issues implicated in present-day immigration issues, such as the nativist, anti-immigrant movements of the past decade. Similarly, some mainstream scholars express concerns about the failure of certain immigrants to assimilate—for example, Latinos[10]—but never consider whether it is possible for racial minorities to fully assimilate or even whether it is philosophically justified to demand such assimilation of minorities.

Moreover, for Kuhn, textbooks represent the normal science of a discipline,[11] and in law, the textbooks are casebooks. In this regard, Johnson shows that the leading immigration law casebooks fail "to engage seriously the work or teachings of race theorists' analysis of immigration."[12] Thus, the normal science of immigration law scholarship does not adequately consider race.

That immigration research overlooks the relevance of race may be understandable—it takes some effort to decode apparently race-neutral immigration laws to reveal their hidden racial implications. This stems from the nature of racism at this moment in history. Racial discrimination is now more subtle than it once was. Discrimination is often conducted by proxy—targeting characteristics of minorities such as their failure to assimilate—as justification for a direct racial attack.[13] Thus, sociologists have recognized that a racial code or system of proxies is used to undermine the interests of minorities.[14] This antiminority code can "ef-

9. *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2417 (1989); George A. Martínez, *Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L.J. 683, 690 (1999) (arguing that the majority group sees racism as "largely a thing of the past"); Sylvia R. Lazos Vargas, *Deconstructing Homo[genous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1523–25 (1998).

10. *See, e.g.*, PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 272–73 (1995).

11. *See* KUHN, *supra* note 1, at 137 (calling textbooks the "pedagogic vehicles for the perpetuation of normal science").

12. Johnson, *supra* note 6, at 549.

13. *See generally* Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. (forthcoming 2000).

14. *See id.* (manuscript at 21–24, on file with the *University of Illinois Law Review*).

fectively re-marginalize minority cultures without ever having to invoke issues of race."[15]

III. SIGNS OF CRISIS AND A PARADIGM SHIFT IN IMMIGRATION LAW SCHOLARSHIP

Scientific revolutions occur when paradigms shift. Revolutions come about when scholars believe that "an existing paradigm has ceased to function adequately."[16] There is a growing sense that something has gone "wrong with normal research"[17]— the accepted paradigm is unable to explain adequately certain phenomena or anomalies[18]— and this awareness of anomaly produces a "state of growing crisis."[19] In response to this crisis, scholars begin to view existing paradigms in a new way, and their research, therefore, changes.[20] There is a transition from normal research to extraordinary research.[21] One begins to see "the proliferation of competing articulations, the willingness to try anything, the expression of explicit discontent, the recourse to philosophy and the debate over fundamentals[;] all of these are symptoms of a transition from normal to extraordinary research."[22] A paradigm shift or scientific revolution ends the crisis.[23]

Immigration law scholarship is in a state of crisis. There are clear indications that scholars have begun to view the existing immigration law paradigm as inadequate. Normal research is changing into extraordinary research. For instance, we now see "the expression of explicit discontent" with the current raceless paradigm.[24] Professor Johnson's piece in this issue exemplifies this trend. He expressly criticizes mainstream immigration scholars for failing to consider race. At the 1998 immigration law workshop at the University of California at Berkeley, a panel of scholars called for immigration law scholarship to address the racial issues at stake in immigration law. LatCrit Theory, a recent permutation of Critical Race Theory, also explicitly connects immigration law with matters of race.[25] A recent piece in the *Columbia Law Review* has further urged

15. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 123–28 (2d ed. 1994).
16. KUHN, *supra* note 1, at 92.
17. *Id.* at 93.
18. *See id.* at 97.
19. *Id.* at 67.
20. *See id.* at 90–91.
21. *See id.* at 91.
22. *Id.*
23. *See id.* at 122.
24. *Id.* at 91.
25. *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 UCLA CHICANO-LATINO L. REV. 503, 576 (1998); Rachel F. Moran, *Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1, 16–24 (1995). *See generally* THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado &

immigration law scholarship to incorporate the approaches of Critical Race Theory.[26]

Similarly, we now observe this "recourse to philosophy and the debate over fundamentals" in immigration law scholarship. For instance, Professor Johnson argues in his article for the need to take a theoretical view of immigration law,[27] and legal philosopher R. George Wright has recently examined the fundamental issue of the "moral limits on immigration."[28] In a recently published article I examine the philosophical foundations of the assimilation mandate: the demand that immigrants should assimilate into mainstream American society and eschew the culture of their origins.[29] Other immigration scholars are similarly reconsidering the basics of immigration law in light of a variety of theoretical approaches including economic,[30] theological,[31] and feminist[32] perspectives.

As Kuhn's theory would predict, indications exist that something has gone wrong with normal immigration research; the current raceless immigration law paradigm is unable to explain certain phenomena or anomalies. This shortcoming is especially evident in the fact that the United States has not moved to liberalize the free movement of workers across borders even though the elimination of immigration barriers would promote economic well being.[33] "Indeed, studies suggest that the gains to the world economy from removing immigration barriers could well be enormous and greatly exceed the gains from removing trade barriers."[34] One leading study has thoroughly examined the philosophical justifications for placing limits on immigration and has concluded that broad legal restrictions on entry into the United States "have no historical or moral justification."[35] Despite all this research, the United States refused to discuss with Mexico the free mobility of labor during negotiations of the North American Free Trade Agreement.[36] This phenomenon

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Jean Stefancic eds., 1998) (collecting foundational readings on LatCrit Theory).

26. *See* Stephen Shie-Wei Fan, Note, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202 (1997).

27. *See* Johnson, *supra* note 6, at 530-31.

28. R. George Wright, *Federal Immigration Law and the Case for Open Entry*, 27 LOY. L.A. L. REV. 1265, 1265 (1994).

29. *See* George A. Martínez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 UCLA CHICANO-LATINO L. REV. 1, 2 (1999).

30. *See, e.g.*, Howard F. Chang, *Liberalized Immigration As Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147 (1997).

31. *See, e.g.*, Michael Scaperlanda, *Who Is My Neighbor?: An Essay on Immigrants, Welfare Reform and the Constitution*, 29 CONN. L. REV. 1587, 1612–25 (1997).

32. *See, e.g.*, Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593 (1991); Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23 (1997); Pamela Goldberg, *Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565 (1993).

33. *See* Chang, *supra* note 30, at 1149.

34. *Id*. at 1150.

35. Wright, *supra* note 28, at 1297.

36. *See* Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 940 (1994) ("[T]he United States excluded the subject of labor migration from the bargaining table.").

seems inexplicable under an immigration law paradigm that does not consider race. America's refusal to provide for the free movement of labor may be explained, however, once race is considered. The dominant group perceives Mexicans as belonging to a different race.[37] Given this, racism, at bottom, operates to prevent the dismantling of immigration barriers between the United States and Mexico.[38]

There are indications, then, that immigration law scholarship is in a state of crisis. Such a state may signal that the discipline is on the verge of a paradigm shift.

IV. THE IMPERIAL SCHOLARS IN IMMIGRATION LAW: THE FAILURE TO RECOGNIZE AS RESISTANCE TO A PARADIGM SHIFT

Professor Johnson points out that "[r]ace immigration scholarship often goes ignored in the mainstream scholarship."[39] He carefully supports this claim by establishing that mainstream immigration scholars generally do not cite or reprint the scholarship of minority law professors.[40] Although this practice may be a "mystery" to some,[41] Kuhn's theory explains the phenomenon. Kuhn recognizes that the practitioners of an old paradigm typically resist the world view associated with a new paradigm.[42] For example, those who believed that the earth held a fixed position resisted Copernicus's suggestion of a new paradigm that held that the earth moved.[43] Indeed, resistance to a new paradigm "is inevitable,"[44] particularly "from those whose productive careers have committed them to an older tradition of normal science."[45] Given this entrenchment, the failure to recognize race immigration scholarship may be partly explained as "inevitable" resistance to a paradigm shift by those with a major stake in normal immigration research.

Professor Johnson also raises the important need for appropriate recognition of race scholarship. On the cusp of the twenty-first century, philosophers have recognized the vital importance of recognition for mi-

37. *See* Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1162 (1997) ("Whites in Texas and across the nation elaborated a Mexican identity in terms of innate, insuperable racial inferiority."); George A. Martínez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 340–44 (1997).

38. *See* Frances Lee Amsley, *North American Free Trade Agreement: The Public Debate*, 22 GA. J. INT'L & COMP. L. 329, 370 (1992); Johnson, *supra* note 36, at 967.

39. Johnson, *supra* note 6, at 547. Richard Delgado made a similar critique of mainstream civil rights scholarship in his classic article. *See* Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PENN. L. REV. 561 (1984).

40. *See* Johnson, *supra* note 6, at 547-52.

41. *See* Joan Fitzpatrick, *Race, Immigration, and Legal Scholarship: A Response to Kevin Johnson*, 2000 U. ILL. L. REV 603, 611.

42. *See* KUHN, *supra* note 1, at 144–59.

43. *See id.* at 149–50 ("Copernicanism made few converts for almost a century after Copernicus' death.").

44. *Id.* at 152.

45. *Id.* at 151.

nority groups. Philosophers have explained that to develop a proper sense of identity, human beings must be recognized or acknowledged.[46] Thus, it is a "form of oppression" to fail to recognize.[47] As a result, the failure of established immigration scholars to recognize and engage the work of minority scholars is a serious matter, and Professor Johnson has done a major service in bringing this issue to light.

V. THE COMMENTATORS: THE "FIRST SUPPORTERS" OF A NEW PARADIGM

The contributors to this special issue are a distinguished group of scholars who do an excellent job in responding to the issues Johnson's article raises. In a way, they may be viewed as doing some of the very things called for in Johnson's article. They not only take his critique seriously but also have begun to incorporate some of the insights and techniques of race scholarship in producing immigration scholarship.

In his thoughtful contribution, Michael Olivas agrees with Johnson that there are significant "racial dimensions" to the field of immigration law and policy.[48] Professor Olivas observes that mainstream immigration law scholarship will be "shaken up and improved" if it integrates a racial perspective into its body of work.[49] At the same time, he cautions that there may be heated exchanges between conventional immigration scholars and the race scholars, just as there have existed "culture wars" between the critical race scholars and their critics[50] in other fields of law. With respect to the imperial scholar phenomenon, Olivas urges mainstream immigration law scholars to "begin to read minority scholarship, enlarge their chorus of research citations, and listen to minority voices."[51] He closes by discussing ideological issues implicated in the teaching of immigration law.

Taking up Johnson's challenge, John Scanlan skillfully employs narrative—a technique often used by critical theorists—to illustrate how he became aware of issues of race and privilege.[52] He agrees that racism continues to play a role in immigration law and policy, that it is a worthwhile project for immigration scholars to expose racism in the law, and

46. *See* Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1994).

47. *Id*.

48. *See* Michael A. Olivas, *Immigration Law Teaching and Scholarship in the Ivory Tower: A Response to* Race Matters, 2000 U. ILL. L. REV 613, 622.

49. *Id*. at 621.

50. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997) (offering a critique of race scholarship). For a response by a leading critical race theorist, 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).

51. Olivas, *supra* note 48, at 630.

52. *See* John A. Scanlan, *Call and Response: The Particular and the General*, 2000 U. ILL. L. REV. 639, 639-40.

that storytelling can reveal the existence of racism. Indeed, he contends that many immigration scholars are already committed to the eradication of racism. Nevertheless, he cautions that it will be difficult to translate the awareness of racism into positive social and legal reform.

In her perceptive commentary, Joan Fitzpatrick also agrees with Johnson that it is important to inquire into the extent to which racism infects contemporary immigration policy.[53] She recognizes that minority scholars have made important and distinctive contributions in their critiques of immigration policy. Indeed, she suggests that the various minority scholars—African Americans, Asian Americans, and Latinos—have had unique experiences that can inform immigration scholarship. In this connection, she calls for further investigation by African American critical race theorists into the issue of African migration to the United States. Finally, she believes that narrative may be particularly useful in exposing the racial issues at stake in immigration law.

In his piece, Bill Ong Hing tells the poignant story of his parents' harsh treatment during the notorious Chinese exclusion era by Angel Island immigration authorities.[54] He uses the story to explain that racism persists in the current immigration law regime. For instance, he suggests that the demand for border enforcement—particularly against Mexicans—is based on racial hostility. Professor Hing notes, therefore, that the use of fixed checkpoints on highways near the Mexican border, which are used to stop primarily those who appear to be of Mexican descent, has racial implications. Similarly, Hing suggests that the significant reductions in Mexican immigration numbers deserve scrutiny. He also urges investigation into why few immigrants come to the United States from Africa. In Hing's view, race is not merely involved in current immigration law and policy but is "central."[55]

Interestingly, some of the commentators assume that critical theory equals narrative scholarship. That is not true. Some critical writing is narrative. However, much, and probably most, is not narrative but rather constitutes critical inquiry into the evolution of the law[56] and, at times, scrutiny of doctrinal nuances.[57] Yet narrative is a useful tool that helps stimulate a paradigm shift in the area of immigration law scholarship.[58]

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53. *See* Fitzpatrick, *supra* note 41, at 603.

54. *See* Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 U. ILL. L. REV. 559.

55. *Id*. at 601.

56. *See, e.g.*, Martínez, *supra* note 37 (analyzing how the courts constructed the race of Mexican Americans).

57. *See, e.g.*, Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997) (offering doctrinal analysis of English-only rules).

58. *See* Martínez, *supra* note 9, at 700–04; *see also* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (describing the usefulness of narrative as a tool for feminist scholars); Alex M. Johnson Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the*

Significantly, all of these commentators agree that it is important for immigration law to confront the issue of race. This fact suggests the possibility of an imminent paradigm shift in immigration law and policy. As Kuhn explains, "if a paradigm is ever to triumph it must gain some first supporters."[59] History may record these commentators as being among the "first supporters" of the new paradigm.

VI. CONCLUSION

Professor Kevin Johnson contends that the mainstream immigration law scholarship paradigm is inadequate because it fails to consider issues of race. This introduction has offered some reasons to believe that a paradigm shift may be at work in immigration law scholarship—a shift incorporating racial critique into mainstream immigration law and policy.

Imposition of Process Theory in Legal Scholarship, 79 IOWA L. REV. 803, 851 (1994) (discussing narrative's potential to "energize" debate).

59. KUHN, *supra* note 1, at 158.