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BEYOND/BETWEEN COLORS: On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sandford

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BIO:

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SUMMARY: ... Several years before Dred Scott surfaced on the legal landscape, the legal system had generated land grant jurisprudence involving Chicana/o claims of ownership in the annexed territories. ... In disallowing the legal process and the Treaty of Guadalupe Hidalgo to govern, the land grant adjudication process effectively changed the burden onto grantees to demonstrate the validity of their claim. ... At the state level in land grant adjudication hearings, the Fremont ruling caused, Judge Murray in a dissent to declare: ... For example, Fremont's actions and his testimony in yet other land grant adjudication, informs that he had gathered land grant documents during the Bear Flag Rebellion, but thereafter he alleged that he had lost them "in the mountains." ... The Court's resistance against banning a congressional act that would have challenged slavery, furthermore, shows its purported regard of property rights not made evident for grantees of Mexican descent in land grant adjudication. ... This deference to the Constitution depending on the claimant, in the land grant experience and rejected in Dred Scott, exposes an inconsistent position with respect to people of color. ...

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Failure to see the complexity of race leads to failure to understand racism. LatCrit theory endeavors to transform our understanding of race. n1

Moving towards a more "sophisticated understanding of race," Lat Crit theorists are exposing denied linkages between the marginalization of communities of color and legal norms refuted by mainstream law. n2 Mainstream theorists, in their demands for universality n3 and sameness, n4 [*692] nonetheless, are disputing Chicana/o racial identity n5 and rejecting race-based inquiries. n6 In addressing the complexities of race as constructed by mainstream law, this preliminary investigation compares the jurisprudence involving African Americans in Dred Scott v. Sandford, n7 with the jurisprudence involving Chicanas/os, n8 in defense of their property interests, following the conquest of the former Mexican provinces in 1848. n9 The theoretical lens employed here draws from LatCrit Theory and its search for "connecting anti-subordination struggles, and cultivating [*693] intellectual community and progressive coalitions." n10 From this perspective, this investigation considers one key point, namely, the citizenship status denied one group, e.g., Dred Scott, n11 contrasted with the purported citizenship granted to another -- Chicanas/os. n12

Upon initial examination, the jurisprudence drawn from Dred Scott and the Chicana/o land litigation disputes appear irreconcilably different. The issues, whether Mr. Scott could sue in federal court, whether

the Missouri Compromise was constitutional, and whether the effect of his residing in non-slave states affected his standing in Missouri, appear to bear little relevance to the property disputes involving people of Mexican descent. That people of Mexican descent are legally characterized as "white" also presents analytical differences. Several commonalities, however, surface and offer an alternative to the hegemonic amnesia of legal histories so long missing from mainstream jurisprudence. n13

In the first instance, the opinions consider the intersection of property law with racial considerations. In *Dred Scott*, the property in question - a human being - encompassed the issue of slavery in Mr. Scott's bid for citizenship. In the Chicana/o cases, the corresponding correlation regarding the property at issue encompassed challenges that questioned Chicana/o citizenship and their ownership of land.

A second shared point engages aspects of federal/state relations. In [*694] *Dred Scott*, the issue of diversity jurisdiction illustrates the tension between federal/state relations and federal/state court jurisdiction. n14 Similarly, in the Chicana/o cases, the relevant federal concern included the Treaty of Guadalupe Hidalgo ("the Treaty"). n15 The Treaty established a legal relationship between the United States and people of Mexican descent whereupon its subsequent interpretation by legal interpreters exposed several conflicts between federal and state jurisdiction levels. n16

A third commonality yields an historical time-frame in which the Supreme Court and other federal courts heard and ruled on several opinions involving people of color. n17 Several years before *Dred Scott* surfaced on the legal landscape, the legal system had generated land grant jurisprudence involving Chicana/o claims of ownership in the annexed territories. n18 Justices Taney, Fields, and Daniel had all participated in [*695] generating land adjudication case law. n19 Several of the justices, moreover, had heard property dispute litigation in Louisiana and Florida, which followed the United States' Treaty of Amity, Settlement and Limits with Spain. n20

Fourth, and for the purposes of the instant case, the majority's purported application of "original intent" in *Dred Scott* illustrates the type of challenges confronting courts and the consequences imposed on communities of color. n21 In several instances involving Chicanas/os defending their property long before *Dred Scott*, the Court ignored its "original intent" interpretation that it adopted in its rejection of Mr. Scott's bid for citizenship n22 and which placed him on the outside of traditional mainstream law. n23 Moreover, although Chicanas/os were deemed entitled to receive the "blessings" deriving from Anglo-American law, n24 most of their property was lost within a short time frame. n25 Sustaining extensive [*696] and irretrievable losses from erratic and arbitrary rulings, in effect, placed those of Mexican descent as outsiders of traditional law. n26

Other aspects of mainstream law have long contributed to the painful legacy of lynchings, segregation, poverty, and generations of unequal treatment confronting communities of color. n27 The struggles Mr. Scott and Chicana/o land grant recipients confronted n28 offer a perspective from which to study and, thus, reject the racial politics of the contemporary period. In unclenching causation strands, developed during this historical framework, a perspective grounded in the combined struggles of subordinated communities, surfaces. Ultimately, this alternative lens contrasts with less inclusive paradigms grounded in essentialism and which deny the nation's complex legal histories. n29

Accordingly, Part I presents a brief historical account of the land grant period and addresses Chicana/o exclusion within the culture of Anglo-American law. It next examines two key rulings that contextualize the status of Chicanas/os within mainstream law. Part II examines [*697] *Dred Scott* and the Court's shifting of constitutional "norms" which governed the Chicana/o land grant construct. The goal of this section reveals the outsider status of Chicanas/os and African Americans within the hegemony of mainstream law. In conclusion, this essay rejects universality, n30 which denies our racial identity and its attendant correlation in looking for our silence by rejection of race-based knowledge and scholarship. n31

PART I. A Historical Construct: Chicanas/os and Exclusion

In the struggle to give voice to our experiences, working class people of color encounter multiple mechanisms meant to silence us. More particularly, we encounter silencing when our voices speak of resistance to injustice - both against ourselves and our peoples. And yet, colonization is the historical legacy that continues to haunt us, even today. The ability to effectively promote justice requires vigilance so that we may immunize ourselves against the paralysis that comes from being silenced. n32

Prior to the United States' conquest of the Mexican Republic, men and women owned and operated rural enterprises of various sizes. n33 Recipients of land grant parcels, individuals and groups, settled and cultivated key regions throughout the present American Southwest. n34 Yet many of their voices are not heard in mainstream law. Maria Concepcion Valencia de Rodriguez' attempts, for example, to defend her Rancho [*698] San Francisquito remains excluded from academic investigations. n35 Holding possession of the Rancho exposed her to a new legal regime resulting from the conquest and obligated her to confirm the validity of her grant, years after she had long settled on the property.

Through the Treaty of Guadalupe Hidalgo, that formally terminated the war between the two Republics, the United States contractually promised to protect the property interests of those remaining within the annexed territories, not unlike that belonging to Maria Valencia de Rodriguez. n36 The Treaty, inter alia, additionally granted citizenship to the conquered population. n37 As the terms of the conquest, moreover, Chicanos/os were granted citizenship status. Notwithstanding the promises and constitutional considerations extended to those of Mexican descent, the law accelerated the irrecoverable losses of their property interests. Through a series of irreconcilable legal principles that confronted Chicanos/os in defending their property interests, the legal order promoted land dispossession. Denying their former standing as rural property owners in the period before the conquest, Chicana/o ownership of rural property persists in its absence into the present period. n38

While Chicana/o land struggles are well-documented outside of law, their existing impoverished conditions in rural regions, resulting from the loss of their property interests, provides systemic evidence of the hegemonic manipulation of mainstream law. In essence, the fragile existence of Chicanas/os within the rural economy reflects the capricious and arbitrary nature of law and its application to people of color. n39

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<qmarkx>Que Pasa Aqui? n40 Has Anyone Seen the Constitution?

The cession of territory from one sovereign to another passes the sovereign only and does not interfere with private property. n41

Through the Treaty of Guadalupe Hidalgo, the United States promised to protect the property interests of those remaining in the annexed territories. Additionally, in referencing the Treaty of Amity, Settlement, and Limits between Spain and the United States involving land grants in Florida and Louisiana, the Supreme Court had long ago ruled that "the obligation imposed by the principles of international law to respect property rights within annexed territory is substantially that recognized by the treaty." n42

Finally, the Constitution's drafters in plain language, tell us that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law

of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding. n43

Case law further emphasizes that: "A treaty lawfully entered into, stands on the same footing of supremacy as does the Constitution ... of the United States." n44 While *De Geofroy v. Riggs*, in its analysis of treaty law, reports that the Constitution's supremacy "directs courts to give them [treaties] legal effect," n45 it mirrors the Constitution's language enumerated above.

Notwithstanding the promises enumerated in the Treaty of Guadalupe Hidalgo and its supremacy as mandated by the United States Constitution, Congress promulgated the California Land Act of 1851 [*700] (CLA). n46 In contradiction to the Treaty of Guadalupe Hidalgo, the CLA shifted the burden of proof onto the grantees to demonstrate the validity of their claims of property ownership. n47 In essence, the CLA defied precedent and denied the literal wording of the Supremacy Clause of the Constitution. While it is within the jurisdiction of Congress to fine-tune treaties, a treaty's substantive revision requires the consent of the signatories to avoid violations of a negotiated agreement. n48 By shifting the burden onto grantees to demonstrate ownership, Congress violated the Treaty of Guadalupe Hidalgo and therefore re-defined its substantive meaning. n49 The legislation ultimately facilitated the disenfranchisement of Chicana/os from their property interests.

Outside of direct litigation, Chicana/o land dispossession also resulted from the use of law as a weapon, and joining with extra-legal methods, forced alienation. Arnoldo De Leon and Kenneth Stewart contend, for example, that Tejanos lost their lands through "a combination [*701] of methods including, litigation, chicanery, robbery, fraud, and threat." n50 Extra-legal methods resulted in the Cortina Rebellion in South Texas and the El Paso Salt War in the 1970s, in which the Texas Rangers challenged Chicana/o use of the region's natural resources as means to intimidate Chicanas/os off their property and from accessing communal resources. n51

In failing to protect Chicanas/os, the United States breached its obligations under federal and international law. Failing to protect Chicanas/os, also makes evident that the federal authority to control public lands yielded to state actions in which the actions of squatters, agricultural interests, and other public law encroached on Chicana/o land.

Legislation that excluded Chicanas/os from the franchise and its impact on their standing in mainstream culture is examined next.

De La Guerra

"When the United States acquired Mexico's northern frontier, the mestizo ancestry of the conquered Mexicans placed them in ambiguous social and legal positions." n52

The above ambiguity draws primarily from Euro-American treatment and hostility towards Chicanas/os. Examples of the role of racism and its numerous instances, which faced Chicanas/os remain beyond the scope of this preliminary essay. Nonetheless, Chicanas/os confronted a hierarchy of laws that sought to exclude them from assimilating within the mainstream culture. Stereotypes targeted them on the basis of their race by those seeking to benefit from that forced exclusion. Building from these myths, facilitated a legal culture that directly disallowed them the full attributes of citizenship status.

One of the earliest instances involved Pablo de la Guerra, a delegate to the 1849 Constitutional Convention in California, n53 who won an [*702] election to the bench. n54 As the nephew of Mariano Vallejo, De La Guerra belonged to one of the well-established families in the region. n55 Notwithstanding the history of his family, his connections, and class standing, De La Guerra, confronted litigation that sought to disqualify him from the bench and which culminated in the case, *People v. De La Guerra*.

The facts of the case reveal that a judicial election in 1869 elected De La Guerra judge of the First Judicial District. Notwithstanding the election, De La Guerra faced a challenge to his right to that position on the basis that he was not a citizen of the United States. The allegations relied on the legislation passed on April 20, 1863, providing that "no person shall be eligible for the office of District Judge, who shall not have been a citizen of the United States, and a resident of this State for two years." The challengers contended that the Treaty of Guadalupe Hidalgo did not permit citizenship but instead required an Act of Congress. Without such legislation, the challengers argued, De La Guerra violated the requirements of the statute.

The court relied on the Treaty of Guadalupe Hidalgo and its Article VIII and declared that the "Treaty was intended to operate directly, and of itself to fix the status of those inhabitants." The court further reasoned that "the political rights are not essential to citizenship" and ultimately ruled that the respondent is clearly a citizen of the United States." Outside of this ruling, the conquest of the former Mexican provinces recognized its former residents as citizens.

Before, during Treaty negotiations, and up to the Treaty's ratification, military and other governmental officials represented citizenship to those residing in the conquered territories. Congress, nonetheless, changed the substantive and literal meaning of the Treaty of Guadalupe Hidalgo and consequently hindered the attributes deriving from citizenship.

Finally, one other factor bears on the legislative history of the type of legal structures impacting Chicanas/os during this period in time. Scholar Leonard Pitt, writes that the Americans "saw the advantage of [*703] letting Californios control Californios, but they would give the native-born no license to govern Yankees." n56 Shortly after the Conquest, the army "sanctioned a constitutional convention. This move in the direction of democracy unfortunately released the Californios to the flood tide of gringo hostility." Those elected to serve at the convention included Manuel Dominguez, who although a Mexican mestizo, was recognized by American law as a "half-breed." n57 Notwithstanding such characterization under American ideology, Mexican law and the Treaty of Guadalupe Hidalgo recognized the indigenous population as Mexican citizens. Dominguez, however, even as a well-established California elite, faced proposed legislation limiting the franchise to "white males." This would have barred him from signing the state's constitution.

During the constitutional convention, in opposing the legislation, De La Guerra argued that "many Californios were dark-skinned, and that to disfranchise them would be tantamount to denying them a part of their citizenship as granted by the Treaty of Guadalupe Hidalgo." n58 Ultimately, the proposed legislation was changed to permit "enfranchising certain Indians."

Other legislation diminishing the attributes of citizenship is underscored when considering Chicanas/os defense of their property interests.

(b) *Fremont v. United States*

Fremont v. United States is the key litigation in which the land grant process and the United States Supreme Court first analyzed the Treaty of Guadalupe Hidalgo and that sets the framework for the purposes of this review. *Fremont* is also critical because it marks the beginning of the end for Chicana/o land grantees through precedent ultimately contrary to constitutional, treaty law, international law, and the dictates of the California Land Act of 1851.

Fremont v. United States involved an instigator of the United States war conflict who sought confirmation of a purported land grant in an opinion authored by Chief Justice Taney. n59 In a note attached to a subsequent case following the *Fremont* decision, the Court informs that:

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Fremont was critical because it was among the earliest of the cases decided by a United States district court on appeal from the board of commissioners. It was the first in which the Supreme Court announced the principles by which this class of cases was to be decided. It has, therefore, remained the most important and the leading case on this branch of the law, and has exercised a controlling influence on all subsequent decisions of this court. n60

The corresponding issues involving Chicana/o-owned property generated a vast realm of law but which, nonetheless, remains primarily excluded from legal study. The value of the instant case, moreover, and its impact on Chicanas/os, provides evidence in which the Court "reconciled" the laws in force, with adverse consequences for Chicanas/os. Ruling otherwise, would have recognized the Treaty of Guadalupe Hidalgo and the legal process required from the various land acts.

In disallowing the legal process and the Treaty of Guadalupe Hidalgo to govern, the land grant adjudication process effectively changed the burden onto grantees to demonstrate the validity of their claim. Determining the validity of a claim of land ownership involving a land grant from the Mexican period, required a court to consider and apply "the law of nations, the laws, usages, and customs of the Government from which the claim is derived, the principles of equity, and (prior) decisions." n61 Adhering the above principles to the instant case, required the Supreme Court to follow Mexican law from which the claim derived. n62 Mexican law obligated grantees to settle and cultivate the land within a one-year period. n63 The conditions attached to the original grantee's claim, moreover, disallowed the original grantee from transferring the land without obtaining the permission of Mexican officials. n64

The material facts of the original grant indicate Juan Alvarado, the original grantee, neither settled nor cultivated the land within the one- [*705] year period. n65 Alvarado, moreover, transferred the property to Fremont without the consent of the Mexican government. Finally, Fremont although claiming ownership of the land grant, lacked documentation as to the purported alienation of the grantee's interest. n66 Applying the law literally, and as intended, therefore, rendered Fremont's claim nothing but unlawful, illegal, and in violation of Mexican land grant procedures and law. n67

Fremont's lack of proof, evidence, and the invalidity of the original land grant, nonetheless, did not preclude the Court from ruling in his favor. The Court reasoned, *inter alia*, that the above did not bar an American citizen from purchasing property. Evidently, citizenship status permitted certain privileges that allowed skirting the Constitution and falling beyond its intent and design depending on the whim of the Court. It further rendered the Treaty of Guadalupe Hidalgo, meaningless without an act of Congress and/or the consent of the Mexican Republic during its negotiations. n68 Accordingly, the Court's holding privileged Fremont with a gold mine and land of inestimable worth. n69

At the state level in land grant adjudication hearings, the Fremont ruling caused, Judge Murray in a dissent to declare:

At the risk of exposing myself to the ridicule or censure of many, for what may be considered temerity on my part in questioning the soundness of these decisions, I cannot refrain from the opinion that in these cases [land grant adjudication cases] the Supreme Court [has] taken a new departure, and entirely disregarded their previous decisions. n70

The Supreme Court, in distinguishing Fremont's claim of ownership from the legal process, resulted in allowing secondary evidence (parole evidence) to prove a claim and through this ruling introduced instability in law. n71 The ripples and residue from Fremont thereafter, produced [*706] arbitrary rulings, and that further governed the land grant cases, accelerated property losses, and denied Chicanas/os

the benefit of the attributes extended to other citizens, such as extended to Fremont and other non-Chicana/o grantees. n72

Thereafter, a number of arbitrary key rulings varied the standard of proof in claims of ownership status depending on whether the grantee was a non-Chicana/o. n73 In some instances, for example, proof of residing on the grant in undisturbed possession, unlike Fremont, who had neither settled nor cultivated the tract as required by Mexican law, failed to protect a grantee. n74 Also unlike Fremont, Chicanas/os who provided documentary proof of a land grant confronted challenges to the authority of Mexican officials to grant them the tract at issue. In other instances, Chicanas/os that lacked documentation of a granted tract charged American officials with the destruction of land grant documents. n75 For example, Fremont's actions and his testimony in yet other land grant adjudication, informs that he had gathered land grant documents during the Bear Flag Rebellion, but thereafter he alleged that he had lost them "in the mountains." n76

In the New Mexico territories, the attorney general re-wrote Mexican law by omitting key legal rules that governed land grant petitions and procedures. The missing rules benefited the United States with legal presumptions that otherwise defined the land grant process under Mexican law. Land grant scholar Malcolm Ebright reports that the Supreme Court, nonetheless, relied on the text in its land grant decisions in determining whether a grantee of Mexican ancestry had demonstrated the validity of their claim. n77

Failure to demonstrate the "validity" of a claim of ownership defaulted the property to the public domain. n78 Yet without protecting Chicanas/os and their property, public law brought other pressures from third parties with intentions to procure Chicana/o property. Seeking preemption claims, squatters and jumpers, for example, targeted Chicana/o owned land without regard to its owners or possessors in interest. n79 Legal scholar Christian Fritz illustrates:

Squatterism posed a final source of difficulty in the struggle over San Francisco land<elip>.

Society was divided into three classes; land grabbers, those that had grants for the lands and believed they were the owners; the squatters, who knowing they had no title, would take possession of lots and hold them by masking improvements<elip>; [and] the jumpers, who stood ready to ignore all law either of strict title or prior possession, and to intrude themselves, either by force, stealth or fraud, into another man's possessions and despoil him of improvements. n80

Fritz further provides that:

Both lot holders and grantees shared a common enemy in the form of settlers and squatters. The squatters were motivated by the prospect of gaining valuable city land by settling upon it and then filing a preemption claim under federal law. The logistics of this process required a rejection of the pueblo title with the implication that such land was part of the public domain.

While some individuals showed a willingness to abide by the federal preemption laws, many squatters made little distinction between the lots held under grants or sales and the land that the city claimed under its pueblo title. n81

Outside of squatters, grantees sustained further challenges from United States attorneys even in cases where grantees received confirmed claims. In summary, although disallowing the intent and literal meaning of the Treaty of Guadalupe Hidalgo, the process employed in American law was deemed "fair" to the claimants with this perception defining the status quo. n82

Thus, a body of federal law and shifting judicial "norms" defined the meaning of property "rights" for citizens of Mexican descent. This jurisprudence, moreover, underscores the contextual legal landscape foreshadowing Mr. Scott's claims in his bid for freedom. The Court's analysis ultimately highlights hegemonic manipulations regarding the legal treatment of people of color. n83

In sum, although international negotiations and a treaty defined a legal relationship between Chicanas/os and the United States, legal institutional structures ostracized them as outsiders. This contextual framework permits yet another lens in which to examine Mr. Scott's bid for freedom.

PART II. Dred Scott v. Sandford n84

The Dred Scott case was probably the most important case in the history of the Supreme Court of the United States. Indeed, it was probably the most important constitutional case in the history of any nation [*709] and any court. But most of us have little if any sense of what it means or was even about." n85

While the orbit of its constitutional importance is beyond the focus of this preliminary essay, the instant case yields critical insight and evidence. n86 And while we might not know "what it means or was even about" we are quite aware of what the decision accomplished. As an example, Derrick Bell, Jr., argues that Justice Taney's "well-documented argument as to the status of black people in this country stands as an irrefutable testament to the extension of the Nation's belief in the inferiority of blacks and the degree to which those beliefs had been inculcated into the laws of the land." n87 Accordingly, the case provides a valuable tool in examining the status of people of color within the hegemony of mainstream law.

The issues before the Court involved: (a) whether Mr. Scott could sue in federal court; (b) whether the Missouri Compromise was constitutional; and (c) whether the effect of his residing in non-slave states affected his standing in Missouri. The issue as to the constitutionality of the Missouri Compromise was critical because slavery was not recognized in the former Mexican provinces. n88 In rejecting his claim for citizenship, the Supreme Court's decision accordingly rendered Mr. Scott outside of traditional mainstream law, therefore, denying him standing to sue in federal court.

In comparing the relevancy of Dred Scott with the Mexican cases, for the purpose of this review, shows the majority's deference to the Constitution and "original intent" analysis; although, this reverence is missing from the Chicana/o cases. n89 Chief Justice Taney, for example, tells us "that their arguments were faithful to the original intentions of [*710] the framers and to judicial precedent." n90 In considering whether Mr. Scott's class, as enumerated in the plea for abatement, constituted "constituent members of this sovereignty," the Chief Justice declared:

We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and Government might choose to grant them. n91

Based on original intent, as Taney interpreted the Constitution at this point in time, it provides that "the duty of the Court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to the true intent and meaning when it was adopted." n92 The Constitution, the court declared "speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States." n93

The Court's resistance against banning a congressional act that would have challenged slavery, furthermore, shows its purported regard of property rights not made evident for grantees of Mexican descent in land grant adjudication. n94 In their decision, Taney, Daniel and Catron declared that "laws banning slavery in the territories were particularly egregious violations of property rights because such measures unconstitutionally gave one class of citizens the right to the exclusive use of jointly-owned American possessions." The Court without a doubt had [*711] to have considered and factored into their ruling the fact that the former Mexican territories did not recognize slavery. To the detriment of Mr. Scott and his claim for citizenship status, furthermore, this purported high regard for constitutional standards and perceived norms also benefited non-claimants of color and disallowed Chicana/o grantees equal consideration. In sum, extending a privilege limited primarily to the dominant population.

Extending beyond the Dred Scott decision, instances from white supremacists targeting Blacks, lynchings, segregation, denial of the right to vote, and other forms of institutional racism speak to the legacy of exclusion and its connection to law. In its totality, legal and extra-legal methods additionally disallowed equal treatment and placed yet further incomprehensible burdens on African-American communities.

Summary

One of the first things we need to do in order to refuse to be colonized is to detect the mechanisms by which they attempt to silence us. They attempt to define what constitutes legitimate and appropriate forms of resistance. When they tell us how to behave, they are using mechanisms to silence us, mechanisms to keep us from effectively resisting against our dehumanization. n95

In comparing the two forms of jurisprudence involving our communities of Mexican and African descent, the purpose of this preliminary investigation is not to collapse the histories of both groups into one false norm. Nonetheless, a body of scholarship and legislation is denying our ethnicity and cultural heritage and law's linkages to the subordination of marginalized communities. In the war over knowledge, its purpose underscores the extent to which legal history remains imprecise. This results from inconsistent and arbitrary holdings adversely impacting our communities. Left to mainstream theory, the circumstances in which law primarily privileged the dominant culture and its connection to other subordinated struggles fail to reveal the manipulation of poorly defined legal "standards." Chicana scholar, Teresa Cordova, tells us that, "Despite claims of universalist objective truth, power and knowledge are intimately connected." n96 She urges that:

Our presence, as working-class people of color (especially women of color), in an institution which values itself on its elitist criteria for admission, forces the debates and challenges previously sacred canons of objective truth. Our presence, therefore, and the issues we raise, threaten the class legitimization function of the University. It is [*712] probably for this reason that our presence here is so complex - and so important. n97

LatCrit theory, as an alternative, rejects exclusionary and universal language and its attendant demands for our silence.

Examinations of legal history dispels "previously sacred canons of objective truth" n98 showing how privilege accrued by our forced invisibility in law. Prior "sacred canons of objective truth" nonetheless, are re-surfacing not unlike anti-Affirmative Action rulings and repressive measures that are eroding the very few civil rights extended to communities of color. Within institutions of higher education, beneficiaries of privileges derived from their dominant status while enjoying the positive attributes of citizenship, assert "diversity is not essential to education." Its consequences, generating harmful circumstances for future generations. n99

Historical legal evidence furthermore, exposes the privileges extended landowners of the dominant population. This evidence of disparate treatment, nonetheless, is not accessed in legal education and study, thereby limiting race-based inquiries to the margins of investigations and legal training. Left to ride the margins of legal inquiry promotes decisions, not unlike Hopwood, which fail to reflect the nation's diverse and complex legal histories. Historical legal evidence in sum exposes the contradictions specific to each racial group, our racial identities, and the causation linking law and legal institutions. Contrary to those rejecting knowledge and specifics about racial identities, the full measure of judicial decisions and their connection with legal institutions and our communities requires unpacking the particularities of hidden legal histories, legal rhetoric, and discourse.

Following the invasion and Conquest of the former Mexican territories, times were not good for those of Mexican descent throughout the American Republic. Deriving from Dred Scott and the Chicana/o cases, "the judicial decisions that formally conferred racial status in nineteenth-century California had important consequences for the historical trajectories for [non-white] groups in California." n100

Although the Treaty of Guadalupe Hidalgo granted them citizenship status, Chicanas/os were forced to endure challenges attacking the validity of that status. n101 Lynchings, segregation, denying Chicano soldiers returning from World War II the right to burial in their hometown cemeteries, poll taxes, and other measures, such as keeping Chicanas/os from the franchise, represented innumerable and complex challenges to their citizenship status. n102

In the African American community, the Court's reasoning in Dred Scott also served as a trajectory for outside forces that extend into the contemporary period, by narrowly limiting citizenship and emphasizing the nature of exclusionary ideology. Taney tells us that:

The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty. n103

To his detriment, the Court's reasoning did not extend to Mr. Scott and its exclusionary force consequently includes the realm of violence, lynchings, and segregation, which mandated the civil rights struggles of the past with linkages into the present.

This deference to the Constitution depending on the claimant, in the land grant experience and rejected in Dred Scott, exposes an inconsistent position with respect to people of color. In Dred Scott, those of African descent were not regarded as citizens. In the Chicana/o cases, although treaty law defined a legal relationship with those of Mexican descent and the United States, the Court disregarded the Treaty of Guadalupe Hidalgo and the force of the Constitution both literally and by design. In several instances, shifting its reasoning to benefit a select class over the claims of Chicana/o grantees or challenging their status as citizens, as in the Dominguez case. In Dred Scott, moreover, the Court, ignoring its [*714] reasoning from the land grant cases in which it privileged non-Mexican grantees, shows the realm of interpretations of purportedly neutral law benefiting one class over another in its failure to protect Mr. Scott. Within this inconsistent treatment, the Court, therefore, consistently defined both groups as outsiders.

Yet not all is as simple as it seems. This inconsistent legal treatment, on its face, exposes a "consistency." By its rulings, the Court defined both groups and their heirs as second class citizens. In doing so, its language and attendant legal culture created a tool for the subaltern to protest the politics of exclusion with linkages extending into the contemporary period. This is made evident by study of historical periods in which legal institutions constructed beneficial rulings excluding people of color. Yet it also mandates

further race-based inquiry of the hidden legal histories of both African-American and Chicana/o communities.

In the present, the politics of exclusion seek to deny our communities the full benefits of citizenship. Anti-Affirmative Action rhetoric is closing the class of those benefiting from governmental contracts. Outside of admission to higher education institutions, our communities face innumerable challenges as to their presence. Chicanas can't buy pizza, can't rent apartments, and cannot open bank accounts without proof of citizenship. n104 Assaults against speaking their native language(s) demonstrates an egregious, yet sustained and ongoing challenge from the Conquest of their native lands to their culture and ethnicity. n105 Teachers are discharged for teaching Chicana/o history, n106 or drivers are stopped while driving on public highways because of their race. n107 African Americans are tied to the backs of trucks and dragged to their death n108 and victimized by other hate crimes that disallow the full benefit of citizenship enjoyed by non-people of color. Young African [*715] American women are further degraded by being followed in public spaces and not allowed entry into public venues; n109 African American males, not unlike Chicanos, are sitting on death row in disproportionate numbers to the dominant population. n110

Within the spirit of the times, law is held hostage to those denying the corresponding complexities branded on our racial identities. An invaluable and immeasurable alternative exists with LatCrit theory. The theoretical foundation of LatCrit as an alternative enterprise emphasizes the relationship between legal rules and process. It exposes trajectories that for too long have promoted the subordination and marginalization of communities of color. The near invisibility of Chicanas/os in legal scholarship reflects the intersection of law with their subordinate status; leaves them to ride the margins of legal scholarship; consigns communities of color outside academic investigations; and otherwise disallows the potential for transforming impoverished communities. Falling outside less inclusive paradigms, ultimately replicates the history of the European conquest of advanced cultures as witnessed by communities of color.

In the alternative, LatCrit embraces an anti-essentialist and anti-subordination theoretical base in which investigations place subordinated communities in the center of inquiry. LatCrit theory and its emphasis on promoting knowledge, advancing social transformation, expanding and connecting anti-subordination struggles, and cultivating intellectual community and progressive coalitions, provides an immeasurable tool going beyond mere exposure of disparate treatment. n111 It [*716] extends, furthermore, beyond a clash of differing values and promotes in progressive coalition building. Linking the contextual background of law's role as in *Dred Scott* and the Chicana/o legal experience allows us to listen to the voices of cultures for too long kept hidden in legal history. The onslaught of challenges that disallowed them the full attributes of citizenship therefore makes clear the indispensability of LatCrit as an alternative enterprise in analyzing the history of hypocrisy constructing adverse race relations in the present.

Conclusion

Chicanas/os and African Americans have long contributed immeasurable and invaluable benefits to mainstream culture while sustaining ongoing challenges to their right to the full attributes of citizenship extended the dominant culture. The intersection of their racial standing with law makes evident the uneven application of legal rhetoric and norms. With *Mr. Scott*, the Court rejected his bid for freedom while conforming to a purported "originalist" interpretation of the Constitution. Yet the Chicana/o legal experience makes evident that the court side-stepped its purported "originalist" deference and disallowed the supremacy obligations drawing from the same legal document. This historical legal amnesia requires not silence as those advocating lesser inclusive models of law advocate, but in contrast obligates yet further unpacking of our collective past. As an invaluable tool, the undisclosed stories and their voices ultimately assisting progressive coalitions in revealing long stymied transformative possibilities. n112

FOOTNOTE-1:

n1. Leslie Espinoza and Angela Harris, Afterword: Embracing The Tar-Baby - LatCrit Theory and the Sticky Mess of Race, [10 La Raza L. J. 499, 507 \(1998\)](#).

n2. Environmental racism in our communities of color serves as an example of denied linkages. See, e.g., Gerald Torres, Race, Class, Environmental Regulation, Introduction: Understanding Environmental Racism, 63 U. Colo. L. Rev. 839, 841 (1992); David L. Hanna, Third World Texas: NAFTA, State Law, and Environmental Problems Facing Texas Colonias, [27 St. Mary's L. J. 871 \(1996\)](#); Guadalupe T. Luna, Agricultural Underdogs and International Agreements, [26 N.M. L. Rev. 9 \(1996\)](#); Robert Bullard, Environmental Justice and Communities of Color (1994); Sheila Foster, Justice From the Group Up: Distributive Inequities, Grassroots, Resistance, And The Transformative Politics of the Environmental Justice Movement, [86 Cal. L. Rev. 775 \(1998\)](#); Robert W. Collin, Review of the Legal Literature on Environmental Racism, Environmental Equity and Environmental Justice, 9 J. Env'tl. L. & Litig. 121 (1994).

n3. Immanuel Wallerstein, Culture As the Ideological Battleground of the Modern World-System, in *Global Culture, Nationalism, Globalization and Modernity*, 31-55 (Mike Featherstone ed., 1990) (asserting that while universality relates to humanity race by way of contrast requires consideration of the specific). The court's language and reasoning in [Hopwood v. State of Texas, 78 F.3d 932 \(1996\)](#) provides an illustration in the present. As to other measures targeting communities of color see e.g., Girardeau A. Spann, Proposition 209, [47 Duke L. J. 187 \(1997\)](#) (California Civil Rights Initiative); Ruben Garcia, Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law, 17 Chicano-Latino L. R. 118 (1998); Nancy Cervantes, et al., Hate Unleashed: Los Angeles In the Aftermath of Proposition 187, [17 Chicano-Latino L. Rev. 1 \(1995\)](#). The term Euro-American references the dominant population. See [In Re Camille, 6 F. 256 \(C.C.D. Or. 1880\)](#) (defining dominant population as European or white race).

n4. See, e.g., Sylvia R. Lazos Vargas, Deconstructing Homogeneous Americanus: The White Ethnic Immigrant Narrative and its Exclusionary Effect, [72 Tul. L. Rev. 1493 \(1998\)](#) (examining assumption of sameness and "why diversity is so resisted"); Seth Schiesel & Robert L. Turna, Is Race Obsolete, Boston Globe Mag. 13, Sept. 22, 1996.

n5. Professor Ian Haney-Lopez reports: "It is clear that in the United States there exists no widespread consensus that Latinos/as share a separate identity that can be specified in terms of race, as opposed to, say, ethnicity, national origin, or culture." Professor Haney-Lopez, in referencing a number of authors promoting a "raceless conception of Latina/o identity, observes that there is a "pronounced resistance in the legal academy to racial conceptualizations of Latinos/as and Latino/a subgroups." Ian F. Haney-Lopez, Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory, [10 La Raza L. J. 57 \(1998\)](#).

n6. See Daniel A. Farber & Suzanne Sherry, The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth, [46 Stan. L. Rev. 647, 652 n.38 \(1994\)](#); Daniel A. Farber & Suzanne Sherry, Telling Stories Out of Law School: An Essay on Legal Narratives, [45 Stan. L. Rev. 807 \(1993\)](#). But see, Richard Delgado, On Telling Stories in School: A Reply to Farber and Sherry, [46 Vand. L. Rev. 665 \(1993\)](#). As to one scholar's experience with LatCrit theory and "traditional" scholarship see Elvia R. Arriola, Difference, Solidarity and Law: Building Latina/o communities Through LatCrit Theory, March, [19 Chicano-Latino L. Rev. 1, 7 \(1998\)](#) (discussing author's "lone battle" in "trying to fill the 'objective' criteria expected of untenured

professors" and the "huge risks" exacted "when individuals like Lino Graglia signal the loss of widespread cultural support for concept like diversity and affirmative action.").

n7. [60 U.S. 393](#) (19 How.) (1856).

n8. "Mexican nationals" refers to citizens of Mexico and "Chicana/Chicano" references individuals of Mexican descent. Terms are used interchangeably and are commonly "self-designations." See Genaro M. Padilla, *My History, Not Yours* (1993). For alternative designators, see Berta Esperanza Hernandez Truyol, *Building Bridges - Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 *Colum. Hum. Rts. L. Rev.* 369 (1994); Margaret Montoya, *Mascaras, Trenzas y Grenas: Un/Masking the Self White Un/Braiding Personal Experience, Latina Heritage, and Legal Socialization*, [17 Harv. Women's L. J. 188 \(1994\)](#); Ana Castillo, *Massacre of the Dreamers* (1994) (defining Xicanisma). Ana Castillo asserts Xicanisma "is formed in the acknowledgement of the historical crossroad where the creative power of woman became appropriated by male society. And woman in the flesh was subordinated." In the essay, the Mexican governance of the annexed territories is distinguished from the Spanish period. Mexico declared its independence from Spain in 1821. Additionally, the Treaty of Guadalupe Hidalgo, which terminated the war between the United States and Mexico recognized those remaining in the Mexican provinces as Mexican citizens. See Treaty of Guadalupe Hidalgo *infra* note 12. Finally, the complexities of race are compounded when legal institutions identify Chicanas/os as "white." For background on this legal designation see George Martinez, *African-Americans, Latinos, and The Construction of Race: Toward An Epistemic Coalition*, [19 Chicano-Latino L. Rev. 213](#), 215 (1998) ("Legal classification impacts the relationship between African-Americans and Mexican-Americans" <elip> and creates a barrier to coalitions with African-Americans and other non-white minorities.").

n9. For accounts of the conflict between the United States and Mexico reference, see William H. Goetzmann, *When The Eagle Screamed, The Romantic Horizon in American Diplomacy, 1800-1860* (1965); Lisbeth Haas, *War in California, 1846-1848 in Contested Eden: California Before the Gold Rush*, 331 (Ramon A. Gutierrez & Richard J. Orsi ed., (1998). See also [Pico v. United States, 19 F. Cas. 590, 591 \(D. Cal. 1855\)](#) (No. 11,127) (discussing "the rights of a conquered people").

n10. Elizabeth M. Iglesias and Francisco V. Valdes, *Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice*, [19 Chicano-Latino L. Rev. 503 \(1998\)](#).

n11. The opinion reports that "neither the class of persons who had been imported as slaves, nor their descendants" could be citizens of the [United States. Dred Scott, 60 U.S. \(19 How.\) at 407.](#)

n12. Article IX of the Treaty of Guadalupe Hidalgo provided for the citizenship of those choosing to remain in the annexed territories. See Treaty of Peace, Friendship, Limits, and Settlement With The United States of America and the Republic of Mexico, Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., Art. IX, 9 Stat. 922, 930 [hereinafter "Treaty of Guadalupe Hidalgo"]. Executed in the City of Guadalupe Hidalgo on February 2, 1848, the Treaty's ratification took place in Queretaro, Mexico on May 30, 1848. Its final proclamation was made on July 4, 1848. See Hunter Miller, *Treaty of Guadalupe Hidalgo, Documents 122-150: 1846-1852, 5 Treaties and Other International Acts of the United States of America* 207 (1937). See also Richard Griswold Del Castillo, *The Treaty of Guadalupe Hidalgo, A Legacy of Conflict* (1990); Antonio de la Peñate y Reyes, *Algunos Documentos Sobre El Tratado de Guadalupe y la Situacion de Mexico Durante La Invasion Americana* (1930) (documents and correspondence regarding the U. S. invasion and war between the two Republics, and the Treaty of Guadalupe Hidalgo).

n13. Regarding the nature of this invisibility and LatCrit theory, see Berta E. Hernandez-Truyol, *Building Bridges - Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 Colum. Hum. Rts. L. Rev. 369 (1994); Kevin Johnson, *Los Olvidados, Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, [1993 BYU L. Rev. 1139](#); Juan F. Perea, *Los Olvidados: On the Making of Indivisible People*, [70 N.Y.U. L. Rev. 965 \(1995\)](#). See also Richard Delgado & Jean Stefancic, *The Latino/a Condition, A Critical Reader* (1998).

n14. For a review of this conflict, see Eric T. Dean, Jr., *Reassessing Dred Scott: The Possibilities of Federal Power in the Antebellum Context*, [60 U. Cin. L. Rev. 713 \(1992\)](#); Alfred L. Brophy, *Let Us Go Back and Stand Upon The Constitution: Federal -- State Relations in Scott v. Sandford*, [90 Colum. L. Rev. 192 \(1990\)](#).

n15. Treaty of Guadalupe Hidalgo, Stat. 922, 929.

n16. [United States v. Circuit Judges](#), 70 U.S. (3 Wall.) 673 (1865). See also [United States v. Ritchie](#), 58 U.S. (17 How.) 525, 533 (1854) (raising separation of powers and federalism considerations). Conflicts surfaced because federal district courts did not have complete jurisdiction over the land grant adjudication until the Act of 1860 was passed. See [United States v. De Rodriguez](#), 25 F. Cas. 821 (N.D. Cal. 1864).

n17. For instances involving people of color and Supreme Court jurisprudence, see, for example, [Arguello v. United States](#), 59 U.S. (How.) 539 (1855); [Choteau v. Marguerite, A Woman of Colour](#), 37 U.S. 507 (1838). Federal law dictated the land grant process and a vast number of land grant litigation shaped federal jurisprudence during this historical period. See, e.g., [United States v. Bernal](#), 24 F. Cas. 1123 (N.D. Cal. 1855) (No. 14,581 (Carmen Bernal's grant challenged as fraudulent notwithstanding confirmation of her grant)); [United States v. Ortega](#), 27 F. Cas. 358 (N.D. Cal. 1856) (No. 15,970) (bequest to Maria Clara Ortega and Maria Isabel Clara Ortega from their father's 1809 San Ysidro grant); *Cervantes v. United States*, 5 Cas. 380 (N.D. Cal. 1855) (No. 2560). See also [United States v. Chaboya](#), 67 U.S. 593 (2 Black.) (1862); [United States v. Gomez](#), 64 U.S. 326 (23 How.) (1859); [Serrano v. United States](#), 72 U.S. (5 Wall.) 451 (1866).

n18. The land grant cases involving United States citizens of Mexican descent are vast and beyond the focus of this review. In sum, the land grant adjudication system outside the state level encompassed several federal levels. For example, claimants faced the Board of Land Commissioners charged with determining the validity of a land claim. See discussion on the California Land Act of 1851 *infra* note 45. The second federal level encompassed the federal district court system. See generally [Feliz v. United States](#), 8 F. Cas. 1130 (N.D. Cal. 1855) (holding performance of conditions attached to grant despite the Board of Land Commissioner's rejection of claim). Finally, appeals at times reached the U.S. Supreme Court. See generally [Fuentes v. United States](#), 63 U.S. 443 (1859). For further examples see [United States v. Morillo](#), 68 U.S. (1 Wall.) 706 (1863) (conflict of jurisdiction dispute); [Romero v. United States](#), 68 U.S. (1 Wall.) 65 (1863) (Innocencio, Jose, and Mariano Romero's land grant claim); [United States v. Olvero](#), 154 U.S. 538 (1864) (involving Los Alamos and Agua Caliente claim in Los Angeles); [Serrano v. United States](#), 72 U.S. (5 Wall.) 451 (1866); [Higueros v. United States](#), 72 U.S. (5 Wall.) 827 (1864).

n19. Justice Field was also a member of the California Supreme Court in which he heard and ruled on several cases involving those of Mexican descent. For background on Justice Field, reference Charles W. McCurdy, Stephen J. Field and Public Land Law Development in California, 1850-1860: A Case Study of Judicial Resource Allocation in Nineteenth Century America, *Law & Society* 235 (1976); Adrian M. Tocklin, *Pennoyer v. Neff: The Hidden*

Agenda of Stephen J. Field, [28 Seton Hall L. Rev. 75 \(1997\)](#). For examples of Justice Field opinions see [United States v. Yorba, 68 U.S. 412 \(1 Wall.\) \(1863\)](#) (U.S. challenge to 1846, La Sierra land grant in Los Angeles); [United States v. Auguisola, 68 U.S. \(1 Wall.\) 352 \(1863\)](#) (U.S. challenge to the claimed ownership of an 1843 land grant); [United States v. D'Aguires, 68 U.S. \(1 Wall.\) 311 \(1863\)](#) (U.S. challenge to Doña Maria Estudillo's land grant claim).

n20. See Hunter Miller, Spain: February Treaties and Other International Acts of the United States, Documents 41-79: 1819-35 (1933) (Treaty of Amity, Settlement, and Limits, signed in Washington on February 22, 1819).

n21. In *Dred Scott*, Taney reasoned "that their arguments were faithful to the original intentions of the framers and to judicial precedent." See discussion *infra* pp. 26-27. See also Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, [14 Const. Comment. 271 \(1997\)](#) ("Taney and his fellow justices explicitly declared that their arguments were faithful to the original intentions of the framers and to judicial precedent.").

n22. Nor did its omission protect Mr. Scott. See discussion *infra* PART II.

n23. See, e.g., Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, [87 Mich. L. Rev. 2320 \(1989\)](#) (the term "outsider" is used to avoid term "minority;" the term "minority" contradicts "the numerical significance of the constituencies typically excluded from jurisprudential discourse").

n24. See Guadalupe T. Luna, *Chicanas, Land Grant Adjudication, and the Treaty of Guadalupe Hidalgo: This Land Belongs To Me*, *Harv. Latino L. Rev.* (forthcoming 1998) (citing Secretary of State James Buchanan in his lobbying against a provision in the Treaty of Guadalupe Hidalgo that would have ensured protection of Mexican-owned property). During his lobbying in voting for the removal of the provision (Article X) Buchanan asserted that the country's laws referred to as "blessings," would otherwise protect grantees. Hunter Miller, *Treaty of Guadalupe Hidalgo, Documents 122-150: 1846-1852, 5 Treaties and Other International Acts of the United States of America*, 256 (1937) (reporting on the nature of James Buchanan and his lobbying).

n25. See Rodolfo O. de la Garza & Karl Schmitt, *Texas Land Grants & Chicano-Mexican Relations: A Case Study*, 21 *Latino Am. Res. Rev.* 123 (1986); Mario T. Garcia, *Merchants and Dons, San Diego's Attempt at Modernization, 1850-1860*, in Carlos E. Cortes, *Mexicans in California After the United States Conquest*, 52, 70-71 (1976). Prominent Alta California Don Juan Bandini corroborated the loss of property resulting from Anglo-American law by stating:

Of the lands mentioned, some have been in the quiet possession of the proprietors and their families for forty or fifty years. On them they have reared themselves homes - they have enclosed and cultivated fields - there they and their children were born - and there they lived in peace and comparative plenty. But now - our inheritance is turned to strangers - our houses to aliens. We have drunken our water for money - our wood is sold unto us. Our necks are under persecution - we labor and have no rest.

Id. at 71 (citing *S. Cal.*, April 11, 1855).

n26. Philip D. Ortego, *The Chicano Renaissance*, in *La Causa Chicana, The Movement for Justice*, 53 (Margaret M. Mangold ed., 1971-72) ("Mexican Americans themselves were kept at arm's length as outsiders."). As to their invisibility in law, see Berta Esperanza Hernandez-Truyol, *Las Olvidadas--Gendered in Justice/Gendered Injustice: Latinas Fronteras and the Law*,

1 J. Gender, Race and Just., 355 (1998); Berta Esperanza Hernandez-Truyol, Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks, [2 Harv. Latino L. Rev. 199 \(1998\)](#); Ian F. Haney-Lopez, The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice, [29 Harv. C.R.-C.L. L. Rev. 1 \(1994\)](#); Kevin R. Johnson, Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement, [1993 BYU L. Rev. 1139](#) (analyzing the vulnerability of noncitizens in the political process).

n27. For an example as to the nature of law and its use in targeting people of color see A Blemish in Oregon History Recalled, Seattle Post-Intelligencer, Feb. 18, 1999, at B2. Over 150 years ago, a legal measure that remained in Oregon's Constitution until 1926 barred blacks from entering the Oregon territory. Several Midwestern states including Michigan and Indiana had also passed laws restricting African Americans from entering their state.

n28. The land grant adjudication conflict is not confined to the past. See Sam Howe Verhovek, South Texas Families' Land Fight A Battle for the Ages, Ft. Worth-Star Tel., July 20, 1997, at 57; [Alliance of Descendants of Tex. Land Grants v. United States, 27 Fed. Cl. 837 \(1993\)](#) (heirs and successor to land grant recipients seeking compensation for appropriation of 12 million acres of land without compensation).

n29. See generally Angela P. Harris, Race and Essentialism in Feminist Legal Theory, [42 Stan. L. Rev. 581 \(1992\)](#).

n30. See, e.g., Wallerstein, supra note 3, at 4. This investigation rejects concepts of essentialism. "The concept of essentialism refers to the issues raised by false universalisms, identity splitting, the assumption of natural principles, and a form of reductionism." False universalisms refer to "overgeneralizations or unstated reference points [that] implicitly attribute to all members of a group the characteristics of individuals who are dominant in that group." Theresa Raffaele Jefferson, Toward A Black Lesbian Jurisprudence, [18 B. C. Third World L.J. 263 \(1998\)](#). Professor Berta Esperanza Hernandez-Truyol asserts "Normativity, in all its forms -- be it maleness, whiteness, or straightness -- creates a false sense of universality of what is right, desired, and desirable. At one time, this idea was used to support racial subordination." See Berta Esperanza Hernandez-Truyol, Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks, [2 Harv. Latino L. Rev. 199, 214 \(1998\)](#).

n31. See, e.g., Daniel A. Farmer and Suzanna Sherry, Beyond All Reason (1997) (challenging methods employed in critical legal scholarship); Haney-Lopez, supra, note 5.

n32. See Teresa Cordova, Power and Knowledge: Colonialism in the Academy, in Living Chicana Theory, 17 (Carla Trujillo ed., 1998).

n33. See Juan Gomez Quiñones, Roots of Chicano Politics, 1600-1940 (1994).

n34. Empresario grants entitled groups to live on large tracts of land. For examples of legal assessments disallowing communal rights under Anglo-American law, see [United States v. Sandoval, 167 U.S. 278 \(1897\)](#). Communal living was valued as a way of life because it permitted groups of grantees living in semi-arid tracts to share scarce water resources. Compare with Edward T. Price, Dividing the Land, Early American Beginnings of Our Private Property Mosaic (1995) (American colonists holding property communally).

n35. [United States v. De Rodriguez, 25 F. Cas. 821 \(N.D. Cal. 1864\)](#) (No. 14,950).

n36. Article VIII, Treaty of Guadalupe Hidalgo, supra note 12 at 929-30. The covenant also provides that "The present owners, the heirs of these, and all Mexicans who may hereafter

acquire said property by contract, shall enjoy with respect to it guaranties equally amply as if the same belonged to citizens of the United States." Id.

n37. Article IX, Treaty of Guadalupe Hidalgo, *supra* note 12 at 930. The covenant also provides that they would be "protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction." See discussion *infra*. Finally, earlier drafts of the Treaty show that its negotiators' intentions included citizenship as a treaty covenant. See, e.g., Senate Executive Documents, 30[su'th'] Cong., 1[su'st'] Sess., 1847-1848, No. 20 (letter to the Nicholas Trist, the U.S. treaty negotiator from the treaty negotiators in Mexico).

n38. Less than 21,000 Chicanos own rural land. U.S. Bureau Of The Census, 1992 Census Of Agriculture, U.S. Data Characteristics Of Operator And Type Operated by Black and Other Races, 1992, 1987, and 1982 (1995). Additionally, rural Black farm owners are also disallowed rural landowner status with specific charges brought against the Department of Agriculture for civil rights violations. See, e.g., Government in Disgrace: The Last Plantation, *The Economist*, March 13, 1999, at 35. In 1920, approximately 925,000 farmers owned and operated agricultural enterprises. At present, less than 20,000 own rural enterprises. The farmers are asserting discrimination in that the Farmers Home Administration did not extend loans and credit comparable to the dominant population. See *id.*

n39. The absence of diversity in rural property ownership reflects the role of law in displacing Chicana/o and African American property owners from their agricultural enterprises. The experience of the Southern Tenant Farmers Union in organizing sharecroppers, provides yet another example of how diversity in the agricultural marketplace disallows inclusion of people of color. See generally H.L. Mitchell, *Mean Things Happening in This Land* (1979) (Union members and supporters subjected to arrests, imprisonment on false charges, evictions, and murder). For an example of Chicanas/os and their organizing attempts in Texas see [Medrano v. Allee, 416 U.S. 802 \(1973\)](#) (arrests, unlawful imprisonment, physical assaults, and other forms of intimidation of union organizers).

n40. The English translation meaning "What is happening here?"

n41. See [United States v. Percheman, 32 U.S. \(7 Pet.\) 51 \(1833\)](#).

n42. [Souard v. United States, 29 U.S. \(4 Pet.\) 511 \(1830\)](#) ("Even if the treaty by which Louisiana was acquired had not contained stipulation by the United States that the inhabitants of the ceded territory should be protected in the free enjoyment of their property, the United States as a just nation would have held that principle equally sacred."); see [United States v. Percheman, 32 U.S. \(7 Pet.\) 51 \(1833\)](#) (The cession of territory from one sovereign to another passes the sovereignty only and does not interfere with private property).

n43. U.S. Const. art. VI, cl.2.

n44. [Amaya v. Stanolind Oil & Gas Co., 158 F.2d 554, 556 \(5th Cir. 1946\)](#); See also [Atocha's Adm'r v. United States, 8 Ct. Cl. 427 \(1872\)](#).

n45. [De Geofroy v. Riggs, 133 U.S. 258, 271 \(1890\)](#).

n46. That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims. Section 8. The Act of Congress of March 3, 1851, entitled "An Act to Ascertain and Settle the Private Land Claims in the State of California." 9 Stat. 631 (1851). In New Mexico, see Statutes At

Large, Chap. 539, An Act To Establish A Court of Private Land Claims and to Provide For The Settlement of Private Land Claims in Certain States and Territories, Mar. 3, 1891.

n47. See California Land Act 11. The largest number of land grant adjudication occurred under the California Land Act, but other land acts also required grantees to demonstrate proof of ownership. This presented further difficulties as in New Mexico, which first required congressional determination of validity and/or until the existence of other states. For an example of this history in case law, see [United States v. Sandoval, 167 U.S. 278, 291 \(1897\)](#).

n48. As to whether a treaty is self-executing and congressional action regarding signed treaties, see Carlos Manuel Vasquez, The Four Doctrines of Self-Executing Treaties, [89 Am. J. Int'l L. 695 \(1995\)](#). As to further analysis on the Treaty of Guadalupe Hidalgo see Symposium Issue, Treaty of Guadalupe Hidalgo 5 S.W. U. J. Int'l Trade Am. 1 (1998).

n49. The adverse conditions facing the landowners resulted in an appeal in which they declared:

In view of the doleful litigation proposed by the general Government against all the land owners in California in violation of the Treaty of Guadalupe Hidalgo and the law of nations, which year by year became more costly and intolerable in view of the repeated falsehoods and calumnies circulated by the public press against the validation of our titles and the justice which supports us in this interminable litigation and which equally influences the tribunals of justice and prejudices our character and our dearest rights, in view of the injustices which have accumulated against us to carry out a general confiscation of our properties; and especially to adopt the most efficient means to assure the abrogation of the existing law which holds all titles acquired from the former government to be fraudulent and which were guaranteed to us by the treaty.

Mario T. Garcia, Merchants and Dons, *supra* note 25 at 70-71, citing Robert Class Cleland, *The Cattle on a Thousand Hills* (1951).

n50. Arnold De Leon & Kenneth L. Stewart, Lost Dreams and Found Fortunes: Mexican and Anglo Immigrants into South Texas, 1850-1900, 14 W. H. Q. 58 (1983).

n51. Arnolde de Leon, *They Called Them Greasers* (1983).

n52. Martha Menchaca, Chicano Indianism: A Historical Account of Racial Repression in the United States, 20 Am. Ethnologist, 583, 584 (1993).

n53. See [People v. De La Guerra, 40 Cal. 311 \(1870\)](#). For yet another example of discrimination see the realm of miscegenation laws impacting Chicanas/os. As an example in California years after the Conquest see [Perez v. Lippold, 198 P.2d 17 \(1948\)](#). In the instant case, the County Clerk in Los Angeles refused to issue a marriage license to Andrea D. Perez and Sylvester S. Davis, Jr. The clerk denied the license because state law provided that no license "may be issued authorizing the marriage of a white person with a Negro, mulatto, Monglian or member of the Malay race." While the California Supreme Court held the statute unconstitutional, the opinion reports on the history of California's first miscegenation legislation from 1850. The decision is also valuable for showing the nature of how law socially constructed the relationship between African-Americans and Chicanas/os in disallowing their marriages and to how people of color were perceived. In citing to precedent from Georgia, the state, for example, argued that "The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of

these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full blood of either race." [Id. at 22](#), quoting [Scott v. State, 39 Ga. 321, 324 \(1869\)](#).

n54. See Leonard Pitt, *The Decline of the Californios, A Social History of the Spanish Speaking Californians, 1848-1890*, at 43-46.

n55. Mariano Vallejo, was the former Director of Colonization in Alta California whose harsh treatment by American officials is well documented as initiating the Bear Flag Rebellion and conquest of the Mexican province. See *id.* For an example of Vallejo's defense and loss of his property interest see [United States v. Vallejo, 28 F. Cas. 356 \(N.D. Cal. 1859\)](#) (No. 16, 818).

n56. Pitt, *supra* note 54, at 42-47.

n57. *Id.* at 45.

n58. *Id.*

n59. [Fremont v. United States, 58 U.S. \(17 How.\) 542 \(1854\)](#). Mariposas was ultimately held as a grant of ten sitios "north of a river, within the Sierra Nevada in the east part of Merced, on the west." [United States v. Cameron, 21 P. 177, 178 \(1889\)](#). As to the nature of Fremont's spying activities on behalf of the United States see A. Brooke Caruso, *The Mexican Spy Company, United States Covert Operations in Mexico, 1845-1848* (1991). The author provided an interpretation of the United States and its covert operations in California and Fremont's involvement and its secret nature are especially illuminating. See *id.* at 80-137.

n60. [United States v. Cambuston, 25 F. Cas. 266, 272 \(D. Ca. 1857\)](#) (No. 14,713).

n61. The Land Act of 1851, 11 provides:

in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the Treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

Id.

n62. See generally [United States v. Perot, 98 U.S. 428, 430 \(1878\)](#) ("The laws of Mexico ... were the laws not of a foreign, but of an antecedent government... Its laws are not deemed foreign laws.").

n63. An easy source of the Mexican colonization laws can be found in [Cessna v. United States, 169 U.S. 165, 171 \(1898\)](#).

n64. See [Fremont, 58 U.S. \(17 How.\) at 566](#).

n65. See *id.*

n66. This is a legal point that did not apply to grantees of Mexican descent. See, e.g., [Peralta v. United States, 70 U.S. \(3 Wall.\) 434 \(1865\)](#).

n67. See [Fremont, 58 U.S. \(17 How.\) at 566](#).

n68. See, e.g., [Botiller v. Dominguez, 130 U.S. 238, 239 \(1889\)](#) (observing courts failing to follow the Treaty).

n69. "It was vital for Fremont to win early confirmation for Mariposa because great quantities of gold were being extracted from it by squatters." Paul Gates, *Land and Law in California* 75 (1991).

n70. [Gunn v. Bates, 6 Cal. 261, 263 \(1856\)](#), cited in Donald J. Pisini, *Squatter Law In California*, 25 *W. Hist. Q.* 285, 277 (1994). (Referencing *Ritchie v. U.S.*, 17 (533 (1854)).

n71. See [Fremont, 58 U.S. \(17 How.\) at 565](#). See also [United States v. Reading, 59 U.S. \(18 How.\) 1 \(1855\)](#). For cases involving a wide realm of contrasting Chicana/o attempts to protect their property interests see Guadalupe T. Luna, *On the Edge of a Naked Knife, Chicana/o Land Tenure in the Agrarian Domain*, 4 [Mich. J. Race & L.](#) 1 (1998). For other accounts of Chicanas/Chicanos, see Richard D. Garcia & Todd Howland, *Determining the Legitimacy of Spanish Land Grants in Colorado: Conflicting Values, Legal Pluralism, and Demystification of the Sangre de Cristo/Rael Cases*, 16 *Chicano-Latino L. Rev.* 39 (1995); Frederico M. Cheever, *A New Approach to Spanish and Mexican Land Grants and the Public Interest Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe Hidalgo*, 33 [UCLA L. Rev.](#) 1364 (1986); Placido Gomez, *The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants*, 25 *Nat. Resources J.* 1039 (1985).

n72. For example, although the claimant had committed an act of treason against the Mexican Republic by joining forces with American rebels in the conquest even after he became a Mexican citizen, the Supreme Court allowed confirmation of his claim. See [United States v. Reading, 59 U.S. \(18 How.\) 1 \(1855\)](#).

n73. Some authors assert the legal process was fair. See e.g., Paul Gates, *Land and Law in California: Essays on Land Policy* (1991).

n74. See [Peralta v. United States, 70 U.S. \(3 Wall.\) 434 \(1865\)](#); John S. Hittell, *Mexican Land Claims in California*, in *A Documentary History of the Mexican Americans* 271 (asserting that the Peralta grant "had title according to the Mexican law <elip>"). In part because of the distances and lack of communication difficulties between Alta California and the Mexican interior, the custom and practice of Mexican law also allowed grantees to occupy the grant before formal processing was completed. See [United States v. Carrillo, 25 F. Cas. 312 \(N.D. Cal. 1855\)](#) (No. 14,737) (reporting that grantees were permitted to sow and build a house before completion of petition process).

n75. See generally [United States v. Pendell, 185 U.S. 189 \(1902\)](#) (during American occupation of El Paso del Norte, military personnel destroyed documents).

n76. [United States v. Cambuston, 25 F. Cas. 266, 267 \(D.C. Cal. 1859\)](#) (No. 14,713) The Bear Flag Rebellion is recognized as initiating the Conquest of Alta California. For an account of the Bear Flag Rebellion see Pitt, *supra* note 54, at 27.

n77. Malcolm Ebright, *Land Grants and Lawsuits in Northern New Mexico* (1994).

n78. *California Land Act of 1851*, 13 (all land claims deemed invalid and not presented to be taken as public lands).

n79. See Christian G. Fritz, *Politics And The Courts: The Struggle Over Land In San Francisco 1846-1866*, 26 *Santa Clara L. Rev.* 127 (1986); see also Charles W. McCurdy, Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth Century America, *Law & Society* 235 (Winter 1996).

n80. Fritz, *supra* note 79, at 135 n. 37, citing Judge R.F. Peckham, *An Eventful Life* 33.

n81. Fritz *supra* note 79, at 135.

n82. Paul Gates, *Land and Law in California: Essays on Land Policy* (1991).

n83. Although not encompassing a land grant litigation, the California Supreme Court in 1948 in an opinion disallowing a Chicana and African American to obtain a marriage license, declared: "For many years progress was slow in the dissipation of the insecurity that haunts racial minorities, for there are many who believe that their own security depends on its maintenance. Out of earnest belief, or out of irrational fears, they reason in a circle that such minorities are inferior in health, intelligence, and culture, and that this inferiority proves the need of the barriers of race prejudice." [Perez v. Lippold, 198 P.2d, 198 P.2d 17, 26-27 \(Cal. 1948\)](#). In the opinion, the court responds to the State's argument contending that "Negroes, and impliedly the other races specified [in the legislation], are inferior mentally to Caucasians" with the following reasoning:

"It is true that, in the United States, catalogues of distinguished people list more Caucasians than members of other races. It cannot be disregarded, however, that Caucasians are in the great majority and have generally had a more advantageous environment, and that the capacity of the members to contribute to a nation's culture depends in large measure on how freely they may participate in that culture. There is no scientific proof that one race is superior to another in native ability.

Id. at 24-25.

n84. The literature on the instant case is vast and beyond the purposes of this review. As to how the decision is characterized see Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, [20 Hamline L. Rev. 1 \(1996\)](#). As to its controversy see Mark A. Graber, *Desperately Ducking Slavery; Dred Scott and Contemporary Constitutional Theory*, [14 Const. Comment 271 \(1997\)](#) (providing "Commentators across the political spectrum describe Dred Scott as 'the worst constitutional decision of the nineteenth century,' 'the worst atrocity in the Supreme Court's history,' 'the most disastrous opinion the Supreme Court has ever issued,' a 'ghastly error,' a 'tragic failure to follow the terms of the Constitution,' a gross abuse of trust,' 'a lie before God,' and 'judicial review at its worst.'"). As to how the decision can be used to encourage intellectual debate for students resisting assertions of unequal treatment see Jane Larson, *A House Divided: Using Dred Scott To Teach Conflict of Laws*, [27 U. Tol. L. Rev. 577 \(1996\)](#).

n85. Cass R. Sunstein, *The Dred Scott Case With Notes on Affirmative Action, The Right to Die & Same-Sex Marriage*, [1 Green Bag 2d 39 \(1997\)](#) (asserting "this was one of the first self-consciously 'originalist' opinions from the Supreme Court. On this issue, the Court spoke for its understanding of what the framers believed."). The competing constitutional theories arising from Dred Scott are beyond the purposes of this preliminary essay.

n86. See Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, [20 Hamline L. Rev. 1, 11 \(1996\)](#) ("Perhaps no legal case in American history is as famous --or as infamous - as Dred Scott v. Sandford. Few cases were as politically divisive when they were decided; few have taken on such symbolic meaning.").

n87. Derrick Bell, *Race, Racism and American Law 2* (1993).

n88. This further affected ownership of property in states, not unlike California, that limited the franchise to "white males." See *supra* notes 53-55.

n89. "Proponents of original intent analysis argue that the Court must interpret the Constitution according to the intentions of the framers. They claim that their approach eliminates personal preference from judicial interpretation." Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, [20 Hamline L. Rev. 1 \(1996\)](#). Compare with [McCulloch v. Maryland, 4 Wheat. 316 \(U.S. 1819\)](#) ("We must never forget that it is a constitution we are expounding <elip> intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.).

n90. [Dred Scott v. Sandford, 60 U.S. \(19 How.\) 393 \(1856\)](#).

n91. [Id. 404-05](#).

n92. [Id. at 393](#). Compare with [Fremont v. United States, 58 U.S. \(17 How.\) 542 \(1854\)](#), in which the court takes liberty with the rules in force as provided in the various land acts and the Treaty of Guadalupe Hidalgo.

n93. [Dred Scott, 60 U.S. \(19 How.\) 393 \(1856\)](#).

n94. *Id.*

The right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words - too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Id.

n95. See Cordova, *supra* note 32, at 38.

n96. *Id.* at 18.

n97. *Id.*

n98. [Hopwood v. Texas, 78 F.3d 932 \(1996\)](#). See also Laura Mecoy, *Wilson Assails Clinton Stand on Racial Issues, He Calls for Equal Opportunity, Not Affirmative Action*, *San Diego Union & Trib.*, June 23, 1997, at A3. The success of anti-affirmative action ideology is measured by the decrease in students of color throughout major higher education institutions. See Linda Leavell, *Black Law Student Happy To Avoid Spotlight at UT*, *Austin Am. -- Statesman*, July 13, 1997, at A13.

n99. See Laura Mecoy, *Wilson Assails Clinton Stand on Racial Issues, He Calls for Equal Opportunity, Not Affirmative Action*, *San Diego Union & Trib.*, June 23, 1997, at A3. The success of anti-affirmative action ideology is measured by the decrease in students of color throughout major higher education institutions.

n100. Tomas Almaguer, *Racial Fault Lines, The Historical Origins of White Supremacy in California* 1, 14 (1994). See also "We Desire Only a White Population in California," *Id.* at 17.

n101. The example of questioning the citizenship of their children makes evident this point. [De Baca v. United States, 37 Ct. Cl. 482, 482 \(1901\)](#). ("The question now presented is<elip>

whether a child of Spanish parents born in New Mexico in 1809 was by birth an American citizen."). See also [In re Rodriguez, 81 F. 337 \(1987\)](#) (Guanajato, Mexico citizen Ricardo Rodriguez's bid for U.S. citizenship).

n102. See Almaguer, *supra* note 8, at 9 ("The very way in which racial lines were defined became an object of intense political struggles.").

n103. [Dred Scott v. Sandford, 60 U.S. \(19 How.\) 393, 404 \(1856\)](#).

n104. See generally Nancy Cervantes, Hate Unleashed: Los Angeles in the Aftermath of Proposition 187, *supra* note 4 ("demonstrates the way in which the rhetoric permeating the debate over Proposition 187 created an environment that gave license to discrimination and intolerance and has had severe consequences for the Latino community<elip>").

n105. See, e.g., Spread of Spanish Unwelcomed By Some, *Las Vegas Rev. J.*, Feb. 7, 1999, at A6 (reporting on a grocery store named "Supermercado Jalisco" in Norcross, Georgia, a suburb of Atlanta, where Norcross fined the owner for violating a local ordinance that required English in naming a business establishment.").

n106. See Michael A. Fletcher, Debates on Ethnicity, Free Speech Flare as N.M. Teachers Fight Dismissal, *Wash. Post*, Feb. 6, 1998, at A3.

n107. Official Vows Probe of Racial Traffic Stops, *San Diego Union-Trib.*, Mar. 10, 1999, at A9. The article reports on the Justice Department assuring "black and Hispanic leaders from New Jersey" that "his agency is serious about investigating whether state troopers stop motorists on the basis of their skin color. Police officers in New Jersey and several other states are accused of employing "racial profiling" in deciding "which cars to stop." *Id.*

n108. Victim's Face Was Painted In Truck-Dragging Debate, *Orlando Sentinel*, June 25, 1998, at A14 (Death of James Byrd Jr., who was dragged to his death behind a pickup truck by three Euro-Americans). See also Giuliani Assails Parade Float As Racist Display, *Buffalo News*, Sept. 10, 1998, at A5 (float "lampooning the June dragging death of a black man in Texas was featured in a Labor Day parade").

n109. See Tina Schatz, Women File Suit Against Area Tavern, Popular Eatery Faces Racial Discrimination Complaint, *Harrisburg Patriot*, Feb. 9, 1999, at B1 (African American females filed a federal complaint alleging that the operators of a local tavern cancelled their reservations upon discovery that the women were black).

n110. It is well recognized that the death penalty is employed in some jurisdictions "particularly if you are a person of color..." Douglas G. Robinson, The Death Penalty in the Twenty-first Century, [45 Am. U. L. Rev. 239, 259 \(1995\)](#). See also Michael Lumer & Nancy Tenney, The Death Penalty in New York: An Historical Perspective, [4 J.L. & Pol'y 81, 107 \(1995\)](#) (statistical breakdown of executions and disproportionate use on African-Americans). For a perspective on the nature of criminal law regarding people of color, see Tracey L. Meares, Social Organization and Drug Law Enforcement, [35 Am. Crim. L. Rev. 191, 193 \(1998\)](#) (urging application of sociology's "concept of community social organization" as retaining "untapped potential to reconceptualize the problems created by both drugs and our current drug-law enforcement regime" as opposed to practices in the present focusing on individuals charged with a crime).

n111. 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 \(1998\)](#). See also Elizabeth M. Iglesias & Francisco V. 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 \(1998\)](#).

n112. As to the connection between judicial indeterminism and the Chicana/o community see George Martinez, Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience, 1930-1980, [27 U.C. Davis L. Rev. 333 \(1994\)](#).