

LATINA AND LATINO CRITICAL LEGAL THEORY, INC.

LATCRIT PRIMER

**(A selection of articles from the annual LatCrit
symposia and related materials)**

VOLUME 2

**A COLLABORATIVE PROJECT OF
LATCRIT, INC.**

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Table of Contents

TABLE OF CONTENTS	3
INTRODUCTION TO THE PRIMER	7
CHAPTER I: LATCRIT III SYMPOSIUM	
PUBLISHED BY THE UNIVERSITY OF	
MIAMI LAW REVIEW (53 MIAMI L. REV.	
575 (1999))	9
1. Elizabeth M. Iglesias, <i>Identity, Democracy,</i> <i>Communicative Power, Inter/National Labor Rights</i> <i>and the Evolution of LatCrit Theory and</i> <i>Community</i> , 53 MIAMI L. REV. 575 (1999)	9
2. Alice G. Abreu, <i>Lessons from LatCrit: Insiders and</i> <i>Outsiders, All at the Same Time</i> , 53 MIAMI L. REV. 787 (1999)	98
3. Berta Esperanza Hernández-Truyol, <i>Latina</i> <i>Multidimensionality and LatCrit Possibilities:</i> <i>Culture, Gender, and Sex</i> , 53 MIAMI L. REV. 811 (1999)	120
4. Dorothy E. Roberts, <i>BlackCrit Theory and the</i> <i>Problem of Essentialism</i> , 53 MIAMI L. REV. 855 (1999)	137
5. Catharine Peirce Wells, <i>Speaking in Tongues: Some</i> <i>Comments on Multilingualism</i> , 53 MIAMI L. REV. 983 (1999)	145
6. Sharon K. Hom, <i>Lexicon Dreams and Chinese Rock</i> <i>and Roll: Thoughts on Culture, Language, and</i> <i>Translation as Strategies of Resistance and</i> <i>Reconstruction</i> , 53 MIAMI L. REV. 1003 (1999)	150
7. Mary Romero, <i>Immigration, the Servant Problem,</i> <i>and the Legacy of the Domestic Labor Debate:</i> <i>“Where Can You Find Good Help These Days!”</i> , 53 MIAMI L. REV. 1045 (1999)	164
8. Roberto L. Corrada, <i>Familiar Connections: A</i> <i>Personal Re/View of Latino/a Identity, Gender, and</i> <i>Class Issues in the Context of the Labor Dispute</i> <i>Between Sprint and La Conexión Familiar</i> , 53 MIAMI L. REV. 1065 (1999)	182

9. Christopher David Ruiz Cameron, <i>The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers</i> , 53 MIAMI L. REV. 1089 (1999)	203
10. Margaret E. Montoya, <i>Introduction: LatCrit Theory: Mapping Its Intellectual and Political Foundations and Future Self-Critical Directions</i> , 53 MIAMI L. REV. 1119 (1999)	227
11. Kevin R. Johnson & George A. Martínez, <i>Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship</i> , 53 MIAMI L. REV. 1143 (1999).....	248
12. Athena D. Mutua, <i>Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm</i> , 53 MIAMI L. REV. 1177 (1999).....	266
13. Francisco Valdes, <i>Theorizing 'OutCrit' Theories: Coalitional Method and Comparative Jurisprudential Experience – RaceCrits, QueerCrits and LatCrits</i> , 53 MIAMI L. REV. 1265 (1999)	312

CHAPTER II: LATCRIT IV SYMPOSIUM

PUBLISHED BY THE UNIVERSITY OF CALIFORNIA AT DAVIS, 33 U.C. DAVIS L. REV. 751 (2000)		366
1. Kevin R. Johnson, <i>Celebrating LatCrit Theory: What Do We Do When the Music Stops?</i> , 33 U.C. DAVIS L. REV. 795 (2000).....		366
2. Leti Volpp, <i>American Mestizo: Filipinos and Antimiscegenation Laws in California</i> , 33 U.C. DAVIS L. REV. 795 (2000).....		400
3. Víctor C. Romero, “Aren’t You Latino?”: <i>Building Bridges upon Common Misperceptions</i> , 33 U.C. DAVIS L. REV. 837 (2000).....		441
4. Guadalupe T. Luna, <i>Gold, Souls, and Wandering Clerics: California Missions, Native Californians, and LatCrit Theory</i> , 33 U.C. DAVIS L. REV. 921 (2000).....		453
6. Kevin R. Johnson & George A. Martínez, <i>Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education</i> , 33 U.C. DAVIS L. REV. 1227 (2000).....		522

8. Chantal Thomas, <i>Globalization and the Reproduction of Hierarchy</i> , 33 U.C. DAVIS L. REV. 1451 (2000).....	622
9. Mary Romero, <i>Historicizing and Symbolizing a Racial Ethnic Identity: Lessons for Coalition Building with a Social Justice Agenda</i> , 33 U.C. DAVIS L. REV. 1599 (2000).....	671
CHAPTER III: MICHIGAN LATCRIT	
SYMPOSIUM.....	696
1. Elizabeth M. Iglesias & Francisco Valdes, <i>Expanding Directions, Exploding Parameters: Culture and Nation in LatCrit Coalitional Imagination</i> , 5 MICH. J. RACE & L. 787 (2000).....	696
NOTES:.....	712
2. Berta Esperanza Hernandez-Truyol & Sharon Elizabeth Rush, <i>Culture, Nationhood, and the Human Rights Ideal</i> , 5 MICH. J. RACE & L. 817 (2000).....	724
0.I. Silent Complicity	724
1.II. Re/Forming Law: Critical Theory and Human Rights	727
2.III. Retooling the Narratives	730
3. Margaret E. Montoya, <i>Silence and Silencing: Their Centripetal and Centrifugal Forces In Legal Communication, Pedagogy And Discourse</i> , 5 MICH. J. RACE & L. 847 (2000).....	744
0.I. Silence and Silencing: Their Cross-Cultural and Cross-Racial Aspects.....	749
1.II. Silence and Silencing And Pedagogical Discourse	762
4. Steven W. Bender, <i>Silencing Culture and Culturing Silence: A Comparative Experience of Centrifugal Forces in the Ethnic Studies Curriculum</i> , 5 MICH. J. RACE & L. 913 (2000).....	795
5. Gema Perez-Sanchez, <i>Franco's Spain, Queer Nation?</i> , 5 MICH J. RACE & L. 943 (2000).....	807
6. Ratna Kapur & Tayyab Mahmud, <i>Hegemony, Coercion, and Their Teeth-Gritting Harmony: A Commentary on Power, Culture, and Sexuality in Franco's Spain</i> , 5 MICH J. RACE & L. 995 (2000).....	842

APPENDIX 1: LATCRIT FACT SHEET	869
APPENDIX 2: TABLES OF CONTENTS OF	
LATCRIT COLLOQUIA AND SYMPOSIA.....	872
1. Puerto Rico Colloquium, <i>Representing Latina/o</i> <i>Communities: Critical Race Theory and Practice</i> , 9	
LA RAZA L.J. 1 (1996).....	872
2. LatCrit I Symposium, <i>LatCrit Theory: Naming and</i> <i>Launching a New Discourse of Critical Legal</i>	
<i>Scholarship</i> , 2 HARV. LATINO L. REV. 1 (1997).	872
3. Miami Colloquium, <i>International Law, Human</i> <i>Rights and LatCrit Theory</i> , 28 U. MIAMI INTER-AM.	
L. REV. 177 (1997).....	874
4. Special Symposium, <i>LatCrit Theory: Latinas/os</i> <i>and the Law</i> , 85 CAL. L. REV. 1087 (1997) & 10 LA	
RAZA LAW JOURNAL 1 (1998).....	875
5. LatCrit II Symposium, <i>Difference, Solidarity and</i> <i>Law: Building Latina/o Communities Through</i>	
<i>LatCrit Theory</i> , 19 UCLA CHICANO LATINO L. REV.	
(1998).....	876
6. LatCrit III Symposium, <i>Comparative Latinas/os:</i> <i>Identity, Law and Policy in LatCrit Theory</i> , 53	
MIAMI L. REV. 575 (1999)	878
7. LatCrit IV Symposium, <i>Rotating Centers,</i> <i>Expanding Frontiers: Latcrit Theory And Marginal</i>	
<i>Intersections</i> , 33 U.C. DAVIS L. REV. 751 (2000).....	880

Introduction to the Primer

This is the second Volume of LatCrit scholarship compiled specifically for the purpose of introducing LatCrit conference participants to the evolving body of LatCrit theory and discourse. Volume 1 of the Primer was assembled by Roberto Corrada of the University of Denver College during the planning process for LatCrit IV. This second volume of the Primer has been assembled in preparation for the LatCrit VI conference and reflects the editorial selections of Elizabeth Iglesias, Kevin Johnson and Frank Valdes, as well as the logistical support of Pedro Malavet at the University of Florida College of Law and of the support staff of the University of Miami Center for Hispanic and Caribbean Legal Studies. Neither Volume purports to define the parameters of LatCrit theory or discourse, but rather seeks only to reflect some of the major currents that have been evolving in LatCrit scholarship during the first five years of the LatCrit project.

The initial Volume 1 of this Primer assembled selections from among the five LatCrit Symposia/Colloquia that had been published in law journals at the time of the Planning process for LatCrit IV. Those journals include: La Raza Law Journal, which published proceedings of the initial gathering in Puerto Rico that launched the LatCrit project; the University of Miami Inter-American Law Review, which published the first symposium ever to examine international law and international human rights from a specifically RaceCritical/LatCritical perspective; the Harvard Latino Law Review, which published the articles and essays emerging from the LatCrit I Conference in La Joya; the California Law Review/La Raza Law Journal, which produced the first stand alone volume of LatCrit Scholarship (separate and apart from the LatCrit Annual Conferences) in a major mainstream law review, and the UCLA Chicano-Latino Law Review, which published articles and essays emerging from the LatCrit II Conference in San Antonio.

This second Volume takes up where the first left off. It includes articles from the LatCrit symposia that have made it “to press” at the time of the Planning for LatCrit VI. These journals include: the University of Miami Law Review Symposium, which published the articles and essays of the LatCrit III Conference in Miami Beach; the University of California at Davis Law Review Symposium, which published the articles and essays of the LatCrit IV Conference in California, as well as the Michigan Journal of Law Reform/Michigan Journal of Race and the Law which produced the second stand alone volume of LatCrit scholarship – a symposium, which focused specifically on introducing interdisciplinary scholarship and centering questions of culture, nation and power in LatCrit discourse.

The Planning Committee views the Primer as a collaborative project that will continue to evolve as the body of LatCrit scholarship expands. It is offered as a courtesy to LatCrit conference participants in the hopes that it will enable newcomers to find their way in and around this new, but increasingly diverse and complex, movement of critical theory and that it will inspire “oldcomers” to read and engage each others work, for mutual engagement is the “stuff” that makes for a vibrant, lasting and increasingly empowered community.

Chapter I:
LatCrit III Symposium
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- 1. Elizabeth M. Iglesias,* *Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 MIAMI L. REV. 575 (1999)**

INTRODUCTION

This symposium marks and celebrates the proceedings of the LatCrit Third Annual Conference, which took place on Miami Beach in May 1998. Preceded by LatCrit I in La Joya and LatCrit II in San Antonio, the LatCrit III gathering marked a watershed event in the evolution of the LatCrit movement, both as the most recent intervention in outsider jurisprudence and as a community of scholars and activists. [n.1](#) *576 If LatCrit I reflected the enthusiasm of a new found commonality and unprecedented dialogue among a diverse group of scholars coming together for a first time, LatCrit II demonstrated the profound challenges facing any movement seriously committed to exploring and transforming the realities of inter- and intra group injustices from an anti- essentialist and anti-subordination perspective. If LatCrit I marked the excitement of a first encounter and the enthusiasm of a party, LatCrit II demonstrated the speed with which any party can end. In a sudden crash or steady line of departures, a party based on suppositions of solidarity and feelings of community can quickly unravel when confronted with substantive difference. When things "get too heavy," parties tend to dwindle and disperse. [n.2](#)

From this perspective, LatCrit III was a watershed moment because it marked a key act of continuity and perseverance despite ruptures and disruptions. Viewed in hindsight, this act of continuity was a definitive moment in the survival of the LatCrit movement as a community of scholars and collective political intellectual project. [n.3](#) Viewed against the backdrop of prior LatCrit conferences, LatCrit III also offers a welcomed opportunity to reflect anew upon the objectives and methods of our community-building efforts. If LatCrit II counsels the need to remain ever-vigilant lest we be confused, seduced and ultimately *577 betrayed by the human tendency to seek

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community in the sentimentality and pseudo-security of sameness, the intellectual and political advances made at LatCrit III show us the substantial pay-offs to be gained by resisting the impulse to seek or settle for sentimentalist communities. By this I mean communities where solidarity is more an image conjured through superficial feelings of identity and hence of momentary closeness, rather than a lived commitment, in solidarity, to relentlessly reveal and steadfastly dismantle relations of dominance and subordination that subvert the potential for authentic human sharing and connection--not just outside, but also within the LatCrit community we aspire to construct. [n.4](#)

To recognize the limited life expectancy of sentimentalist communities is to take a first step down a long and difficult path that challenges us, at every instance, to seek affirmatively and self-consciously to produce something different in our midst. That difference is a community of scholars and activists that can intellectually engage, politically negotiate and collectively absorb the kinds of internal controversies and external assaults that have, in other contexts, shattered communities built on the fragile bonds of sentimental feeling, strategic alliance, individual careerism or simple self-interest, however mutual such interests may be said to be--in short, on any bond other than an inter-subjective commitment to seek and manifest objective justice in a caring and careful manner. [n.5](#)

The excellent work and important advances, the conceptual breakthroughs, the interpersonal relationships and political solidarities that were further strengthened or newly born at LatCrit III are, indeed, substantively significant--as reflected in the proceedings of this symposium. The fact that none of these things might have ever seen the light of day, at least not in their current configurations and certainly not, as they are now, embedded in and enhanced by our memories of the shared community and collegiality that made LatCrit III such an enlivening experience--this fact should give reason to pause. Indeed, the achievements of LatCrit III offer ample evidence that LatCrit community-*578 building must walk a careful path between the tendencies to rely, on the one hand, on the feel-good emotions of superficial identifications and, on the other hand, the tendency toward a kind of packing behavior that is sometimes indulged because it appears to enable spontaneous, though fleeting and often problematic, alliances to converge around a slash- and-burn, hold-no-prisoners, hypercritical attack upon some unfortunate and often unsuspecting target. Neither tendency serves the purposes of a community determined to foster for the long-haul a collaborative project that continuously enables ever-more demanding engagements in the sort of substantive critical analysis that was the aspiration and, to an unprecedented degree, the achievement of LatCrit III.

LatCrit III definitively demonstrated that even highly controversial topics and proposals can advance our intellectual development and strengthen our political and solidaristic commitments if organized and actually conducted in a respectful and inclusive manner. Thus, while there was significant controversy generated by a programmed event proposing to launch a jurisprudential intervention styled "BlackCrit theory" as an experimental way of centering the particularities of Black Latina/o and Caribbean peoples in and against the Black/White paradigm, [n.6](#) this pre-event controversy did not disrupt the conference, but was instead identified and negotiated

through extensive substantive discussions, conducted late into the evening, in good-faith and mutual concern to resolve the misconceptions that might otherwise disrupt the next day's event. The payoff was that rather than an explosive emotional disruption followed by the scrambling (of some) to mediate the hurt feelings and unnecessary misunderstandings that routinely follow such explosions, we had a very fruitful discussion that has since spawned substantial advances by raising important questions about the relationship between LatCrit and other critical jurisprudential movements, most notably Critical Race Theory, [n.7](#) and about the particularities of Black experiences and the significance of those particularities to the LatCrit project. [n.8](#)

***579** There is no doubt that solidarity, understood as an anti-essentialist commitment to inter and intra-group justice, presents continual challenges and demands tremendous work. This work is not always fun. At the same time, there is no question that LatCrit III was fun. The conference was graced with the sunny springtime beauty, the pastel colored sounds and Caribbean skies that make Miami beaches a tropical paradise for wealthy tourists and gave us an opportunity to enjoy each other's company and to share some sensual displacements amid much privilege and luxury, even as we confronted the daunting challenges of our work. In fact, the conference was a lot of fun, and the fun we had was a positive energy in our efforts to build community across our differences. [n.9](#) Thus, in myriad ways, LatCrit III demonstrated that the LatCrit project can and should engage profoundly controversial positions and proposals without indulging community-destroying disruptions that undermine, rather than enable, our efforts to explore substantive disagreements and to learn from our differences of position and perspective in the spirit and expectation of lively and lasting friendship.

In retrospect, it also bears noting that our collective efforts to self-consciously build the LatCrit community, and by implication any community, upon a commitment to anti-essentialist anti-subordination politics, is an unprecedented project of millennial proportions. Questions pending today on the LatCrit agenda will emerge tomorrow as definitive questions of the 21st century. This is because the human community must find ways to construct identities that do not depend on the activation of essentialized differences or the reproduction of sociolegal hierarchies. There is no sustainable alternative. In the 21st century, controversies that today are triggered by LatCrit's theoretical determination to reveal essentialist assumptions and traverse, in solidarity, such inherited boundaries as mark the distinctions of race, ethnicity, class, gender, sexual orientation and nation will tomorrow erupt the discursive ***580** boundaries of sociolegal theory and confront the world community as the wo/man-in-the-local/global streets, trodding the electronic highways for news of how, when and where the human flows in motion will be set or let to rest. Borders busted by new configurations of freedom and compulsion are producing new social realities in need of new identities, beyond the essential-isms of the modern that currently, and not so tenuously, still organize so much the conscious and unconscious of so many. [n.10](#)

It is precisely because LatCrit theory has taken up the challenge of producing knowledge and performing community for the purpose of manifesting and advancing an anti-essentialist commitment to anti-subordination politics that the LatCrit community stands as microcosm of the many challenges that will face the global community in ever

more pressing degrees. Our in/ability to negotiate the differences amongst us, to link identities to histories, histories to the articulation of an ethical and future-oriented vision, and our visions to the consolidation of effective and transformative political coalitions--on this-- the stuff of dreams--depends the future of such weighty 21st century imperatives as world peace, social justice, and human liberation. [n.11](#)

With this in mind, this Foreword seeks to contextualize the LatCrit III symposium essays in relation to four basic points of reference: the first is LatCrit's evolving substantive agendas; the second is the impact of our discourse and interactions on our community-building objectives and on alternative trajectories for institutional development of the LatCrit project; the third is the broad array of issues and many fields of substantive inquiry that have not yet been addressed in LatCrit theory. These three points create a dialectical frame of reference linking past, present and future, thereby enabling us, more meaningfully, to assess where we have been and to project a vision of where we should go. The fourth point of reference refers back to the pre-conference objectives as delineated in the substantive program outline; [n.12](#) it injects a fourth ***581** dimension of intentionality into our understanding of LatCrit dynamics because what we actually achieve at any LatCrit gathering means different things and offers different lessons depending on its coherence with, departure from and/or expansion of the objectives we intended to achieve. Using this four-part frame of reference to contextualize the essays in this symposium enables us to assess the evolution of LatCrit theory and praxis in ways that engage the multiple dimensions of a project that is always and everywhere both about producing knowledge and about performing community.

The rest of this Foreword divides in three parts. This three part structure reflects, but does not directly track the live-events of the conference, which are detailed both in the LatCrit III Substantive Program Outline and the LatCrit III Program Schedule. [n.13](#) The live-events were programmed to effectuate the conference planners' self-conscious and concerted commitment to push LatCrit theory into new substantive areas, to encourage dialogue across jurisprudential and disciplinary boundaries, to bridge the gap between theory and practice, to experiment with new discussion formats, to include newcomers, to accommodate the many responses to our initial call for papers and to provide a forum for works-in-progress. To this end, the program featured four plenaries, two focus-group discussions, four keynote addresses, five concurrent panels and a concurrent works-in-progress session. However, as in previous LatCrit conferences, the energy, richness and synergies of our discourse exceeded the pre-established structure of our program--a phenomenon reflected, this time, in the many thematic interconnections evidenced across the keynotes, plenaries and concurrent panels, as well as by the fact that a number of essays submitted for this symposium volume were inspired by, but not delivered at, the LatCrit III conference. Organizing this abundance into a coherent final product has been a border-busting project in its own right precisely because the expedient of tracking the live-events was simply untenable. Instead, the objective in this

symposium, and therefore in this Foreword, has been to cluster the various essays around the substantive themes most directly salient to our discussions at LatCrit III.

Part I, entitled *Beyond/Between Colors: De/Constructing Insider/Outsider Positions in LatCrit Theory*, takes up the essays in the first two clusters. These essays demonstrate the continued centrality of identity politics in LatCrit discourse, making questions of intra-group hierarchy and inter-group justice of special salience in any LatCrit gathering and *582 their exploration a critical dimension of the continuity we seek to maintain. They also demonstrate that each time the LatCrit community takes up these issues in our formal gatherings, we approach them with a heightened awareness of the broader context in which we articulate the political implications of Latina/o identity. Using a variety of critical methodologies, including doctrinal deconstruction, policy-based political analysis of current affairs, personal narratives and social psychology, these essays take up the challenge of articulating how the anti-essentialist anti-subordination aspirations of the LatCrit project are implicated in struggles over such relatively theoretical matters as judicial power, interpretative objectivity and personal identity, as well as in the more immediate political struggles over immigration policies, minority access to legal education, the delivery of legal services to the poor, the ongoing expropriation of indigenous peoples in Latin American countries and the particularities of intergroup relations in South Florida, the site of the LatCrit III conference. [n.14](#)

Both individually and cumulatively, these essays challenge LatCrit scholars to deconstruct essentialist representations of the Latina/o condition by attending to the particularities of subordination as experienced by different groups at different junctures of historical time and trans/national space. As critical methodology, attention to the particular helps unpack intra and intergroup hierarchies, enables critical analysis to resist the suppression of intra-group diversities and exposes instances in which representations of a common good or shared imperative are manipulated and monopolized to configure relations of intra and intergroup privilege. This attention to the particularities of subordination can, however, generate its own problems--most notably the problem of comparing subordinations both within and between groups. Such intergroup comparisons activate identifications that can dis/organize alliances and can therefore have profound and varied impact on the future viability of any coalition project--depending on the kinds of political positioning a particular mode of comparison tends to promote. [n.15](#) At the same time, *583 attention to the particularities of subordination makes intergroup comparisons practically inevitable.

LatCrit theory thus faces the formidable task of articulating an ethic and politics through which the practice of comparing the different realities of subordination that are increasingly revealed through our particularized analyses can be made to foster, rather than destroy, the possibilities for intergroup solidarity and genuine understanding across our many differences of experience and position. We need to learn how to articulate our intergroup comparisons in ways that energize new solidarities and promote more fluid and inclusive political identities by revealing new interconnections and commonalities among the oppressed despite and perhaps because of our differences. Indeed, understood specifically as a way of learning about and engaging our differences, intergroup comparisons can enable the affirmative valuation and embrace of the differences that

make us both ourselves and not each other. [n.16](#) The essays in these first two clusters provide a valuable point of departure for this important task because their attention to the particularities of subordination across different contexts also illustrates a variety of instances of intergroup comparison.

Part II, entitled Substantive Self-Determination: Democracy, Communicative Power and Inter/National Labor Rights reflects the rapidly expanding agenda marked for LatCrit attention. This Part takes up three clusters of essays. The first cluster seeks to articulate a LatCrit perspective on the disjunctures between reality and rhetoric in the transition and practice of democracy. The second cluster focuses on communicative power, and the third and final cluster focuses specifically on the way LatCrit antisubordination theory and practice is implicated in and activated by the sociolegal structures of labor and employment in an increasingly globalized society. Cumulatively, the essays in these three clusters reflect a concerted and self-conscious effort to expand the substantive concerns of the LatCrit movement beyond the familiar fare of *584 "Latina/o issues." This is an appropriate and timely development because the struggle to articulate an anti-essentialist theory and practice of coalitional politics and transformative legal intervention implicates LatCrit scholars in a project that must concern itself with issues not peculiarly or exclusively of interest to Latinas/os in this country.

Until relatively recently, the trials and tribulations, for example, of the international peace movement, the labor movement, the environmental movement and the international movement for human rights, like the deconstruction of U.S. national security ideology or the critical analysis of the legal regimes organized by antitrust, tax and corporate laws have, for the most part, been cast as matters of universal concern, not particularly relevant to Latina/o and other minority communities, whose primary focus of attention has been thought to center on issues of discrimination and the meaning of equal protection. [n.17](#) LatCrit theory, by contrast, claims an interest in matters of universal concern, precisely because it rejects the metaphysical and epistemological assumptions that underpin the bifurcation of universal and particular. [n.18](#) By taking up and subjecting to critical anti-essentialist analysis such matters as the rhetoric and realities of the democratic project, the legal structures of communicative power and the future of the labor movement in and beyond the United States, these essays demonstrate how attention to the particularities of Latina/o experiences and perspectives can produce a richer and more contextual understanding of the broader contexts and multiple dimensions of the human struggle for justice and peace.

Finally, Part III takes up the essays in the cluster entitled, Mapping Intellectual/Political Foundations and Future Self-Critical Directions. Though only three years old, LatCrit theory reflects a rich and varied intellectual inheritance because of the wide diversity of scholars who have chosen to self-identify as LatCrit scholars or participate in LatCrit conferences. Thus, LatCrit Theory finds its intellectual roots in Critical Race Theory, Critical Race Feminism, Chicano/a Studies, Law and Society, and Critical Legal Studies precisely because these various strains of critical discourse are the intellectual roots of the individuals whose energy drives the LatCrit project and secures its continued evolution. On the other hand, formations of scholarly communities do not

spontaneously generate; and, in this respect, LatCrit theory is a project with a particular institutional history that reflects the efforts and visions of particular *585 individuals responding to and reacting against the perceived limitations of each of the various strains of critical discourse that precede it.

The essays in Part III reflect this rich and varied intellectual inheritance even as they raise important questions about the purpose, history and future trajectories of the LatCrit project. In this vein, the one definitive lesson to be gleaned from the three years of LatCrit conferences that culminated in LatCrit III is that there are major differences between the kind of intellectual work that aims at articulating new critical insights in individually authored law review articles and the kind of work required to operationalize new possibilities of thought and action in ways that can effectively reorganize the dynamics of group interaction and generate a shared theoretical discourse with common points of reference and principles of engagement. Learning to understand and negotiate the vast spaces between the individual conceptualization of new possibilities and the collective processes that must be activated to translate these new insights into shared understandings, and to then manifest these shared understandings in new forms of interaction and institutional arrangements, is a crucial imperative in the further evolution of LatCrit theory and community.

This learning is crucial and central precisely because the practice of LatCrit conference organizing has been self-consciously and intentionally aimed, since its inception, at transforming the production of legal scholarship from an experience of intellectual isolation into a practice of collective engagement and empowerment. [n.19](#) Once this collective project becomes the imagined purpose and desired objective of our gatherings, the value of our work can no longer be measured simply by the breadth of any individual's vision or the depth of any one analysis, but by the degree to which our gatherings are effective fora for communicating and operationalizing the abstract ideas we so ably articulate in our individual work. Because the energies, efforts, errors, strengths, limitations and evolving visions of embodied human beings are such central components of this collective learning process, this Foreword also takes up the important challenge of recounting the historical development and institutional trajectories of the LatCrit project.

***586** I. Beyond/Between Colors: Constructing Inter-Group Solidarity and
Deconstructing Insider/Outsider Positions in LatCrit Theory and Coalitional
Politics

A. Centering Particularities and Comparing Subordinations: Toward an Ethic of
Inter-Group Comparisons

The four essays in this first cluster provide different perspectives on the possibilities and obstacles confronting any project to promote inter-group solidarity. [n.20](#) Professor Luna's opening essay seeks to identify points of commonality between Blacks and Chicanos by forwarding a deconstructive analysis of the legal doctrines through

which judicial interpretation facilitated both the institution of Black slavery and the dispossession Mexican landowners. The other three essays focus on the particularities of inter-group relations in South Florida. Attorney Cheryl Little's essay on intergroup coalitions, immigration politics and the Haitian experience uses the recently enacted Nicaraguan Adjustment and Central American Relief Act (NACARA) as the point of departure for a historical account of the discriminatory treatment Haitian refugees have been singly and systematically subjected to over the last 30 years, in contrast specifically to the treatment Cuban refugees have received during this same period. Attorney Lyra Logan provides a narrative account of the intergroup conflicts and convergence of interests among Black and Cuban-American political constituencies that enabled Florida to enact this country's first and only statewide state-funded affirmative action program aimed at increasing access to legal education for Black, Latina/o and other minority groups, whose members are grossly under-represented in the Florida State Bar. Finally, Attorney Virginia Coto recounts the objectives and assesses the initial achievements of an innovative project to provide legal services to battered immigrant women in the South Florida community.

Cumulatively, these four essays provide a rich and varied perspective on the role of law in mediating or exacerbating intergroup tensions and divisions, as well as facilitating or obstructing the possibilities for achieving intergroup justice. The narratives are of law and legal institutions. Though the deconstruction of white supremacist legal ideology may initially seem far and away from the more immediate political struggles for immigration relief, access to legal education and the practice *587 and politics of designing and running an alternative legal services program, each essay provides a unique perspective on the challenge of promoting inter-group solidarity in theory and practice. Theory without practice is a hollow luxury only the privileged can indulge; however, practice without theory too readily collapses complexity into a unidimensional struggle that can be counterproductive in the struggle for inter-group justice. Indeed, the complex social, political, cultural, economic and legal dimensions of the different struggles recounted in each of these essays is precisely the reason why theory and practice must remain in dialectical engagement.

Beyond Difference: Deconstructing the Legal Structures of Subordination

Professor Luna's essay on the complexities of race aptly opens the first cluster of essays on inter-group solidarity by exploring points of commonality and difference across two otherwise disconnected fields of legal doctrine. [n.21](#) The first is constituted by the antebellum legal struggle of emancipated Blacks to obtain the status and privileges of U.S. citizenship, a struggle that culminated in the infamous *Dred Scott v. Sandford* decision of 1856, which propelled the United States into its bloody civil war. In *Dred Scott*, the Supreme Court declared that all Blacks, whether free or slave, were ineligible for U.S. citizenship because of the inherent inferiority of the African race. The court also accorded the property rights of southern slave owners a privileged constitutional status, denying both Congress and the free- states the legal authority to confine the institution of slavery to the territorial boundaries of the slave-states. The second field is marked by the

legal struggles of Mexican-Americans to retain their lands in the territories ceded by Mexico after the Mexican War of 1846. These struggles generated a long line of cases in which Mexican landowners were systematically dispossessed of their lands for the benefit of white settlers, land speculators and gold- diggers.

By juxtaposing the historical tribulations of Blacks and Chicanas/os across these two very different sociolegal contexts, Professor Luna strikes three themes worth further comment and reflection. First, Professor Luna's essay makes historical reality a central concern in the articulation of anti- subordination legal theory. The history she recounts is of legal interpretation. It is a history of the arbitrary and inconsistent adjudication of rights asserted by different outsider groups across different *588 points in time and space. [n.22](#) It is also a history, the telling of which is designed to reveal how the internal coherence of legal doctrine has been repeatedly subordinated to the external imperatives of white supremacy--a history that can only be told by deconstructing the judicial decisions that constitute this history. Through this deconstructive analysis, Professor Luna's essay is able to link the distinct histories of free Blacks and Mexican landowners both to each other and to a critical analysis of the legitimacy of legal interpretation and the role of law in the re/production of subordination. Second, her essay also opens new avenues of critical analysis into the way white supremacist ideology articulates the legal meaning of U.S. citizenship, a recurring theme in LatCrit scholarship and throughout this symposium. [n.23](#) Finally, her analysis offers a valuable point of departure for developing an ethic and assessing the political implications of intergroup comparisons.

Professor Luna locates her historical analysis in the field of legal discourse. Her objective is to reveal otherwise invisible similarities, demonstrating that free Blacks and Mexican land owners confronted a common context of struggle despite apparent differences in their particular experiences of subordination within white supremacy. Professor Luna reveals these similarities by deconstructing the interpretative strategies and legal arguments used to rationalize the judicial decisions that produced these different experiences. The differential treatment of property rights across these two contexts provides a particularly valuable point of comparison. By invoking the concept of due process, the Dred Scott decision afforded slaveowner's rights of property a constitutional status that simultaneously contracted Congressional power and projected the legal effect of slave-state laws beyond their territorial jurisdiction. The Dred Scott decision was so immediately explosive because it cast slaves as property subject to constitutional protection everywhere in the country. In then Chief Justice Taney's view, slave owners were entitled to travel through and reside within the free states and territories with their slaves and were further entitled to have their property rights in slaves protected by due process despite the fact that slavery was illegal *589 in the free states and territories. [n.24](#) Since Dred Scott's claim to U.S. citizenship was premised on his status as a freeman emancipated by the act of residing in free territory, the Court's constitutional analysis stripped him of his legal claim to freedom, and hence to the citizenship status upon which his right to invoke federal diversity jurisdiction ultimately depended. [n.25](#)

Professor Luna contrasts the costly protection granted the property rights of slaveholders to the treatment of Mexican property owners, whose land title claims

purportedly were protected by the Treaty of Guadalupe Hidalgo. Read through the lens of legal precedent, the history of land adjudication in the ceded territories is a history of arbitrary rulings and of blatant disregard for established precedent. It is a history of nothing less than judicial lawlessness. While the United States was treaty-bound to grant U.S. citizenship to Mexican nationals choosing to remain in the ceded territories and to respect their property rights as established under Spanish and Mexican law, neither the implementing legislation, nor the process of land adjudication complied with these obligations. Under the terms of the Treaty of Guadalupe Hidalgo, Spanish and Mexican land titles were to be given legal effect in northamerican courts, yet reference to Hispanic law was, at best, inconsistent. In some instances, courts applied Hispanic law, demonstrating their familiarity *590 with its requirements and with their own duty to apply it; yet, in other cases, Hispanic law was inexplicably ignored or blatantly misrepresented. [n.26](#) In a similar vein, even a minimalist interpretation of due process would eschew arbitrary and inconsistent adjudication; yet Mexican land title cases are rife with such inconsistencies as border the irrational. Cases applied shifting burdens of proof, in some instances requiring documentary evidence of title, while, in others, mere parole evidence was allowed to suffice. In some cases, actual physical residence on the claimed property was required to confirm title despite the claimant's valid documentary evidence. In other cases, title was confirmed solely on the basis of documentation of doubtful authenticity. Indeed, through this morass of arbitrary adjudication, Professor Luna finds only one regular and predictable consistency: Anglo claimants tended to win title to land, while Mexican claimants tended to lose.

Certainly, Dred Scott and the long line of Mexican land title cases occupy very different sociolegal fields and might therefore be readily distinguished. The Mexican land title cases might be read as just another example of the United States repeated failure to respect customary international law and honor its treaty obligations. Dred Scott, by contrast, might be dismissed as aberration, an idiosyncratic moment of judicial lapse--like a handful of equally infamous Supreme Court decisions. [n.27](#) However, the value of Professor Luna's analysis is that it nevertheless reveals a common context of struggle shared by Blacks and Mexicans and otherwise obscured by the fact that these instances of dispossession are coded in the abstractions of legal discourse and articulated across very different sociolegal contexts. In particular, Professor Luna's search for commonalities challenges LatCrit scholars to think critically about the way the doctrinal evolution of Anglo American property rights regimes is directly implicated in the material dispossession and economic marginalization of communities of color both within and beyond the United States. [n.28](#) Her point, after all, is that the elevated constitutional *591 status and due process protections accorded the property rights of slaveowners in Dred Scott were nowhere seen when the property rights at issue were the rights of Mexican nationals to retain the lands to which they were entitled under customary international and federal treaty law, thus suggesting that the protection of property depends more on the racial identity of the property owner, rather than the abstract elements of property law.

LatCrit scholars can usefully follow Professor Luna's lead in many directions, for example, by comparing the way abstract legal principles requiring just compensation

in instances of expropriation have been applied when the expropriated are foreign direct investors in third world countries as compared to indigenous peoples separated from their communal lands and livelihoods by forced relocation. [n.29](#) Indeed, once the search for commonalities leads us to center the interpretation of property rights regimes in our critical analysis of white supremacy, a whole range of familiar questions are rendered all the more compelling: we might ask not only how relations of subordination have been historically constructed through the differential legal protection afforded white property owners as compared to non-white property owners, but might also begin to develop a critical analysis of the way some economic interests are accorded the legal status of a property right, while others are not. [n.30](#)

***592** The Supremacy of Citizenship: Beyond a Discourse of Absolute Difference

Professor Luna's comparative analysis also provides important insights into the way the search for commonalities through inter-group comparisons can expand the opportunities for intergroup identification and solidarity. For example, Taney's reasoning denied Dred Scott U.S. citizenship on the grounds that he was Black and that Blacks were so inherently inferior that they could never constitute a part of "the people of the United States." [n.31](#) It is not hard to see how the brutal racism of this decision might easily be configured around a discourse of fundamental and irreconcilable difference. [n.32](#) Such a discourse would, however, offer very little room for comparative projects of the sort Professor Luna has forwarded here because, in a discourse of absolute difference, the only thing that matters is that there is a fundamental difference between losing one's property through theft, corruption and racial bias and being altogether denied the self-possession of one's own body and mind, one's labor and sexuality. [n.33](#) A discourse of absolute difference destabilizes the search for intergroup commonalities, or rather rejects the project out of hand. In this discourse, Black and Chicana/o histories are positioned within a hierarchy of dispossession, with one group cast as "more dispossessed" than the other. Indeed, the experience of African American slavery is cast as so profoundly unbridgeable--an abyss so separate and apart from the experiences of Chicanas/os in the ceded territories--that there is no meaningful point of reference or departure for constructing a common identity or forging a common agenda around these different histories of dispossession. The wrongs can never be compared; therefore the boundaries of difference can never be traversed, and inter-group solidarity is that much more ephemeral. [n.34](#)

By contrast, in juxtaposing the Dred Scott decision to the Mexican land title cases, Professor Luna challenges LatCrit scholars to seek the commonalities of oppression without collapsing these two distinct histories into one false norm. [n.35](#) The payoff is a new perspective on the way ***593** law is implicated in the present day configuration of white supremacy. Read through the discourse of Black exceptionalism, Dred Scott is about slavery--a form of oppression uniquely experienced by Blacks in this country. Being about slavery, the decision is dead precedent, thoroughly discredited and consigned to historical infamy. Read, by contrast, through a discourse of common oppression, Dred Scott is about the configuration of state power around a citizen/non-

citizen dichotomy. Indeed, the language Professor Luna quotes from the Dred Scott opinion makes it abundantly clear that the decision not only denied free Blacks citizenship, but in doing so, transfigured a representative government of limited powers into an imperial state. This is because the constitutional framework of government underpinning the Dred Scott decision reveals a state that claims the power to govern, without any legal limitations, a class of persons whose interests it does not even pretend to represent. [n.36](#) These persons are the non-citizens, who do not constitute part of "the people of the United States," do not "hold the power," do not "conduct the government through their representatives," and therefore do not "enjoy the rights and privileges" that the constitution secures only to its citizens. [n.37](#) Unlike slavery, the forms of oppression that have been organized around the citizen/non-citizen dichotomy and effectuated through the exercise of imperial power, both domestically and internationally, are common to many, including Blacks who have never been enslaved. [n.38](#) *594 Read through this discourse, the reasoning of Dred Scott is still alive and well in the present day configuration of white supremacy. Its present day target is no longer the Black American, as such, but the foreign, [n.39](#) the poor, [n.40](#) and those who are cast as "national security" threats. [n.41](#)

Toward an Ethic and Politics of Intergroup Comparisons

By juxtaposing the struggles of Blacks and Chicanas/os across these two very different sociolegal contexts, Professor Luna demonstrates the potential value of intergroup comparisons. These comparisons reveal the kinds of structural interconnections that can help LatCrit scholars articulate a common agenda despite the different histories of dispossession. At the same time, she also recognizes that inter-group comparisons can be dangerous. She is therefore, careful to disclaim any essentialistic intent "to collapse the histories of people of color into one false norm." Instead, her stated purpose is "to demonstrate how law from one historical period established the subordinate status [of these two different groups]." [n.42](#) For this reason, Professor Luna's essay provides a valuable point of departure for reflecting on the ethics and politics of intergroup comparisons.

*595 The key objective, viewed through a LatCrit normativity, is to ensure that our inter-group comparisons are performed in ways that promote the commitments and alliances that strengthen a community of solidarity. Indeed, my point is even more dramatic. Not only can different group histories and lived realities be compared in many different ways, but it is precisely for this reason that the value of any comparison turns on the kind of collective identifications and inter-group alliances such comparisons engender. Comparisons that undermine the possibilities for anti-essentialist solidarity and derail the anti-subordination imperatives of our theory and praxis ought to be rejected outright precisely because they are not true in any way that matters. Conversely, comparisons that promote these objectives ought to be embraced for further exploration and centered in our collaborative projects. [n.43](#)

If this position seems to play fast and loose with inherited notions of "historical truth," that too is untrue--in any way that matters. On the contrary, this position simply

attaches a political imperative to the interpretative choices we make in telling our histories and comparing our subordinations. One happy truth of our otherwise decidedly unhappy era is that the once-upon-a-time illusion of a unitary history has been oh-so utterly destabilized by a proliferation of our discourses and perspectives. Rather than bemoaning the fact that as finite social beings, we each access history, like any other reality, through the contingencies of discursive orders that are always in flux, [n.44](#) LatCrit scholars need to understand this discursive flux--and the multiplicity of perspectives it generates--as precisely the reason why the histories we should tell are the histories of the future we are determined to create together. [n.45](#)

***596** Attorney Cheryl Little's essay provides a valuable counterpoint. Her essay is based on years of committed advocacy on behalf of Haitian refugees. Hers is a story of an uphill battle on behalf of a vulnerable and disdained minority. Her point of departure is a critical analysis of NACARA, otherwise known as the Victims of Communism Relief Act. [n.46](#) This immigration legislation provides substantial immigration relief for nationals of Nicaragua, Cuba, El Salvador, Guatemala, the former Soviet Union and Warsaw Pact countries. Haitians are noticeably missing. Attorney Cheryl Little links their absence to a historical pattern of discrimination and exclusion, dating back to the initial wave of Haitian refugees fleeing the right wing brutality of the Duvalier regime and continuing through a series of instances in which Haitians have been singled out for differential treatment. This differential treatment is all the starker when juxtaposed against the treatment accorded Cuban refugees. Though both groups came to the United States fleeing dictatorship in their countries of origin, Haitians fleeing the political repression of the Duvalier regime received a very different reception than Cubans fleeing Castro in the freedom flotillas of the 1960s. This differential treatment has also generated significant intergroup tension and unrest. Haitians, subject to indefinite detention at Krome, have engaged in hunger strikes to protest the double standard that keeps them imprisoned, even as Cuban hijackers have been promptly released upon arrival in Florida. Haitians, intercepted at sea, have been repatriated to Haiti despite their claims of well-founded fear of persecution, while Cubans, rescued by the Coast Guard, have been flown to Miami and paroled into the community. Attorney Little sums up the differential treatment like this:

In many ways, immigration practices toward Cubans and Haitians have represented the extremes of United States policy. While immigration policy toward Cubans tends to be generous and humanitarian, even with recent repatriation, immigration policy toward Haitians tends to be stringent and inhumane. [n.47](#)

Because so much of Attorney Little's argument is organized around a juxtaposition of Haitian and Cuban refugee experiences, her essay provides an appropriate moment to reflect anew and with greater precision on the political implications of the way intergroup comparisons are ***597** articulated in LatCrit theory. It enables us to move from abstract discussions of the normative aspirations and commitments that ought to inform the practice of intergroup comparisons to the more difficult task of articulating a methodology for assessing such comparisons from a LatCrit perspective. The first step is to recognize that intergroup comparisons impact the formation of collective solidarities and political alignments by structuring the perception

of similarities and differences within and between the varied and various groups that might potentially coalesce around any particular political project--in this case the politics of refugee policy. Comparing comparisons means assessing the way different intergroup comparisons tend to structure different political alignments and subjecting these alternative political alignments to anti-essentialist critical analysis informed by LatCrit commitments to anti-subordination politics. [n.48](#)

Applying this methodology, it is worth noting that unlike Professor Luna, whose effort is to reveal suppressed commonalities in the legal construction of Black and Chicano subordination, Attorney Little's narrative account is organized around a discourse of absolute difference that emphasizes the uniqueness of the Haitian refugee experience by contrasting it to the experience of Cuban refugees. In doing so, her narrative marks the lines of similarity and difference along a racial schemata that casts Cuban refugees as racially white and Haitian refugees as racially Black. This racial dichotomization, though profoundly essentialized, may nevertheless further some anti-essentialist political realignments at least insofar as it destabilizes discourses used to pit domestic minorities against recent immigrants. Black Americans, in particular, have often been cast as the group most directly and negatively affected by the influx of immigrants. [n.49](#) Reading the treatment of Haitian refugees through a discourse that links their differential treatment to the fact that a large majority of Haitians are Black can be an effective way of combating the articulation of anti-immigrant politics among Black Americans. By showing how Haitian refugees have been singled out for particularly restrictive immigration exclusion, the discourse of absolute difference makes a clear link between exclusionary immigration policies and domestic racism. The domestic anti-racist agenda is thereby challenged to become more inclusive precisely because a politics of racial justice cannot ignore the differential oppression and exclusion of Black immigrants without invoking and/or activating a particularly problematic form of intra-Black hierarchy that privileges Black Americans over Black immigrant refugees. Thus, reading the Haitian immigration experience through the discourse of absolute difference may help expand and consolidate a pro-immigrant political coalition by foregrounding a perspective from which achieving justice for immigrants can be seen as a part of a broader struggle for racial justice in this country.

Although Attorney Little's discourse of absolute difference may help redefine the treatment of Haitian refugees as a matter of racial justice, the pro-immigrant political realignments fostered by this discourse can become truncated in two important respects. First, Haitians are not the only racialized immigrant group that has been treated unfairly and restrictively by U.S. immigration policy, and Black Americans are not the only domestically subordinated group that have cast themselves as particularly victimized by immigrant entry. [n.50](#) The discourse of absolute difference can truncate the coalitional solidarity that might otherwise be organized around these intergroup commonalities precisely because its account of racial injustice is based on the claim that harsh treatment received by other immigrant groups pales in comparison to the treatment Haitian refugees have received because they are Black. Rather than fostering a comprehensive and inclusive political agenda in opposition to racist immigration policies based on the substantive merits of each group's particular claims of injustice, intergroup comparisons

articulated through a discourse of absolute difference tend to provoke intergroup competition over which group has received the harshest treatment.

Equally important, articulating a discourse of absolute difference forces Attorney Little to overlook intergroup commonalities and emphasize intergroup differences in ways that suppress other significant dimensions of U.S. refugee policy. While refugees from Cuba, Haiti, Guatemala and El Salvador have come to this country seeking refuge from dictatorship and persecution in their countries of origin, in Attorney Little's account, the totalitarian repression experienced in Cuba is reduced to the "relatively mild mistreatment of Cubans in their homeland (which results in a grant of asylum), while gross mistreatment of *599 Haitians does not." [n.51](#) This juxtaposition helps articulate a discourse of racial difference, but only by minimizing the degree of repression in communist Cuba and suppressing the fact that, Guatemalan and Salvadoran refugees, who like Haitians experienced gross mistreatment and death squad activities in their countries of origin, also have been routinely denied political asylum. [n.52](#) These facts do not fit neatly into a discourse of absolute difference because the totalitarian repression in Cuba, like the systematic denial of political asylum to Guatemalan and Salvadoran refugees, both suggest factors other than race are operative in the differential treatment of Cuban and Haitian refugees. These other variables include the articulation of U.S. national security ideology, [n.53](#) the doctrinal structure of U.S. refugee law, particularly its economic/political dichotomy, which justifies the exclusion of "economic refugees" even as the indeterminacy of the dichotomy renders every racialized immigrant group vulnerable to exclusion regardless of the objective merits of their claim to political asylum, and the unsettled controversy over the conditions and principles that justify international intervention in the "internal affairs" of repressive regimes. [n.54](#)

To be sure, Attorney Little's narrative account notes these variables, but only in passing. Her objective is to center the reality of racial discrimination in the way we understand the politics of refugee policy, and in this respect, she is entirely successful. Her compelling narrative leaves no doubt that eliminating racial discrimination from U.S. refugee policy is a compelling objective; nevertheless, her narrative does trigger doubts as to whether the kinds of intergroup coalitions needed to advance this objective are likely to coalesce around a political agenda defined by a discourse of absolute difference, particularly if this discourse is articulated through intergroup comparisons that minimize the substantive claims of justice of one group in order to buttress claims of discrimination made by another group. The challenge is to move beyond these kinds of intergroup comparisons. The question is how. *600 The answer is to articulate a broader perspective from which the particular experiences and various claims of different groups can be seen as part of a common struggle for justice.

A moment's reflection on the variables marginalized by Attorney Little's narrative account may provide some direction. These variables give reason to doubt whether a political agenda defined by the objective of eliminating racial discrimination from U.S. refugee policy would be enough to achieve justice for Haitian refugees--even as they suggest a variety of perspectives from which all refugees inhabit a common context of struggle. All refugees, including Haitians, inhabit a world in which U.S. policy responses to human rights violations, both at home and abroad, are filtered through

an aggressive and self-serving national security ideology, [n.55](#) in which restrictions on mobility and exclusionary policies can be directed with legal impunity at the world's poorest peoples, and in which the international community has not yet developed the legal norms and enforcement mechanisms to empower and protect peoples against the repression and abuses of internal elites. [n.56](#) Reading the differential treatment of Cuban and Haitian refugees through these variables, rather than the discourse of absolute difference, would activate very different political agendas and foster very different intergroup coalitions precisely because these variables link the critical analysis of U.S. refugee policy to a critical analysis of the U.S. imperial state, the production of poverty in the international political economy, and the failures of the interstate system of sovereign nations to sustain a world order based on respect for international human rights. These dimensions of domestic and international law and politics bear directly on the project of achieving substantive justice for Haitian refugees; however, their transformation implicates a fundamental reconfiguration of power relations and requires a discourse of mutual recognition and intergroup respect, not of absolute difference articulated through intergroup comparisons that minimize the substantive claims of one group to enhance those of another.

Substantive Justice: Beyond Interest Convergence

At the same time, the essay by Attorney Little effectively foregrounds ***601** the difficulties of translating abstract assertions of intergroup commonalities into a practical politics of coalitional justice. In Attorney Little's narrative, the noticeable exclusion of Haitian refugees from the amnesties enacted by NACARA is significant, not only because it is linked to and informed by a long history of differential and discriminatory treatment towards Haitians, but because it represents an intergroup political betrayal in the corridors of Congress. Though a bipartisan and intergroup coalition, including leaders of the Black and Hispanic Congressional Caucuses, has been coalescing in response to growing community opposition to the continued and blatantly discriminatory exclusion of Haitians, Haitians still lack the political representation and committed advocacy other immigrant groups enjoy. The fact that Republican members of Congress supporting NACARA were willing and able to perform a so-called "jihad" for the benefit of Nicaraguan, but not Haitian, refugees raises profound questions about the practice of coalitional politics, [n.57](#) particularly in light of another part of the story. Confronted with assertions that including Haitians in NACARA would kill the bill, Haitian advocates might, nevertheless, have decided to press the point. They might, in effect, have chosen to perform their own "jihad" on behalf of the excluded Haitians. According to Attorney Little, they did not. [n.58](#) As a result, thousands of refugees and immigrants from Nicaragua, Cuba, El Salvador, Guatemala, the former Soviet Union and Warsaw pact countries are enjoying the benefits of NACARA, leaving Haitians to wonder whether their self-restraint and self-sacrifice in this instance will be remembered and reciprocated in the next.

Told as a story of sell-outs and sacrifices, the story of NACARA tracks a familiar problematic in the practice of coalitional politics. Years ago, Professor Derek

Bell gave us the theoretical framework for understanding this problematic in the context of Black/White civil rights coalitions. Professor Bell forwarded an "interest convergence" theory of the way white people practice coalitional politics. [n.59](#) In this practice, intergroup unity and solidarity are grounded, not in any commitment to objective justice nor in any substantive vision of inter-racial equality, but rather in the contingencies of converging group interests. Inter-racial ***602** civil rights coalitions were viable only so long as white people saw their own particular self-defined group interests furthered by supporting Black civil rights struggles. The much discussed collapse of the civil rights coalition, and increasing reactionary retrenchment aimed at affirmative action policies, minority business set-asides, entitlements programs, read against the backdrop of economic problems, provide ample evidence in support of Professor Bell's initial thesis. [n.60](#)

Attorney Little's narrative reveals the way Haitian refugees were cast as politically expendable in the coalitional politics that achieved the enactment of NACARA. It thus raises the significant question whether minority groups, their political representatives and legal advocates are destined to replay the interest convergence politics through which the white majority has strategically maintained its privileges. It challenges LatCrit theory, in particular, to struggle with the problem of articulating a more meaningful foundation for our coalitional theory and praxis. [n.61](#) Can we move the practice of intergroup coalitional politics beyond the pseudo solidarity and fleeting alliances of contingent convergence of interests? Of course, this question, itself, presupposes a level of perceived commonality that may have yet to be imagined in the local politics of South Florida.

In this context, the question asked by Attorney Lyra Logan in her essay in this symposium is whether Black and Cuban-American legislators, and the communities they purport to represent, can set aside their differences to establish common cause. [n.62](#) She believes they can, and this belief is based on her experiences directing Florida's Minority Participation in Legal Education Program. The MPLE is a statewide, state-funded affirmative action program designed to increase minority participation in legal education through annual funding of scholarships for 200 minority law school students and 134 undergraduate pre-law students. Attorney Logan's express purpose in recounting the history of the MPLE Program is to reflect critically on the conditions that enabled Black and Cuban-***603** American state legislators to transcend a politically partisan and racially divisive competition over the creation and location of "a minority law school" in Florida to develop the intergroup, bi- partisan coalition that succeeded in enacting the MPLE Program.

Attorney Logan explains that the MPLE program was proposed by Florida's State University System as an alternative to competing proposals to establish a new law school at Florida International University (FIU), which is 50% Hispanic and 11% Black, or to reopen a law school at the historically Black Florida A&M University (FAMU). FAMU's all-Black law school was closed by Florida's all white legislature in 1965 in order to open another white law school at Florida State University. The decision was purportedly made to enable Florida to meet an expected increase in the demand for lawyers, since FAMU's law school was reportedly failing to graduate sufficient numbers

of lawyers that would later be admitted to the Florida Bar. The recent controversy over whether a new law school should be located at FIU, a proposal favored by Florida's Cuban legislators, or reopened at FAMU, the alternative supported by Florida's Black legislators, was sparked by various reports indicating that minorities are seriously under-represented throughout the legal profession in Florida. Indeed, in 1990, the Florida Supreme Court Racial and Ethnic Bias Study Commission concluded that a critical shortage of minority law students, attorneys and judges was a major factor contributing to the denial of equal justice for minorities in the State.

According to Attorney Logan, the MPLE program aptly illustrates the value of intergroup coalitions. The proposal to establish the scholarship program was introduced in 1994 by a Black representative in the House and a Latino Senator, as a bi-partisan, biracial compromise bill. This bi-partisan, bi-racial support has enabled the program to survive the transfer of power between Democrats and Republicans in the various elections since 1994. Rather than continuing a partisan and racially divisive competition for a law school that the State had no intention of funding, the Black and Hispanic legislators were able to put aside their differences and find common cause in a program that would help both groups achieve the objective of increased minority participation in legal education and the legal profession.

The problem is that, as her account indicates, this successful coalitional initiative is a case study in interest-convergence politics. Indeed, the success of the coalition was grounded in the contingencies of the moment, most particularly on the fact that the State could not justify giving either group the law school it wanted. If the State had decided to give a school to one group, this bi-racial, bi-partisan coalition would never have coalesced. Because the State did not, the two groups had to ***604** cooperate or walk away with nothing. This coalition is, however, fragile and unstable. Each group still wants "its own" law school, and both FIU and FAMU have indicated that a law school is among their top priorities for 1998-2003. The stakes are as daunting as the coalition is fragile. As Attorney Logan observes, "[i]f that battle reheats and intensifies, chances for future alliances on any issue will become more and more remote. Also, if one group gets a school, the other group may well find its under-representation left inadequately addressed." [n.63](#) The fragility of this coalition is directly attributable to the fact that it is based on a contingent convergence of interests, rather than a substantive vision of and commitment to intergroup social and racial justice. Thus, while Attorney Lyra Logan views the MPLE as evidence of progress in intergroup coalitional politics, a LatCrit sensitivity must demand more from both groups.

At a minimum, a substantive vision of intergroup justice would eschew any political move to cast the problem of equal justice as a simple matter of increasing the number of Blacks and Latinas/os enrolled in Florida law schools or admitted to the Florida Bar, particularly when number-counting can operate to pit Blacks and Latinas/os against each other in a zero-sum competition. From the perspective of the Black and Latina/o residents of Florida seeking equal justice and affordable legal services, the crucial question is not who is going to control any proposed minority law school, nor how many Blacks and Latinas/os are admitted to the Bar, but how that control will be exercised and whether those attorneys will be trained, committed and enabled to practice

law for social, racial, and ethnic justice.

The current structure of the legal profession in Florida, as in many places, is hardwired for inequality and injustice. [n.64](#) Despite the supposed over-supply of lawyers in South Florida, low and middle income individuals and families, as well as many small businesses, are literally priced out of the market for private legal services to such a degree that their legal needs go unattended or they resort to pro se representation. [n.65](#) State supported legal services for the poor are grossly underfunded. [n.66](#) *605 Recent law school graduates inspired by a vision of social justice and a desire to practice law in the public interest are hard-pressed finding any public interest jobs, and certainly any that pay a living wage after accounting for law school loan repayment obligations. [n.67](#)

Rather than empowering minority students to become effective advocates on behalf of the poor and the marginalized or even to achieve individual fulfillment through personally meaningful work, many minority students experience their legal education as a socialization process that numbs their sense of justice, subjects them to relentless microaggression, triggers profound identity crises, ignites their appetites for status and money, distances them from the communities they initially wanted to help and, if they are successful by mainstream standards, condemns them to slave away for years at any job that allows them to repay their student loans, while they take solace in the fact they are making more money than they have the free time to spend. [n.68](#) Integrating minorities into this pre-existing status quo without serious attention and proactive efforts to reform the way legal education, the legal profession and the delivery of legal services are currently structured may provide Black and Latina/o students with a well-deserved opportunity for individual advancement through professional education, but it will not in and of itself ensure that low and middle income Blacks and Latinas/os, not to mention the poor of any race, will enjoy equal justice, nor that these new attorneys will be ready and able to practice law for social justice.

Clearly, the MPLE program is a remarkable feat in an era of backlash and retrenchment. The question that Attorney Logan's essay effectively raises for LatCrit theory and praxis is this: how can we use the contingencies of interest convergence as a stepping stone toward, rather than a restriction upon, the achievement of social justice. Both the civil rights and the MPLE experiences show that coalitions based on interest-convergence can be put to good use, but those two experiences also counsel LatCrits to transcend the limitations and fragilities of these strategic *606 alliances. With this critical account of the MPLE experience, Attorney Logan usefully reminds LatCrit scholars that our challenge is to imagine and implement coalitions based on a vision of and commitment to substantive justice.

In this context, Attorney Coto's essay is a particularly instructive counter-example. [n.69](#) Like many students of color, Attorney Coto experienced her Latina identity as a compelling source of empathy for and commitment to the marginalized communities with whose struggles and suffering she could in many ways identify. Unlike most law students, however, Attorney Coto was able, with the help of an Echoing Green Fellowship and the sponsorship of the Florida Immigrant Advocacy Center, to translate her empathy into an innovative legal services project, which she founded upon graduating from the University of Miami School of Law in 1997. This project is called LUCHA. Its

mission is to serve battered immigrant women by providing critical legal assistance under "VAWA," the Violence Against Women Act, a federal law that makes the prevention of violence against women "a major law enforcement priority" and includes provisions enabling battered immigrant women to self-petition for permanent resident status without the cooperation or participation of their abusive spouse. VAWA also provides suspension of deportation relief; however, without access to effective legal services, the vast majority of battered immigrant women lack the information and resources necessary to obtain this relief. Like other immigrants, these women face barriers of language, culture and social economic marginalization, but they face additional barriers because they are trapped in relationships with men who abuse them and manipulate their fears of deportation in order to exert power and maintain control.

The LUCHA project is especially noteworthy because it reflects a self-conscious and self-critical effort to implement an alternative model of legal services that is less focused on traditional litigation and more focused on reducing the dependency and isolation that make battered immigrant women so desperately vulnerable. While the traditional legal services model constructs the client as passive beneficiary of the benefits secured and rights vindicated through the agency of the lawyer advocate, LUCHA seeks to relocate and inspire agency in and among the battered immigrant women themselves. Formed as a grassroots membership organization, its strategy is to enable and promote self-determination by involving battered immigrant women in a larger community where mutual engagement and assistance become the vehicles of individual empowerment. LUCHA members are eligible for free legal services on immigration matters; however, to become a LUCHA member, ⁶⁰⁷ women must take a six-part educational program and commit a portion of their own time to assisting other women. The educational component raises women's consciousness and provides them with necessary information on relevant topics in immigration law, workers' rights, domestic violence, public benefits, victim's rights, community resources and lessons on how to be heard by government. The mutual assistance creates community and organizes social networks otherwise disrupted by the dislocations of the immigrant experience and the isolation of domestic battery.

Despite its many strengths, the LUCHA project faces two significant sets of obstacles. The first is that the structure and philosophy of LUCHA run counter to elitist attitudes that currently structure the delivery of legal services to the poor. The second is that the project is primarily supported by a terminal fellowship. These two obstacles illustrate the difficulties or conundrums facing even the most creative and entrepreneurial minority law students committed to doing public interest work. On the one hand, their identification with their client communities can make them highly critical of the way traditional legal services operate and eager to innovate new approaches; on the other hand, established legal services are resource strapped and hardly interested in, nor often able, to hire recent graduates to develop and implement untested innovations. As a result, even the most innovative projects and ideas are increasingly dependent on terminal fellowships and grants, making these projects fragile, unstable and vulnerable to sudden termination, even after tremendous efforts have been invested in their success. The unsurprising result, too often, is a disillusioned disengagement and retreat to well-trodden paths of career development. Thus, Attorney Coto's story reflects the range and structure

of possibilities and obstacles confronting recent law graduates determined to translate anti-subordination theory into meaningful practice. The reforms needed to alter this picture are systemic and profound--and attest to the fact that a struggle to increase minority participation in legal education, unconnected to a project of systemic reform in the delivery of legal services to disadvantaged communities, may fall short of the mark.

This is not to suggest that increasing minority participation in legal education and the profession is not a compelling social justice objective. [n.70](#) It is to say that the struggle to achieve equal justice for Blacks, *608 Latinas/os and other marginalized groups in Florida requires more comprehensive reforms, reaching deep into the heart of legal education and forward into the structure of the legal profession. [n.71](#) These reforms can barely be imagined, let alone achieved, without the kinds of sustained, collaborative, bi-racial and bi-partisan alliances that the MPLE coalitional initiative conjures, but has not yet fully delivered. By this, I mean alliances that are grounded in a substantive vision of justice and of the role of law and legal education in effectuating that vision, rather than a contingent convergence of interests among two factions that choose to position themselves in a racially marked, politically partisan, zero-sum competition for control of a non-existent law school at the expense of the collaborative intergroup political alliances needed to achieve more comprehensive and systemic reforms in the structure of legal education and the organization of the legal profession--to the detriment of the minority interests they purport to represent and, more generally, to the cause of social, racial justice through law in this State. [n.72](#)

B. Inside Outside: Mapping the Internal/External Dynamics of Oppression

The second cluster of essays maps the dynamics of internal and external oppression within Latina/o communities, even as it illustrates a rich multiplicity of perspectives from which the theory and practice of anti- subordination politics can be mapped around the inside/outside metaphor. [n.73](#) Professor Padilla first activates the inside/outside metaphor by focusing our attention on the phenomenon of internalized racism. Acknowledging that Latina/o subordination is not just a function of external oppression, but also of internal acquiescence in the negative stereotypes that undermine individual self-confidence and destroy collective solidarity, challenges LatCrit scholars to theorize the relationship *609 between internal and external oppression, to familiarize ourselves with the psychologies of liberation [n.74](#) and to put into practice the affirmation of self that Professor Abreu's essay so effectively displays.

The four essays by Professors Abreu, Hernandez-Truyol, Wiessner and Roberts in very different, though complementary and synergistic, ways introduce a second problematic that is also usefully analyzed through the heuristic lens of the inside/outside dichotomy. LatCrit theory has from the beginning sought to articulate an inclusive and multidimensional critical legal discourse, aimed at centering the previously marginalized experiences of Latinas/os, even as it continuously aims toward an ever more inclusive vision and practice of anti- subordination politics and intergroup justice. The initial birth and current trajectory of LatCrit theory has in some instances been celebrated as a natural

outgrowth of the intersectionality and hybridity that characterizes Latina/o identities. Latinas/os are said to be uniquely positioned to bridge the hierarchical divisions of race, ethnicity, class, immigration status, linguistic marginality, gender and sexual orientation because Latina/o identity constitutes the intersection of all of these terms. [n.75](#)

It is by now, for example, a LatCrit mantra that Latinas/os come in all races and colors: we are of African, Asian, European and Indian heritage. "We speak Spanish, English, Spanglish, regional dialects and indigenous tongues." [n.76](#) Latinas/os are, in this respect, a universal that contains all particulars, and whose liberation is therefore intricately intertwined and directly implicated in the liberation of all particulars. [n.77](#) Against this backdrop, Professor Abreu's reminder that LatCrits must avoid essentializing our intersectionality sounds a helpful note of caution, even as Professor Hernandez-Truyol's account of the multiple forms of subordination experienced by Latina lesbians within their own communities, Professor Wiessner's emphasis on the oppression of indigenous peoples within every Latina/o community across the globe, and Professor Robert's discussion of the particularities of Black experiences and political identity, all challenge LatCrit scholars to examine how Latinas/os construct insiders and outsiders within the very midst of Latina/o communities. Our aim must be to avoid the practices and ***610** assumptions that would replicate these insider/outsider configurations in the articulation of LatCrit theory, the consolidation of the LatCrit community and the organization of LatCrit conferences.

Internalized Oppression and the Problematics of Self-Affirmation

By invoking the notion of internalized oppression, Professor Padilla's essay offers a valuable point of reference from which to explore the role of individual psychological and spiritual agency in the process of anti- subordination liberation praxis. Read in tandem with Professor Abreu's account of her experiences as a Cuban immigrant, these two essays center the psychological processes through which outsider groups both participate in and transcend their own marginalization, as well as the way individual experiences of inclusion and exclusion are mediated by culturally specific narratives of identity and community. As narratives of Latina/o group identity, these two essays project very different accounts of the way the constitution of Latina/o identities is experienced by members of different Latina/o groups.

Professor Padilla's essay calls Latinas/os to begin our anti-subordination theory and praxis by acknowledging the reality of internalized racism in Latina/o communities, a phenomenon in which, according to Professor Padilla, "'Mexicans internalize the Anything But Mexican' mind set." For Professor Padilla, exposing instances of internalized oppression is an important first step in any liberation struggle because internalized racism is the primary reason why Latinas/os collaborate in their own denigration, sabotage the opportunities and undermine the positive efforts of other Latinas/os. She cites numerous examples: the fact that significant numbers of Latinas/os in California voted to deny immigrants access to many benefits they had previously enjoyed (Prop. 187), to end affirmative action in government contracting and public colleges and universities (Prop. 209), and to end bilingual education (Prop. 227).

Latinas/os who have internalized the negative stereotypes promulgated by the white majority are alienated both from themselves and from each other. Thus, they experience even their substantial achievements through the insecurity of an imposter and project their self-doubts and self-hatred onto other Latinas/os.

Overcoming subordination requires overcoming this internalized racism, and to this end, Professor Padilla offers numerous suggestions as to how Latinas/os can develop more positive self-identities and more empowered and empowering relations with other Latinas/os, both within *611 and beyond the legal academy. [n.78](#) These practices have the common elements of collective solidarity, mutual assistance and sustained engagement in each other's struggles and aspirations--over time and across the many different social, political and professional settings where Latinas/os can make common cause in promoting each other's achievements and development--including LatCrit conferences.

Professor Abreu's essay, by contrast, offers a narrative in which Cuban identity has been experienced as a source of pride, privilege and unique opportunities. She describes her own experience of being Cuban as an experience of being "where it was at." [n.79](#) Cuban identity most certainly marks a whole constellation of differences between her and the Anglo majority, but in Professor Abreu's narrative, these differences are experienced of a piece with the talent of a Luciano Pavarotti or the intellect of an Albert Einstein. "Difference," she notes, "is negative only when it is constructed as such." [n.80](#) Being Cuban never felt like a negative thing, nor did she ever feel inferior because she was Cuban. This is not to say that she never felt excluded, stereotyped or pressured to conform to the roles and positions the majority culture allots to immigrants in general and Latinas in particular. It does mean that these instances of exclusion produced no permanent damage in her sense of self because she, like many of the first and later waves of Cuban refugees, experienced their presence in this country as a temporary phenomenon triggered by the disruptions of the Cuban revolution. For many Cubans, the memory of a privileged pre-revolutionary status in Cuba and the dream of return, not to mention the human capital and economic resources some Cubans were able to take into exile, provide the social psychological resources through which many in the Cuban-American and "Ameri-Cuban" community combat their "minoritization." [n.81](#)

These two essays provide a unique opportunity to explore the wide range of discourses through which Latina/o identity is mapped across the multiplicity of differences and similarities that constitute us as individuals marked by, or invested in, a Latina/o identity. Their focus is internal, self-critical and self-reflective. Though they perform the project of constituting a Latina/o identity in very different ways, each does so undeniably from the inside of a discourse, consciousness and community that are as internal to the Latina/o construct, as they are external to each other. The differences are striking. Where Professor Padilla reflects now on the broader significance of the fact she never dated any of the Chicanos *612 with whom she went to college, Professor Abreu remembers dating only Cuban boys in high school; where Professor Padilla speaks of Chicanas/os distancing themselves from the Spanish language, Professor Abreu recounts the concerted and assuredly draconian efforts through which her parents ensured she would grow up bilingual; and where Professor Padilla speaks of Chicana/o feelings of

inferiority at the margins of a dominant white society, Professor Abreu recounts the decidedly critical perspective her Cuban upbringing gave her on Anglo culture--a perspective that shielded her from ever feeling excluded by a society into which she never wanted to assimilate.

Read in counterpoint, these two essays give substantive content to the general observation that the way individuals and groups respond to experiences of oppression and exclusion is both central to the development of personal and social agency and informed by the different cultural narratives we internalize. [n.82](#) They also demonstrate how the project of Latina/o liberation implicates existential questions of universal significance, in this instance provoking a critical analysis of the relationship between the internal experience of one's own agency and will to flourish and the external structural constraints that might otherwise determine our fate by consigning us to the margins. [n.83](#) Poised between the discourses of free will and determinism, between the constraints of structure and the possibilities of agency, is a subtextual conflict between those who construct Latina/o identity through a discourse of victimization and those who eschew any connection to a victim identity. [n.84](#) Read in counterpoint, the essays activate this tension because they challenge LatCrit scholars to reconcile Professor Padilla's "reconstructive paradox" [*613](#) with Professor Abreu's celebration of self and assertions of indomitable agency.

The reconstructive paradox refers to the difficulties of enacting one's liberation from within a society that barely notices "the most insidious types of social evil because those evils tend to be so ingrained." [n.85](#) If Latina/o marginality and inferiority are so pervasive in our society, where or how, as Professor Westley asks, do Latinas/os find the resources to resist acquiescing in the very power that constructs us? [n.86](#) Professor Abreu responds that Latinas/os should seek these resources of self-affirmation and personal agency in the fact Latinas/os are always both insiders and outsiders all at once. Drawing energy and affirmation from those contexts in which we are insiders prepares us to combat the power that, in other contexts, would cast us as outsiders. The problem, as Professor Abreu acknowledges, is that, unlike herself, not all Latinas/os know the experience of being inside a group that is privileged by class, education, or social status. Not having access to an inside that is materially privileged or socially valued means having to create a self- and other-affirming identity from the bottom or the outside.

To be sure, Professor Abreu recognizes that "[refusing to acknowledge victimization does not transmute a victim into a non-victim." [n.87](#) Her point, as I see it, is that the impact of victimization is, in many though not all instances, fluid and indeterminate. There is always some avenue of agency. And even if there isn't really, the individual who always believes there is a way forward (or out) is more likely to flourish than an individual who internalizes the discourses and credits the practices that cast her as inferior or inadequate. Personal agency, like any great achievement or failure, is from this perspective a manifestation of the will to be and believe. [n.88](#) But even here, engaging Professor Padilla's reconstructive paradox means confronting the question: where does the outsider, one lacking access to the sorts of material, educational or social privilege Professor Abreu admits to enjoying, or one, who--like the Latina lesbian of whom Professor Hernandez-Truyol writes--finds herself multiply rejected, despised and

excluded from all the identity groups or communities with which she might otherwise identify and align herself, where does someone so positioned--at the bottom and on the outside--find the will and resources to manifest an alternative vision from the bottom or the outside?

***614** Read in this context, Professor Hernandez-Truyol's essay contributes a particularly valuable critical perspective on the significance of internalized oppression as well as on the configuration of insider/outsider positions within Latina/o communities. Tracking earlier accounts of the profoundly sexist constructs through which Latina/o culture structures heterosexuality and consolidates familial interdependence around the images of female sexual purity and maternal self-sacrifice, Professor Hernandez-Truyol notes how Latina/o culture routinely invokes the strictures of Catholic religiosity to regiment a form of heterosexuality that empowers men and smothers women. Under the weight and burden of the virgin/whore dichotomy, heterosexuality is constituted as a practice of male dominance and female self-negation, while the expression of female sexual agency or autonomy is cast as a dangerous step toward a rapid and ineluctable free fall into a life of sin, perversion and vulnerability to male sexual dominance. [n.89](#) And yet, however oppressive these cultural constructs may be for straight Latinas, Professor Hernandez-Truyol is right to insist that Latina/o culture is even more virulent in its oppression of lesbians as lesbians.

Though all Latinas must negotiate the rigidity of the virgin/whore dichotomy every time and everywhere it is invoked to confine Latina assertions of autonomy and self-determination within the parameters of permissibility dictated by heteropatriarchal normativity or to bully Latinas into doing and being only those things a Latina can do or be without being labeled "a whore," nevertheless, in this context, Latina lesbians must, in addition, negotiate a cultural reality that sums itself up like this: *Mejor puta que pata*. As Professor Hernandez-Truyol indicates, this cultural adage says it all: "The social and religious factors and influences that render sex taboo for mujeres in the cultura Latina are intensified, magnified and sensationalized when imagining lesbian sexuality." [n.90](#) As bad as the whore is, the lesbian is worse. The fact that Latina lesbians have nonetheless found ways to develop and express a self- and other-affirming identity reflects the power and resilience of ***615** humanity asserting "I am and I count" against all odds, [n.91](#) but it does not change the fact that the homophobia that marks her a lesbian also makes her an alien outsider--marginal and irrelevant, perverted and unnatural--everywhere and anywhere, but most painfully within her own Latina/o family and community. [n.92](#)

By centering the experiences of Latina lesbians, Professor Hernandez-Truyol projects a perspective from which the anti-subordination imperative now pending on the LatCrit agenda far exceeds the anti-subordination potential of any strategies that would reduce this imperative to a struggle against internalized oppression or would ground Latina/o liberation on the identification and reclamation of some insider position we have all purportedly experienced at sometime, somewhere or another. This is not to say that these strategies, as articulated by Professors Padilla and Abreu, have no anti-subordination potential. It is just to suggest that the anti-subordination potential of these seemingly different strategies is limited by a common element that, but for Professor Hernandez-Truyol's intervention, might be easily overlooked. This common element is

that neither strategy really addresses the problem of outsiders within the Latina/o community.

Professor Abreu's reflections on the insider/outsider dynamic conjure but do not really engage the problem because she intentionally conflates the difference between outsider status and difference itself. While she may be quite right to insist that "difference" is negative only when it is constructed as such, there is still a vast difference between being "different" in the way of a Luciano Pavarotti and being different in the way of a Latina lesbian. The difference between these ways of "being different" *616 is precisely the fact that some differences, like sexual orientation, race and gender are in fact constructed as negative. As a result, the proposal to ground Latina/o liberation on the self-valorization of one's difference rings a little hollow precisely because the project of self-valorization smacks of other-world psycho-spiritual realization, rather than the material and institutional transformation of the real-world configurations of power and privilege that are currently invested in maintaining these negative constructions of difference-- precisely because these constructions help reproduce and legitimate hierarchical relations, both within and against Latina/o communities, in profound and material terms.

Professor Padilla's discussion of internalized oppression skirts the same problem in a different way. This is because the deconstruction of internalized oppression addresses a psycho-cultural dynamic in which the self is pitted against itself. In the case of Latina lesbians, overcoming internalized oppression may help the Latina lesbian, like other victims of relentless oppression, to resist the practices and discourses of subordination and exclusion and may thus enable her to revalue and respect both herself and other lesbians, but it does not eliminate the reality of homophobic oppression in la cultura Latina precisely because, and to the extent, this oppression is embedded in the very different dynamic of the self against its "other."

In this context, what Professor Hernandez-Truyol's intervention suggests is that anti-subordination theory and praxis must make a clear distinction between internalized and internal oppression within Latina/o communities: the first dynamic targets sameness; the second targets difference. The first is activated by self-hatred and self-doubt, the second by hatred or fear of the Other. Overcoming the first, requires that we learn to value ourselves. Overcoming the second requires that we learn to value others. Learning to value ourselves does not automatically translate into the valuing of others, particularly "Others," in whose difference Latina/o culture has inscribed its most virulent prejudices and whose acceptance and full inclusion within the Latina/o community would threaten and profoundly destabilize the routine practices and ingrained ideologies through which traditional relations of power and dominance are culturally performed and legitimated. It therefore follows that self-valorization can be only part, though--as Professors Abreu and Padilla powerfully demonstrate--an important part, of the anti- subordination agenda that drives LatCrit theory and practice. The other part requires that, in learning to value Others, who are at the bottom or on the outside of their particular contexts, we learn to value ourselves in a different way--in a way that does not reproduce the *617 prejudices and hierarchies of the various supremacies we seek to transform.

Deconstructing Racial Hierarchies and De-Centering Hispanic Identities in LatCrit Theory

Like Professor Hernandez-Truyol, Professor Wiessner calls on Latina/o communities to practice anti-subordination principles internally. [n.93](#) His essay opens by recounting a vision of a world order based on human dignity, inclusion and respect for diversity. In this imagined order, the anti- subordination agenda articulated by Latina/o communities raises compelling claims of justice. Nevertheless, he finds fault in the fact that LatCrit scholarship has seemingly turned a blind eye to the plight of indigenous peoples. [n.94](#) This asserted failure to engage the struggles of indigenous peoples jeopardizes the legitimacy of Latina/o demands for equal treatment and respect. In Professor Wiessner's words, "If we do not respect the legitimate claims of others, we forfeit our own." [n.95](#) Indeed, the struggles of indigenous peoples are particularly appropriate matters for LatCrit attention precisely because they implicate a whole array of current and historical discrimination and exploitation by Hispanic Latinas/os, both in Latin American countries, where Hispanic Latinas/os constitute a dominant class, and elsewhere and everywhere Latinas/os display the conscious and unconscious racism that is endemic in Latina/o cultural sayings and practices toward indigenous peoples. [n.96](#) Just as Latinas/os resist our subordination within Anglo society, Professor Wiessner's objective is to challenge the subordination of indigenous peoples within Latina/o society.

Professor Wiessner makes his case by examining the legacy of Hispanic conquest in Latin America. This legacy is a history of physical and cultural genocide. From the initial encounter with the Spanish Conquistadors through the more recent history of military dictatorships, ***618** indigenous peoples in Latin America have been tortured, massacred, robbed, enslaved and displaced from their communal lands by the brutality of scorched earth military campaigns, international development projects, U.S. sponsored drug enforcement search and destroy missions, and multinational companies seeking free access to their natural resources. Theirs is a struggle for physical and cultural survival, for self-determination and for land. Their current legal status in countries like Brazil, Venezuela, Nicaragua and Mexico reveals the legal legacy of the Hispanic conquest as well as the increasing influence and impact of neo- liberal hegemony in Latin America. In Brazil, for example, Professor Wiessner notes that indigenous peoples are still subject to a special regime of tutelage, which casts them as "relatively incapacitated" and places them under the guardianship of the Brazilian state. Government decrees initially promulgated to protect indigenous rights to their ancestral lands have been rolled back by more recent decrees designed to afford private commercial interests the right to contest Indian land demarcations in an adversarial process. By outlining the present day legal struggles of indigenous peoples in the various countries of Latin America, Professor Wiessner reveals the continued complicity of Latin American elites in the expropriation of these subjugated, but resurgent Indian nations, even as he notes with approval the legal advances being made in some countries like Colombia and Chile.

This is not to say that Professor Wiessner's analysis is beyond criticism. Perhaps to underscore the compelling need for Hispanic Latinas/os to recognize their own complicity in the subordination of indigenous peoples, Professor Wiessner structures his

argument around a comparison of the treatment indigenous peoples have received from Anglo and Hispanic conquerors. In this comparison, Hispanics fair poorly. According to Professor Wiessner, Anglo conquerors were more civilized and less brutal than Hispanic conquerors. [n.97](#) To support this brash generalization, Professor Wiessner quotes the work of Professor Steven McSloy. [n.98](#) The problem is that nothing in Professor McSloy's text supports *619 Professor Wiessner's comparative assessment. The fact that the "the wars, massacres, Geronimo and Sitting Bull . . . [were really just clean up," hardly suggests that the colonization of the Northern parts of the American continent was any more humane than the conquest of the South. If anything, the comparison Professor Wiessner activates suggests instead that the "British colonizers" were more unitary and less internally conflicted about their colonizer status. While Spanish colonizers struggled against internal opposition by Spanish religious elites, who deployed "the natural law theories of St. Thomas Aquinas" to compel recognition of indigenous peoples as subjects with inalienable rights under the law of nations, the "British" colonization was total--in the law, as much as in the flesh. [n.99](#)

My point is not to defend the Spanish conquest of Latin America, or to suggest that the treatment of indigenous peoples was, or continues to be, anything but brutal. My point is rather to use Professor Wiessner's analysis as a reference point for further reflection on the commitments implicit in the LatCrit aspiration to promote an anti-subordination politics that is broadly inclusive and relentlessly anti-essentialist, as well as to reflect further on the politics and practice of intergroup comparisons. From this perspective, there is no question that Professor Wiessner's essay activates a problematic that often is organized around an inside/outside dichotomy and is most immediately apparent in debates over who has standing to criticize the practices of oppression and internal hierarchies within a subordinated community. This is because Professor Wiessner's pointed and comprehensive account of the way indigenous peoples have been exploited, marginalized and oppressed "within the Latino-Latina midst" is in no sense a self-critical intervention, as Professor Wiessner at no point claims a Latina/o identity. Thus, his contribution provides a valued opportunity to reflect not only on the substance of his criticisms, but also on the way LatCrit theory should position itself in debates over standing to criticize the reproduction of hierarchies within Latina/o communities. To this end, a LatCrit response to these sorts of criticisms needs to take note that the practice of coding criticism as external interventionism, like the discourses of cultural relativism, privacy, sovereignty and the individualization of guilt and innocence, are standard tropes, routinely invoked by elites the world-over to deflect criticism from their abusive and exploitative practices, *620 as well as from their unearned privileges. [n.100](#) Thus, it is imperative that LatCrit scholars resist the tendency to dismiss external criticisms automatically, even as we reflect critically both on the difference between internal and external criticism and on the way we draw the internal/external line in responding to those particular criticisms we might want most to suppress.

At the same time, the analytical and empirical imprecision with which Professor Wiessner juxtaposes the colonization of North and South America, as well as his mere passing reference to the substantial efforts currently underway to incorporate indigenous peoples into LatCrit discourse should give self-constituted "outsiders" reason to pause

before launching their well- intentioned criticisms. At a minimum, such criticisms need to avoid inflammatory over-generalizations that cast their comparisons in broad, ambiguous and unsubstantiated terms. Such comparisons do little to enlighten, though much to confuse the issues and inflame the politics of reaction and division. Nevertheless, the underlying truth of Professor Wiessner's broader argument warrants serious LatCrit attention. Indeed, read through the heuristic of the insider/outsider dichotomy already thematized in the preceding essays by Professors Padilla, Abreu and Hernandez-Truyol, his essay calls attention to, and prompts reflection on, the fact that none of these essays address the way their analysis might be relevant to the particular experiences of indigenous peoples, nor for that matter of Black Latinas/os and Asian Latinas/os--though these group experiences would certainly enrich our understandings of the social-psychological processes of internalized oppression as well as expanding our analysis of the way "difference" is used to configure insider/outsider positions within and between Latina/o communities.

To give just one brief example of the way attention to the particular realities of indigenous peoples might substantially enrich the analysis, even as it helps clarify the scope and meaning of LatCrit commitment to anti- essentialist anti-subordination theory consider the following: When Professor Padilla writes of internalized racism, she speaks specifically of the practices through which Chicanas/os undermine themselves and each other. The very concept of internalized oppression is activated around an imagined inside/outside. Internalized racism is not external oppression because it occurs within a delimited community, amongst its members, pitting insider against insider. Asking how this analysis might be relevant ⁶²¹ to articulating a LatCrit perspective on the anti-subordination struggles of indigenous peoples means asking how the histories of enslavement, exclusion and extermination, as well as the current marginalization of indigenous peoples, both beyond and within the United States, would figure in a theory of Chicana/o internalized oppression? The discourse of Latina/o hybridity and mestizaje offers one ready response. ^{n.101} In this response, the subordination of indigenous peoples figures centrally in the dynamics of internalized oppression because it is the indigenous aspect that makes Chicana/o identity a source of self-hatred and self-doubt.

The important point, however, is to see how this response falls short of the anti-essentialist commitments that ground the LatCrit project, even as it perhaps misses the mark of Professor Wiessner's criticism, for Professor Wiessner is not talking about the subordination of indigenous identities, but of peoples. Grounding LatCrit concern for their struggles in the discourse of Latina/o hybridity suggests that indigenous peoples are inside the Latina/o construct, and important to the LatCrit project, not in and for themselves, but rather because their experiences and realities have been important to the construction of Latina/o identities. To be sure, recognizing the indigenous and other racial mixtures that oftentimes are repressed in the constitution of Latina/o self-identifications has been one of the important advances achieved through the discourse of mestizaje; nevertheless, the anti-essentialist commitments underlying the LatCrit movement's aspiration to articulate a politics of intergroup justice will eventually require even further progress.

Indeed, fully recognizing and embracing the struggles for justice of indigenous

peoples challenges the LatCrit movement to develop the critical discourses and implement the intergroup practices that will enable the LatCrit community to pursue three important objectives, simultaneously and in tandem: to continue articulating an anti-essentialist critique of the way the institutionalization and cultural performances of white supremacy marginalize different Latina/o communities in different ways, to de-center Hispanic identity in our conceptualization of Latina/o communities so that we can better understand the particular experiences and perspectives of minority groups within our communities, and ultimately to recognize and embrace the universal claims of right--to equality and dignity--that are everywhere constituted in the demand for justice and desire for inclusion expressed by every group oppressed by the articulation of white supremacy, both within and beyond the United States. Ultimately, the struggles of indigenous peoples, *622 like the struggles of Black and Asian peoples, are matters of LatCrit concern, not so much because Latinas/os are a hybrid people composed of all these elements, but because recognizing and transforming the particularities of injustice is the only viable strategy for achieving substantive justice. [n.102](#)

Read through the prism of these three objectives, the essays by Professors Padilla and Abreu make significant contributions to the LatCrit project, understood initially as a movement to articulate the particularities of Latina/o perspectives and experiences within the regime of white supremacy and to promote a pan-ethnic Latina/o political identity that can mediate and transcend the politics of division that is too often activated around the differences between Cuban-Americans, Puerto Ricans and Mexican-Americans. [n.103](#) They want to make Latinas/os "insiders" even as they make "the inside" a place worth inhabiting. But, as Professors Hernandez-Truyol and Wiessner remind us, "the inside" we create must aspire always and everywhere to provide a home for those at the bottom of their particular contexts because the logical and political implications of the LatCrit commitment to anti-essentialist intergroup justice, both encompass and transcend the politics of Latina/o pan-ethnicity and hybridity.

In this vein, Professor Roberts' contribution appropriately closes this cluster of essays. [n.104](#) Her essay is based on remarks she delivered at LatCrit III in a colloquy programmed to open the focus group discussion entitled From Critical Race Theory to LatCrit to BlackCrit? Exploring Critical Race Theory Beyond and Within the Black/White Paradigm. [n.105](#) The purpose of this focus group was to expand the parameters of LatCrit discourse by triggering a critical analysis of the different ways in which the Black/White paradigm of race truncates and essentializes the liberation struggles of Black peoples, for example, by deflecting attention from the intra-group hierarchies and diversity that divide "the Black community," as well as by obstructing the cross-racial and multiracial solidarities that might otherwise coalesce around issues of imperialism, colonialism, national origin discrimination, language rights, immigration policy, gender and sexual orientation. The hope was that *623 by creating a space and intentionally focusing attention on the sorts of intra-Black particularities constituted in and through the different histories, perspectives, political ideologies and transnational identities of Black Latinas/os and Caribbeans, we might begin the process of conceptualizing the critical methodologies, thematic priorities and substantive areas of law and policy that might form the center of a post-essentialist 'BlackCrit' discourse,

which is just to say, a critical discourse that engages the particularities of Black subordination from an anti-essentialist perspective.

LatCrit stakes in such a project are high, for while LatCrit theory was itself born of the critical need to move beyond the essentialism of the Black/white paradigm toward a more inclusive theoretical framework that focuses, broadly and comprehensively, on the way the institutionalization and cultural performance of white supremacy affect all peoples of color, though in different ways, still the political impact of uncritically abandoning the Black/white paradigm would be indefensibly regressive. [n.106](#) To be sure, Asian and Latina/o communities have been marginalized by the Black/White paradigm and our increasing and mutual recognition of the commonalities that construct Asian and Latina/o subordination are among the most powerful new insights enabled by the anti-essentialist movement in Critical Race Theory. [n.107](#) Nevertheless, the intergroup solidarities this knowledge enables us to imagine and pursue cannot be promoted at the expense of our theoretical and political commitments to combating the particular forms of racism experienced by Black people, both in this country and abroad. If LatCrit theory were to abandon uncritically the Black/White paradigm, it would marginalize a substantial portion of the Latina/o community and betray our aspirations to substantive intergroup justice. Thus, the objective must be to move our understanding of white supremacy progressively beyond the Black/White binary of race, even as we acknowledge the ***624** particular and virulent forms of anti-Black racism that are institutionalized and expressed in virtually every society across the globe, including Latina/o communities. Doing so requires that we center the particularities of Black subordination long enough to recognize the way anti-Black racism operates in Latina/o communities and the way the struggles of Black peoples, who are not Latina/o, are also implicated in the LatCrit project.

From this perspective, Professor Roberts essay makes two points worth further reflection. Her first point is to challenge a common misunderstanding of the meaning of "essentialism" in the anti-essentialist critique. White feminist legal discourse, for example, has construed this critique as an attack on any analysis that focuses exclusively on the experiences of one group of women without also addressing the experiences of other groups of women or, indeed, of all women in general. This misunderstanding may be genuine or opportunistic, but in either case, it makes it easier to deflect the impact of any analysis that focuses on the particular forms of oppression experienced by any particular group of women of color. Thus, when Professor Roberts writes or talks about the particular experiences of pregnant Black women in a racist criminal justice system, her analysis is at times discounted on the grounds that it does not discuss the experiences of other pregnant women in analogous situations. But, as Professor Roberts argues, the anti-essentialist critique, which launched Critical Race Feminism as a reaction against the exclusive attention feminist legal discourse was then giving the problems of white women, did not attack the practice of studying the problems of a particular group of (white) women, but rather the practice of assuming that this particular group represented all women. [n.108](#) As Professor Roberts puts it, "[writing about Black people is not essentialist in and of itself. It only becomes essentialist when the experiences discussed are taken to portray a uniform Black experience or a universal experience that applies to

every other group." [n.109](#)

This important insight has profound implications for the way the LatCrit movement should understand and pursue the practice of producing anti-essentialist, anti-subordination critical legal scholarship and was, in fact, a driving force behind the initial decision to organize the "BlackCrit" focus group discussion at LatCrit III. The purpose of this focus group was to operationalize, within the LatCrit community and conference setting, a vision of intergroup solidarity and substantive justice that is categorically different from the vision that currently links the anti-essentialist critique to a particular, and ultimately unsatisfactory, *625 representation of both the meaning and the practical and political implications of a commitment to "multiculturalism." This alternative vision is referenced in, but not fully explained by, the call for "rotating centers" because the aspirations embedded in the practice of rotating centers are too easily confused with and overshadowed by an ingrained tendency to hear the call for critical attention to the particularities of subordination experienced by different groups as a call that can only be answered through the Balkanization of the universals that might otherwise bind us in solidarity. [n.110](#)

Against this backdrop, the decision to feature a focus group discussion exploring the necessity and possibilities of launching a new intervention in outsider scholarship provisionally styled "BlackCrit Theory," was to perform a public event that, thereafter, would provide a meaningful point of reference for articulating a different vision of the way the anti-essentialist critique can (and should) mediate the relationship between universal and particular. The easiest way to explain this is to contrast the structure of the BlackCrit focus group at LatCrit III with the paradigm model through which the commitment to multiculturalism has been performed in other contexts. [n.111](#) Rather than organizing LatCrit III as a conference dedicated to Hispanic Latina/o issues and relegating discussion of the particularities of Black subordination to one of a number of concurrent sessions, in which different subgroups separate to discuss "their own" particular issues, the BlackCrit focus group was designed to center the problem of Black subordination in LatCrit theory and to invite all participants to focus on these particular problems, with the implicit understanding that these particular problems are of universal concern for all LatCrit scholars committed to an anti-subordination agenda based on substantive intergroup justice, and with the further understanding that future LatCrit conferences would, in similar fashion, seek to center the *626 particularities of subordination confronting other marginalized and intersectional minority identities.

This latter point is crucial. By linking critical analysis of the particularities of subordination experienced by different groups to the practice of "rotating centers," the BlackCrit focus group at LatCrit III clearly illustrates why the production of anti-subordination theory and praxis must be conceptualized and performed as a collective project, reflected in and strengthened by our mutual commitment, across our many differences, to remain engaged in each other's issues over time. As Professor Roberts rightly notes, no one need, nor ever can, focus on everything at once, but the struggle against white supremacy requires that we--each individually and all collectively--increasingly learn to see and combat the multiple structures and relations through which the practices and ideologies of white supremacy have constructed the particular forms of

subordination confronted, in different ways, by all peoples of color, both within and beyond the United States. Thus, the common project to transform the realities of white supremacy can only be realized through a collective and collaborative effort, in which we teach each other about the similarities and differences in the way white supremacy operates in our various communities. This by necessity requires a practice of "rotating centers," even as this practice, in turn, requires a mutual commitment to remain engaged over time. Only members of a community committed to fostering an inclusive and collaborative anti-subordination project for the long haul can afford to decenter their own compelling problems to focus, instead, on the problems confronting people other than themselves.

It follows, therefore, that the practice of rotating centers can operate effectively only in the context of a genuine community, whose members' commitment to remain engaged for the long haul can foster the kind of continuity needed to ensure that "the center" does, in fact, rotate from year to year and from venue to venue. It is this kind of community that the decision to feature a BlackCrit focus group at LatCrit III was designed to perform and promote. However, despite these seemingly unobjectionable intentions, the BlackCrit conference event generated significant controversy from two distinct perspectives, each of which sheds substantial light on the many challenges awaiting our collective attention. From one end, the critique was that, in centering Black subordination, LatCrit III was on the verge of taking "the Lat" out of LatCrit Theory. [n.112](#) From the other end, the critique was that, by centering Black subordination, LatCrit III was on the verge of assuming an umbrella position that was more appropriately left to the more universal and ***627** inclusive venue of Critical Race Theory. [n.113](#) Both of these critiques, however, miss the point of featuring the BlackCrit focus group at LatCrit III--though they do so in different ways.

The first critique misses the point because it essentializes Latina/o identity in a way that threatens to reproduce, within LatCrit theory, the racial and ethnic hierarchies that pervade Latina/o communities and culture and that are fundamentally at odds with any anti-essentialist commitment to anti-subordination politics. Latinas/os, to repeat yet again, come in every variety of race and ethnicity. LatCrit theory cannot marginalize the particular experiences of Black subordination, without presupposing, among other things, that Black Latinas/os are somehow less fully Latina/o, than Hispanic Latinas/os, and that therefore their problems are somehow less central to the LatCrit project.

The second critique misses the point because it tends to reinscribe the project of generating anti-subordination theory and praxis within a model of multiculturalism that continues to cast Black subordination as primarily "a Black thing," Hispanic subordination as "a Hispanic thing," Asian subordination as "an Asian thing," and so on and so forth. This structure has been tried, and the consciousness it simultaneously reflects and constructs has failed to enable the kinds of intergroup engagement and solidarity necessary for the task at hand: the deconstruction of white supremacy and reconstruction of a sociolegal reality grounded on a commitment to substantive intergroup justice. Indeed, it is all but obvious that this kind of structure and consciousness can promote little intergroup understanding and collaborative progress precisely because the "discussions" it generates are hardwired to flounder in arguments

about whose particular subordination ought to be addressed first: in the initial instance, when the particularities separate into groups that inevitably will include multiple and intersectional identities, like the Black Latina/o or the Japanese Peruvian; and in the second instance, when these separate particularities regroup to articulate a universal agenda in a common setting.

This is where Professor Robert's second major point makes her essay a welcomed and timely intervention. Professor Robert's second point illustrates the otherwise suppressed realities that make Black identity an intersectional space, where group affiliation can be seen as a matter of political choice. She describes three different contexts in which her self-identification was fluid and in flux: in choosing to identify as African American, rather than as West-Indian; in choosing to identify as *628 Black, rather than as bi-racial or multi-racial; and in choosing to identify as the daughter of a Jamaican immigrant during a debate with Peter Brimelow. [n.114](#) To Professor Robert's credit, each of these acts of self-identification reflects and performs, in different ways and from different perspectives, a commitment to anti-subordination solidarity. This is because the West-Indian identity has often been embraced by Caribbean Blacks as a mark of distinction that separates them from and seeks to raise them above the subordinated status of Black Americans in the United States; [n.115](#) the bi-racial or multi-racial identity category has sometimes operated to privilege whiteness and other non- Black identities in the configuration of Black identity among people marked by non-Black racial mixtures; and finally, because claiming an immigrant identity can, in some contexts, position Black Americans in solidarity with the victims of the virulent nativism that seeks to consolidate a supposedly "multicultural" American identity by purchasing inclusion for Black Americans at the expense of precisely those immigrants most vulnerable to exclusion: the racialized and impoverished peoples of the Third World.

Professor Robert's discussion of the different political identity choices she has made in different contexts challenges the notion of a unitary Black identity and thereby strengthens the case for the practice of "rotating centers," not only at LatCrit conferences, but at every gathering committed to the production of anti-subordination theory and practice through identity-based critique--whether those gatherings are organized under the auspices of the Critical Race Theory workshop or in other venues such as those emerging from the recent development of Asian Pacific American Critical Legal Scholarship. [n.116](#) Viewed from this perspective, the practice of rotating centers is, indeed, a move to claim a universal perspective for LatCrit theory, but only as an expression of the profoundly revolutionary possibilities embedded in the anti-essentialist critique. These new possibilities of thought and action will fully emerge only when enough us learn to see that every particular identity group constitutes a universal because every particular group includes members whose multiple and intersectional identities link each group to every other group. Just as Latina/o identity includes Blackness, certainly the converse is equally true that Black identity includes Latinidad; just as *629 Latina/o identity includes Asian, Indigenous and European identities, so too it is true that each of these identities include all the others.

This realization has profound implications for the future development of identity politics and positions the anti-essentialist critique beyond rather than, as often is charged,

at the center of the political fragmentation and Balkanization that threatens to sunder every universal into a proliferation of increasingly atomized and ineffectual particularities. This is because the anti-essentialist critique makes it possible to see that all the particular groups into which we might possibly separate are inhabited by multiple and intersectional identities. Any particular group that purports to practice anti-essentialist politics internally will, by necessity, have to treat the distinct problems of group members marked by intersectional identities as equally valid and central to the anti-subordination agenda defined by the group. This is simply to say, for example, that just as LatCrit theory must engage the problems of Black subordination because Latina/o identity includes Blackness, so too an anti-essentialist BlackCrit theory would have to confront the problems of Latina/o subordination because Black identity includes Latinidad. And yet, by doing so, each group would find that its pursuit of a genuinely anti-essentialist politics promises, always and everywhere, to reconstitute the group as a universal that contains all particulars. This would, however, be a very good thing. Indeed, the "only" thing still blinding us to the reality that every particularity constitutes the universal, albeit from a different perspective and in a different configuration, is the essentialist assumptions embedded in the imperatives of organizing hierarchical power relations through practices of inclusion and exclusion and the ingrained tendency, both within and between our various communities, to construct our collective identities and solidarities around an inside/outside dichotomy. [n.117](#)

***630 II. Substantive Self-Determination: Democracy, Communicative Power and Inter/national Labor Rights**

Part II takes up three clusters of essays that appear at first glance to have little in common: the first cluster focuses on the transition to and consolidation of democracy in regions as diverse as the Caribbean and Eastern Europe; the second cluster centers the struggle over language rights and communicative power, while the third cluster takes up a broad range of issues exploring the way Latina/o identities and lived realities should figure in the transformation of domestic and international labor rights regimes. Despite their differences, these essays reveal a common tension. In each instance, the struggle for self-determination confronts a seemingly irreconcilable and pervasively articulated antagonism between freedom and order, stability and plurality, uniformity and chaos. This antagonism has been most clearly articulated in democratic theory as the so-called "crisis of governability." [n.118](#) But this underlying antagonism is revealed everywhere the claim to individual or group self-determination threatens inherited patterns and identities. It is evident, for example, in the political struggle over language rights and the paranoid nativism of the English-Only movement, in which the domestic proliferation of languages and cultures is cast as threat to the unity and integrity of the American national identity. [n.119](#) It is evident also in the anti-political structure of the labor rights regime established in this country. [n.120](#) By taking up these various issues, the essays in these three clusters illustrate how the universal struggle for self-determination is reflected in and ***631** advanced by the anti-essentialist commitment to anti- subordination politics at the heart of the LatCrit movement.

A. Democracy in Anti-Subordination Perspective: Global Intersections

The meaning of democracy and its role in the struggle for liberation present formidable conceptual and political challenges for LatCrit legal scholars and activists. As sociologist Max Castro aptly suggests, these challenges are born of the many profound and apparent disjunctures between democratic theory, or rather, the strategic manipulations of democratic rhetoric, on the one hand, and the reality of "democracy" as we live it, on the other. It is this disjuncture between rhetoric and reality that makes the struggle over the meaning of democracy a crucial political space for LatCrit theory to occupy, even as it makes the actualization of democracy, an aspiration and objective that, approached from an anti-subordination perspective, positions us against the injustices and beyond the hypocrisies of the "really existing democracies" we currently inhabit. [n.121](#) By critically examining the disjuncture between democratic rhetoric and the trans/national power structures that coopt and subvert the self-determination struggles of so many peoples in so many different contexts, all five essays in this cluster make significant contributions to articulating an anti-essentialist perspective on the meaning and practice of a real and substantive democracy both within and beyond the United States. [n.122](#)

Three Stories of "the Caribbean"

The opening essay by Professor Griffith provides an excellent point of departure for a LatCrit analysis of democracy. His objective is to show how "the drug problem" impacts the democratic project in small countries throughout the Caribbean. By locating his intervention in "the Caribbean," Professor Griffith situates our analysis of democracy in an imaginary region whose multiple dimensions exceed the boundaries of ***632** any particular term. [n.123](#) Like "the drug problem" or "democracy," "the Caribbean" is a signifier with no stable, uncontested referent. It is, at first glance, a sea, not a territory--its boundaries marked by water, not by land. It is at second glance a clustered string of geographically isolated islands governed by weak and often corrupt little states, politically fragmented, but strikingly similar in their economic vulnerability to and dependence on the foreign aid and so-called preferential trade arrangements of their former colonizers and current day masters. [n.124](#) On a triple take, the Caribbean might be found beating to the rhythms of mambo, reggae, salsa, merengue and the cha-cha-cha--somewhere in, and yet beyond, a complicated overlay of transplanted cultures that emerge from, and have flourished despite, the last 500 years of colonial penetration, intervention and relentless expropriation--a history we would have to tell in Spanish, English, French, Dutch and Portuguese. [n.125](#) Pull back a bit, redraw the map a moment, and the Caribbean rises yet again--this time from a sea of blood, a theater of war zoned for the low-intensity conflicts that submerged it in waves of broken, burnt and butchered bodies, bleeding to the pulse of state sponsored terror and super-power contestations.

Embedded in this controversy over where "the Caribbean" begins and ends is the dialectic of universal and particular--as well as of the many diverse and conflicting political projects emerging from and targeted at this region. [n.126](#) Whether any universal

term can unify these *633 politically fragmented, culturally distinct, and multi-lingual particularities is an open question, but whether we seek "the Caribbean" in the regional similarities that transcend the diversities of language and history or, alternatively, in the struggle to imagine a future beyond the political fragmentation and economic uniformity that keeps these small countries dependent and weak, we will certainly not find it in any substantive meaning of the term democracy. On the contrary, as the first three essays in this cluster demonstrate, the Caribbean offers a particularly compelling starting point for an anti-subordination analysis of "democracy," precisely because democracy has been, for so long and for so many different reasons, as elusive in this region, as the dream of self-determination and the hope of peace. By focusing LatCrit attention on "the Caribbean," Professor Griffith challenges us to configure a broad and multidimensional vision of the democratic project--one that genuinely engages the anti-subordination struggles of peoples beyond the United States, even as it requires LatCrit scholars to think more critically about the U.S. role, both in promoting and obstructing the democratic project in this hemisphere.

Professor Griffith's story of the Caribbean is of democratic possibilities held hostage to an international drug war. Though U.S. popular rhetoric casts the problem primarily in terms of drug traffickers and pushers, "the drug problem," as Professor Griffith argues, is a fully integrated multi-billion dollar transnational industry that--from production to consumption to the recycling of drug profits--cuts across all regions of the hemisphere, penetrates all sectors of society and implicates all levels of government. [n.127](#) Assessing the impact of "the drug problem" on democracy requires a clear understanding of the divergent problems triggered by the different stages of this industry. It also presupposes some working definition of what democracy is. Drawing on the classic work of Joseph Schumpeter, Professor Griffiths defines democracy as a political form in which the contestation over state power operates through free and regular elections, where a high degree of participation is admitted and where there exist effective institutions to guarantee respect for civil and political rights and enhance social justice. Thus, when we speak of democracy "we are talking about contestation for *634 power, participation, and institutions." [n.128](#)

Given this definition of democracy, Professor Griffith develops a multidimensional analysis of the way the international drug industry and the war it has spawned operate in different ways to undermine the democratic project in the Caribbean. It is a story of corruption engendered by the circulation of billions in illegal profits that skews the logic of political contestation and makes state power unaccountable to the democratic electoral process, as well as a story of private business and financial elites, seduced into money laundering schemes that disrupt ordinary market forces, undermine the viability of legitimate economic activities and facilitate the consolidation of power and wealth in the hands of drug lords and their cronies. It is also a story of law enforcement run amok in its increasingly futile efforts to stamp out the drug trade through repressive and anti-democratic assaults on precisely those fundamental civil and political rights without which no democracy can flourish.

Professor Stotzky's essay tells a second story of the Caribbean. Measured against the aspirational imperatives of what he calls "deliberative democracy," [n.129](#) the

transition to democracy in Haiti is a story of the democratic project held hostage to internal corporative political structures and external financial elites. These internal corporative structures suppress the emergence of a genuinely deliberative democracy by excluding "the people" from effective participation in the political process--in different ways, depending on whether the corporative structures are organized from the top down or the bottom up. When imposed from the top down, the state controls, coopts and to a large degree incorporates the organization of interest groups into state sanctioned monopolies, whose agendas are then confined to the politics of the possible as determined by the state; when organized from the bottom up, private power blocks so dominate the political process that the state is captured and subordinated to the articulation of their special interests. In either case, these corporatist variations leave little room for the expression of the popular will of the people.

In Haiti, as elsewhere throughout Latin America and the Caribbean, factions of the military, the Catholic Church, the business class, trade unions and even the press have all, at different times, cooperated in the institutionalization of corporatism by trading support for authoritarian regimes in exchange for special privileges. Because these privileges are threatened, as much by the rise of a genuine and popular sovereignty as by the extremism of a military dictatorship run amok, the legacy of corporatism ***635** is a network of organized power blocks hostile to any project of social, political or economic change that might force them to relinquish their special privileges or hold them accountable to the people whose families they have murdered or whose patrimony they have expropriated and squandered. In such a context, the consolidation of a democracy requires dismantling these corporative power blocks precisely because a genuinely participatory democracy presupposes and would undoubtedly trigger vast changes in the socio-economic and political structures these corporatist groups are most invested in maintaining.

Indeed, one need only consider Professor Stotzky's description of the objectives of "the Aristide Plan" to see how constructing the conditions for participatory democracy might threaten vested interests. [n.130](#) Demilitarization, an independent judiciary, empowered labor unions, grass roots organizations, cooperatives and community groups, progressive taxation and human rights prosecutions are all political objectives certain to put any democratic project on a collision course with precisely those sectors that have most benefitted from the repression and demobilization of the impoverished majority. Add to these internal obstacles, the externally imposed austerity measures dictated by the structural adjustment policies through which international financial organizations like the World Bank and the IMF have projected their neo-liberal agenda onto the international political economy, [n.131](#) and the obstacles confronting the democratic project in Haiti are nothing less than daunting. [n.132](#)

***636** However, the Haitian story only brings into starker relief the extent to which the democratic project in poor countries throughout Latin America and the Caribbean is caught between the internal rock of corporative political monopolies and the external hard place constituted by international financial organizations. Based on past history and the short-term interest analysis these two sectors tend routinely to exhibit, it is reasonable to predict that the former will continue opposing the progressive tax policies,

antitrust regimes and educational programs through which Professor Stotzky would reform the neoliberal agenda to help the poor majority live a dignified life, the latter will continue to oppose any state intervention in the economy that impinges on foreign exports and direct investments or restricts the expatriation of profits, and neither will be much interested in actually implementing Professor Stotzky's vision of deliberative democracy. Thus, this second story of the Caribbean is not heartening. [n.133](#)

Mr. Martinez's essay on the rise and fall of the socialist project in Nicaragua provides yet a third perspective on the problem of democracy in the Caribbean. Though Nicaragua is geographically located in Central America, its position in "the Caribbean" is a function of the geopolitical rhetoric through which the Reagan Administration chose to respond to the "communist-in-our-own- backyard" problem. [n.134](#) The will to view the Nicaraguan revolution in terms of Cold War politics, rather than as a response to the legacy of terror and expropriation imposed on this small country by a U.S. sponsored dictatorship, is testament to the self-serving myopia that enabled former President Reagan to tell the Wall Street Journal in 1980 that '[the Soviet Union underlies all the unrest that is going on. If they weren't engaged in this game of dominos, there wouldn't be any hot spots in the world.' [n.135](#)

Contrary to Reagan's suggestion, the Nicaraguan revolution ousted the Somoza dictatorship in 1979 through "the organized, militant participation *637 of Nicaraguan citizens in a 'people's war' against a brutal and ruthless tyranny." [n.136](#) Mr. Martinez's objective is to explain why the Nicaraguan people initially supported this revolution and how the Sandinistas ultimately lost the people's support. [n.137](#) He tells this story through a critical analysis of the Somocista property regime that preceded the revolution, as well as the promises made and later betrayed by the Sandinista government's failure to legally institutionalize its agrarian reforms in a viable property rights regime. [n.138](#) This failure to establish a new legal order facilitated the rapid re-concentration of land ownership, through privatization, Sandinista self-dealing, and the rush of former landowners to reclaim their expropriated properties after the Sandinistas lost the 1990 election to Violeta Chamorro.

These three stories of "the Caribbean" provide different perspectives on the profound challenges confronting the articulation of democratic theory in LatCrit scholarship. They tell of the democratic project held hostage to drug traffickers, domestic corporative elites, international financial organizations and the self-interests of defeated revolutionaries. What they do not mention is the role played by U.S. government agents in facilitating the growth of international drug trafficking through their collaborations with, protection of and assistance to, known drug traffickers involved in this government's "anti- communist" crusades; [n.139](#) they do not tell of the millions of U.S. tax payer dollars spent supporting the Duvalier and Somoza dictatorships, as much as the corporatist elites in post-dictatorship Haiti and Nicaragua; [n.140](#) they do *638 not tell of the CIA complicity in, and financial support for, the terror unleashed by the Haitian military and the Nicaraguan contras in their efforts to "restore order" and demobilize the masses for a more "governable democracy." And yet, these missing elements are crucial to any anti-essentialist, anti-subordination analysis of the challenges facing the democratic project in the Caribbean precisely because, and to the increasing

extent that, the democratic project everywhere is ultimately hostage to the policies of the only remaining superpower. The United States cannot continue "to promote democracy" with one hand, even as it undermines it with the other.

Thus, from an anti-subordination perspective, it makes sense for LatCrit scholars to begin our foray into democratic theory by focusing on the nature and impact of U.S. policies and politics. Beginning this way locates the problems of democracy at the center, rather than the peripheries, where LatCrit sensibilities should counsel us to tread rather carefully, lest we are too quickly seduced or reduced to thinking in terms of the readily available blame- the-victim discourses of Third World corruption, authoritarian traditions, and bureaucratic impotence. [n.141](#) These factors are certainly obstacles to the consolidation of democracy in the Caribbean and elsewhere, but they are embedded in an ongoing, centuries-long process of interventions, transactions and exchanges between Third World states and peoples and a multitude of "foreign intervenors," whose resources, objectives and ideologies are profoundly implicated in the scourge of corruption, dictatorship and underdevelopment that has visited these regions. Thus the problems of democracy in the Caribbean or elsewhere cannot be fairly assessed, nor effectively resolved without detailed and particularized attention to the anti- democratic impact of U.S. foreign and domestic policies. Indeed, revealing and combating these policies may be the best way for LatCrit scholars to get to "the bottom" of the problems of democracy, both beyond and within the United States. [n.142](#)

Recontextualizing the Democratic Project: Beyond NeoLiberal Assumptions and Imperialist Legal Structures

The last two essays in this cluster by Professors Mertus and Roman *639 shift our focus and expand our analysis of the problem democracy. [n.143](#) Professor Mertus's essay launches a new trajectory of analysis by offering a preliminary comparison of the transition process in the countries of Eastern Europe and Latin America. In articulating these comparisons, she notes four particularly significant differences worth further reflection: (1) the different attitudes and relationships foreign intervenors have adopted towards the governing elites of the pre-transition regimes in these two regions; (2) the logically incoherent rhetorical structures generated by the biased and uninformed manner in which foreign observers tend to assess the meaning of, and allocate blame for, the internal conflicts and atrocities committed by competing groups in Eastern Europe and Latin America; (3) the different way foreign intervenors in these two regions have prioritized market and electoral reforms in the transition from dictatorship; and (4) the degree of internal conflict over the so-called "stateness problem" within these different regions. By identifying these four points of comparison, Professor Mertus provides a valuable analytical framework for a critical comparative analysis of the substantive content of "the democratic project" now circling the globe, as well as for assessing the degree to which this neoliberal project coheres with the right of self-determination, understood from an anti-essentialist, anti- subordination perspective.

In this vein, Professor Mertus notes that western intervenors have generally been more willing to work with the remnants of pre-transition regimes in Latin America than

those in Central and Eastern Europe. This she finds unsurprising, given that the U.S. government actually established and substantially maintained the military dictatorships in some countries, like Haiti, Guatemala and Nicaragua, and remained a steadfast ally of, and apologist for, the military dictatorships in others, like Argentina and Chile--even as these regimes waged dirty wars of inconceivable brutality against their own people. [n.144](#) These regimes, though homicidal and corrupt, were friends and clients of the U.S. national security state. The need to legitimate U.S. complicity in their criminal practices and repressive policies gave birth to the totalitarian/authoritarian state dichotomy. In Reaganite doublespeak, the kind of human rights violations and political and economic repression perpetrated by the military dictatorships in Latin America were of a lesser evil than the *640 kind committed by Eastern block regimes because the latter were "totalitarian states," while the former were only "authoritarian." Totalitarian states were always, everywhere and in every way, repressive and evil. Authoritarian dictatorships, by contrast, were not nearly so bad, and sometimes even necessary to ensure the governability of impoverished and uneducated masses too readily duped by international communists. [n.145](#) By organizing her comparison of the transition process in Latin America and Eastern Europe around a critical analysis of the relationships and attitudes foreign intervenors adopt toward pre-transition regime elites, Professor Mertus thus reveals how the neoliberal democratic project is still embedded in the doublespeak legacy of cold war politics.

Professor Mertus also contrasts the attitudes reflected in the way western intervenors have treated the process of political reform in Latin America and Eastern Europe. She notes, for example, that the 1988 Chilean plebiscite that ousted the Pinochet dictatorship was observed by thousands of western election observers, while fewer than thirty western observers were sent to oversee the 1992 Presidential elections in which Slobodan Milosevic defeated challenger Milan Panic. [n.146](#) This differential treatment raises profound questions about the "really existing agenda" driving the neoliberal project to promote "democratic" transitions across the globe. Certainly, Professor Mertus is right to suggest that western intervention projects of the 1990s in Eastern Europe have tended to prioritize the institutionalization of transnational capitalist economic relations over the consolidation of democratic accountability and the self-determination of peoples. However, the apparent emphasis on political reform in Latin America may not reflect different priorities, so much as the fact that Latin America has already been dancing to the tune of neoliberal market reform projects since the sovereign debt crisis of the early 1980s and its aftermath shifted the balance of power between Latin American debtor states and international financial organizations. [n.147](#) Indeed, if anything, the ready willingness with which the U.S. government embraced and supported the Pinochet dictatorship, which even today is lauded as a poster-child for the neoliberal model of economic development in the Third World, [n.148](#) suggests the degree to which U.S. foreign policy in the region has subordinated democratic reform to the imperatives of transnational capitalism.

By focusing LatCrit attention on the relative priority accorded democratic political and neo-liberal economic reforms in these different regions, Professor Mertus's comparative analysis maps out a rich field of inquiry for examining and assessing, from

an anti-subordination perspective, the increasing convergence between current projects to promote "democratic transitions" through market reform in Eastern Europe and the structural adjustment policies and agendas that have ravaged much of Latin America. [n.149](#) At the same time, by situating her comparative analysis in the perennial debate over the relationship between capitalism and democracy, Professor Mertus challenges LatCrit scholars to reflect more deeply on the way LatCrit anti-essentialist, anti-subordination objectives are impacted by the economic and political outcomes of this debate.

In the dominant neoliberal narrative, capitalism and democracy are cast as complementary and mutually reinforcing processes: capitalism promotes democracy, and democracy promotes capitalism in a happy embrace of economic abundance and political freedom. In some variations of the narrative, this is because competitive markets prevent the concentration of economic power, thereby preserving the people's freedom by dispersing and decentralizing private power; [n.150](#) in others, ironically, it is because capitalism enables the consolidation of private power blocks large enough to counter-balance the power of the ever-embryonic totalitarian state. [n.151](#) This narrative of the happy relationship between *642 capitalism and democracy exists in direct competition with accounts of their mutual incompatibility. In these alternative accounts, each domain threatens always and everywhere to overrun and subsume the other: Capitalism threatens democratic freedom, and democratic politics threaten capitalist freedom. The threat to democratic freedom arises from the growth of economically powerful private firms, whose significance to the national economy renders the state, and the political possibilities it can pursue, hostage to the policy preferences of these corporate giants. [n.152](#) Conversely, since democracy creates the space through which demands for redistributive interventions are expressed and imposed upon private economic elites, the institutionalization of democratic accountability to the people always threatens to contract the realm of capitalist freedom. [n.153](#)

Given the degree to which racial, ethnic and other forms of subordination are organized around both the political marginalization and the economic dispossession of peoples of color, Professor Mertus's essay suggests the profound challenges and wide range of questions awaiting LatCrit attention in the field of democratic theory. Though a LatCrit perspective might certainly shed valuable light on the rhetorical instability created by these abstract theoretical debates about the "real" relationship between capitalism and democracy, our legal training makes us particularly well situated to pursue a project more immediately relevant to the objectives of promoting anti-essentialist, anti-subordination social transformation through law. This project would focus critical analysis on the way the relationship between the state and the market is articulated in the interpretation of legal doctrine-- particularly in litigated cases and legislative debates where the struggle for racial justice has confronted and sought to render the monopolization of both economic and political power democratically accountable. [n.154](#) The outcome of such *643 cases and legislative debates raise fundamental questions about the relationship between racial inequality and the institutional structures and processes of the neoliberal political economy.

At stake, ultimately, is the question whether racial, ethnic and other forms of

subordination can be eliminated within the institutional arrangements of a neoliberal political economy, structured around the strategic separation of economics and politics. [n.155](#) The answer LatCrit scholars give to this question may determine whether the imperatives of racial equality are to be satisfied by a project that achieves for minority communities the reproduction and transposition of the same class hierarchies pervasive in white society or whether the struggle for racial equality will eschew institutional arrangements that perpetuate the economic dispossession and political marginalization of the world's vast majorities and engage, instead, in the search for alternative arrangements that can actualize a more real and substantive democracy throughout both the political and economic institutions of the inter/national political economy.

Finally, by focusing her comparative analysis of the transition processes in Latin America and Eastern Europe on "the problem of stateness," Professor Mertus raises one of the most vexing problems confronting any project aimed at articulating a substantive vision of self-determination--that is, in Professor Roman's formulation, the problem of defining "the self" whose right of self-determination is to be protected and enabled through the construction of democratic regimes. [n.156](#) While Latin American states have enjoyed substantial international support in resisting the legal recognition of self-determination movements operating in this hemisphere, [n.157](#) Professor Mertus notes that "the state" in Eastern Europe has been systematically weakened by recent developments both at the international and subnational levels. At the international level, the driving engine of the neoliberal project has been the perceived imperative of weakening the totalitarian state. Indeed, the weak state, *644 with limited authority to intervene in the economy and power fragmented across a system of checks and balances is at the heart of the liberal democratic vision of freedom. [n.158](#) However, in weakening the state to free the market, foreign intervenors have perhaps unwittingly contributed to the reactivation of ethnonationalist divisions at subnational levels throughout the region. These ethnonationalist group identities each claim the right of self-determination, undermining the power of the state and thereby triggering the so-called "stateness problem," precisely because the right of self-determination is legally effectuated through the international community's recognition that a particular group has the right to pursue self-government through the organization of their own state.

The final essay by Professor Roman takes up the international right of self-determination as if by design. While the preceding essays reveal, in different ways, the disjuncture between democratic rhetoric and the anti-democratic realities produced by the history and ongoing fallout of cold war politics, Professor Roman's essay links this disjuncture to the structure of international law and, more specifically, to the strategic manipulations through which the doctrine of the right of self-determination of peoples has been interpreted in international law. According to Professor Roman, despite the supposed underpinning of the right to self-determination in the universal norms of human freedom and the equal right of all peoples to control their own destinies, the right of self-determination has been hostage to three stages in the organization of the current world order. These three stages are marked by the era of geopolitical militarism; the era of racial tutelage, in which the self-determination for non-self-governing and trust territories was to proceed, under the Trusteeship System, "at a pace dictated by the colonial

administrators"; and the era of global disinterest marked by the tolerance of first world powers towards the alien domination of some third world peoples by other third world peoples.

In each era, the right to self-determination has been hostage to the political calculations of the most powerful states in the international community as well as to the indeterminacy surrounding the scope and limits of the right of self-determination. In its most restrictive formulation, the right is not recognized outside the decolonization context; in its most expansive formulation, the right of secession might be asserted by any distinct minority group. Thus, in Professor Roman's view, articulating a substantive content for the right of self-determination of peoples requires the formulation of objective criteria by which to determine whether a group constitutes "a self" or "a people."

*645 Professor Roman's search for the objective criteria that make a group a people, like Professor Mertus's comparison of the stateness problem in Latin America and Eastern Europe, raise manifold questions for LatCrit theory. The Eastern European experience under the ethnonationalist governance structures established by the Dayton Peace Accords counsels grave caution in conflating the right of self-determination with the project of having "a state of one's own." [n.159](#) As with any complex and multidimensional problem, the substantive and methodological commitments already articulated in prior LatCrit scholarship provide a useful point of departure. At a minimum, this record counsels that the problem of defining the meaning of, and designing the institutional structures to give substantive content to, the right of self-determination should be approached from an anti-essentialist, anti-subordination perspective. From this perspective, the problem of self-determination is the same vis-à-vis any collectivity that purports to represent the interests of individuals, who are always and everywhere constituted as multidimensional beings marked by distinctions of class, gender, race, ethnicity, language, sexual orientation, and national origin. That problem, as Professor Mertus notes, is the problem of developing institutional arrangements that can sustain the commitment to social justice, both between and within states, by recognizing the importance of group membership and identities, on the one hand, and the value of personal autonomy and individual rights, on the other. [n.160](#)

From this perspective, the anti-subordination agenda implicated in the struggle for self-determination reaches far beyond the parameters delimited by the problems of constituting a state. Indeed, I have argued before, and still believe, that the demise of the interstate system of sovereign nations is a potentially progressive development for the struggle against subordination. [n.161](#) Not only has the structure of the interstate system figured prominently in enabling both the processes of uneven development and the practice of war, [n.162](#) but as the essays by Professor Mertus and Roman illustrate, the very project of delimiting the parameters of a state must inevitably essentialize the identities and suppress the multiplicity *646 of interests that simultaneously converge and diverge in the configuration of any group.

Rather than investing further in a bankrupt system of nation-states, LatCrit theory might chart a new agenda to imagine and articulate the kinds of institutional arrangements and rights regimes that can promote the right of self-determination, both at the international and sub-national levels where the neoliberal project is, even now,

reconfiguring and consolidating new regimes of freedom and compulsion. At an international level, this agenda might take up the pending project of promoting the full recognition of individuals as subjects of international law, for example, through the incorporation of international human rights into the institutional structures, substantive norms, and decisional procedures currently regulated by international economic law. [n.163](#) At a subnational level, this agenda might begin by rejecting the neoliberal paradigm that confines democracy to the political realm, and pursue the institutionalization of democratic governance structures throughout the inter/national economy as well. [n.164](#) Both trajectories provide a meaningful way out of "the stateness problem," even as they expand the parameters and meaning of democracy in ways that more readily cohere with the anti-essentialist, anti-subordination commitments that are the heart of the LatCrit movement.

B. Language, Technology and Communicative Power: From Language Rights to the Struggle for Control of the Means of Communication

Language rights have been a central issue in LatCrit theory since its inception. [n.165](#) LatCrit III was, however, the first time that LatCrit conference organizers sought intentionally and self-consciously to link the *647 struggle against English-Only to a broader struggle for communicative power. This imagined project was forwarded to expand LatCrit theory's substantive agenda by encouraging a collaborative effort to develop a critical analysis of the way differential access to the means of communication is legally constructed across different sociolegal contexts and the way the resulting structures of communicative power/lessness should be addressed in LatCrit theory. [n.166](#) In this expanded critical project, the struggle over language rights reflects only one instance in a more general struggle against relations of domination organized by and effectuated through the legal production of differential access to the means of communication. This is because the compelling personal and collective interests at stake in the struggle against the suppression of non-English languages are equally implicated in the such matters as the regulation of political speech [n.167](#) and the ownership and control of new technologies of communication. [n.168](#)

Indeed, in each of these contexts, the matter at stake is the power to communicate--to express oneself--meaningfully and effectively. Increasingly, the power to communicate is determined by access to, control of, or authority over the means of communication. [n.169](#) Indeed, the "means of communication" have become as central to the structure of power/lessness in our postmodern, hyperlinked, globalized, mass media society as the "means of production" were central to the class struggles of modernizing industrialism. Individuals and communities shut out of the information age and out-spent in a political system that casts the expenditure of money as protected political speech--such that effective speech comes to depend increasingly on the ability to spend money--are just as certainly robbed of the instruments of self- determination and *648 the power of self-expression, as workers separated from and denied control over the means of production. By thematizing the linkages between language, meaning-making power and the struggle for self- determination, the essays in this cluster go a long way toward

delimiting a broad field ripe for anti-subordination theory and practice. [n.170](#)

Language Rights in Economic Analysis and Moral Theory

The opening essay by Professors Bill Bratton and Drucilla Cornell is based on a collaborative project in which they join the anti-nativist struggle against initiatives to suppress the use of languages other than English. [n.171](#) Their objective is to make an economic and moral case for treating language based discrimination as an equal rights violation. Interestingly, they develop their arguments using two very different forms of discourse. Professor Bratton uses law and economic analysis to challenge key assumptions about the way English-Only laws and employment regulations affect the incentive structures through which individual language acquisition and group assimilation are mediated in this country. Professor Cornell articulates a moral theory of rights that casts respect for language rights as fundamental to "the basic moral right of personality," thereby moving the articulation of equality rights beyond the truncated formalism of an anti-discrimination framework to ground it, instead, on the concept of self-determination.

More specifically, Professor Bratton's objective is to use economic analysis to destabilize the nativist political project by challenging the assumption that English-only laws and workplace regulations will promote assimilation to the English-speaking norm that, for the nativist, defines "the essence" of American identity. He acknowledges that English-only laws and policies are, at least superficially, supported by a plausible economic argument that language regulation maximizes social utilities by increasing communicative efficiency and reducing barriers to social interaction otherwise associated with the Tower of Babel *649 cacophony of multiple languages. [n.172](#) To be sure, Professor Bratton also challenges the initial assumption that "sameness" lowers costs. [n.173](#) However, his major contribution is in showing why English-only laws are unlikely to achieve their purported "efficiency" objectives. He does this through a detailed analysis of the incentive structures Spanish speakers confront in acquiring English language proficiency.

In a nut shell, Professor Bratton's economic analysis suggests that if nativists are really serious about promoting Latina/o assimilation into American society, they should focus on eliminating discrimination against Latinas/os, rather than suppressing Spanish. This is because the suppression of Spanish is neither necessary nor sufficient to achieve its purported objective of fostering Latina/o assimilation. Spanish suppression is unnecessary because Latinas/os have strong economic incentives to learn English. [n.174](#) Those incentives only increase when non-discriminatory practices enable English language acquisition to produce upward social mobility. Conversely, Spanish suppression is insufficient to promote assimilation precisely in those instances in which the reality Latinas/os confront in American society is discriminatory and exclusionary. From this perspective, enclave settlement, employment and commercial practices are simply a rational response to the discrimination experienced when Latinas/os venture outside the Spanish-speaking enclave. [n.175](#)

Professor Bratton's law and economics analysis of English-only is particularly

interesting and valuable because it creates the point of departure for a more general and far-reaching attack on the oft-repeated assertions made by law and economics practitioners that civil rights and anti-discrimination laws constitute unwarranted "special interest" interventions in the otherwise efficient private ordering of American society. [n.176](#) It doesn't take a rocket scientist to see the ready uses of this discourse for the nativist project. Bilingual education programs and other public policies aimed at mitigating the exclusionary impact of language *650 difference on non-English speakers are either manifestations of the concrete steps needed to give meaning and effect to the vision of inclusion underlying the promise of equal protection and non-discrimination--or they are manifestations of the capture of public policy by special interests. Framed this way, it is clear that the initial debate is over the meaning of bilingual programs, on the one hand, and English-only, on the other.

In this debate, law and economics discourse gives the nativist substantial meaning-making power because the language of costs and efficiency is so readily wrapped in the mantle of purported objectivity and value-neutrality: English-only laws are not discriminatory because they are efficient, or so goes the argument. Against this backdrop, Professor Bratton's contribution maps the economic arguments that can effectively turn the tables to reveal English-only laws as special interest legislative interventions. Since--in the absence of discrimination--private ordering already ensures that non-English speakers will have strong incentives to acquire English language proficiency, there is no regulatory need to create such incentives through English-only laws. There being no regulatory need, English-only laws constitute the use of state power to reaffirm the exclusionary political project embedded in the presumption that Anglo culture defines what it means to be "an American," and, more specifically, to promote higher levels of English language acquisition and usage than the market would produce--in the absence of discrimination.

By laying out these arguments, Professor Bratton arms the anti-nativist struggle with a valuable meaning-making resource: the language of law and economics, but his analysis also demonstrates the indeterminacy and normative vacuity of law and economics analysis. Ultimately, cost-benefit analysis cannot tell us how public policy should respond to the skewed incentive structures currently obstructing Latina/o assimilation. This is, at least initially, because discrimination is not "absent" from the incentive structures mediating language acquisition. Given the presence of discrimination, the public policy issue cost-benefit analysis cannot answer is precisely the question whether state interventions should attempt to counteract these skewed incentive structures by promoting language assimilation through anti-discrimination enforcement and bilingual initiatives or through the imposition of policies like English-only. Indeed, cost-benefit analysis not only cannot tell us how to promote language assimilation in a discriminatory social context, it also cannot justify why assimilation to an English language norm should be the objective, given that efficiency is only one of many compelling values at stake in the formulation of public policy.

*651 Professor Bratton is not unaware of the normative problems inherent in any discourse that measures language rights through a cost-benefit analysis. Thus, a fair assessment of his efforts requires that we read it as it was intended to be read--as part of a

larger collaborative project in which Professor Cornell's role is to articulate the normative framework which gives moral content to the task of articulating public policies that otherwise are rendered profoundly indeterminate by Professor Bratton's creative subversion of the nativist economic arguments. Professor Cornell proceeds in this way to ground the case against English-only in the basic moral right of personality of non-English speaking and bilingual Americans.

As I read Professor Cornell, this basic moral right of personality is not just a right to be treated as an end-in-itself rather than a disposable means in some project to maximize social utilities, nor does it simply refer to the right to be treated as a free and equal subject whose rights of self-determination and self-expression are non-negotiable imperatives. It is all this and more, for in Professor Cornell's formulation, the moral right of personality is a right to be recognized--in one's very difference-- as an equal and legitimate perspective. This formulation, correctly understood, constitutes a profound and compelling call for a fundamental gestalt shift in our current interpretations of the meaning of equal protection because it clearly marks the difference between "equal treatment" and "treatment as an equal." Treatment as an equal does not always mean equal treatment, precisely because the expectations imposed and benefits conferred by equal treatment may have a substantially different impact on one's human dignity and self-determination depending on the circumstances of one's difference. Conversely, it would be a mistake, in my view, to confuse the call for an equality norm based on the treatment of others as equals with earlier calls for an equality of results rather than of treatment. [n.177](#) The objective in treating others as equals is not to make everybody equal by eliminating differences, but rather to recognize that everybody is already equal in their very differences and to design our social and legal institutions in ways that respect that reality. [n.178](#)

***652** The implications of Professor Cornell's way of understanding the meaning of equality are profound and far-reaching. It entirely changes the public policy issue, for the issue is not whether public policy effectuates equal treatment among the similarly situated, but whether it treats those who are differentially situated as equally worthy of the respect and deference to which equals are entitled. Applying this framework to the analysis of English-only laws, it is immediately evident that the impact of English-only on the self-determination and self-expression of non-English speakers and bilingual or multilingual Americans cannot be reconciled with the imperative to treat all others as equals--each having the right of self-determination as defined and effectuated from their particular and altogether different perspectives. Thus, in this context, it is clear that the legitimacy of English-only laws depends on the projection of an equality norm that presupposes sameness as the predicate for equal treatment. Professor Cornell's great contribution is to show the profound inadequacy of this approach and to offer a more meaningful normative framework through which to resolve the indeterminacies otherwise generated by the instrumental analysis of public policy.

Though Professor Wells' reading of Professor Cornell's analysis is different from my own, [n.179](#) her essay does offer a clear and compelling account of the reasons why Professor Cornell's call for an equality norm based on the treatment of others as equals would constitute a major evolution in the moral fabric of human society. In this vein,

Professor Wells' argument begins by noting the advantages a Kantian perspective offers over the utilitarian perspective underlying law and economics discourse: "while the economist thinks of human beings as aggregations of preferences backed by dollars, the Kantian conceives of them as non-⁶⁵³ negotiable subjects of respect and value." [n.180](#) Indeed, as Professor Bratton's essay illustrates, in a world ordered by law and economics, a person's interest in speaking a particular language will, like any other interest, be measured against the efficiency costs of protecting that interest so that, if the cost is too high, the individual's right will be sacrificed for the "greater good" of the whole. By contrast, in a Kantian moral universe, a fundamental right of personhood cannot be sacrificed at any cost.

The non-negotiable status given to rights of personhood makes Kantian moral discourse a more appropriate language than law and economics for articulating the meaning of equal protection. Nevertheless, in Professor Wells' view, the Kantian framework is ultimately inadequate because it grounds respect for others on the notion that human beings share an essential sameness--that the imperative of doing unto others as you would have done unto you is based on the recognition of a common humanity and a reverence for the things that make all human beings the same-- rather than a recognition of the value of the differences between us. In Professor Wells' words, "[what we can't get from Kant is the notion that what is sacred in you is fundamentally different from what is sacred in me; that someone who differs is--for that very reason-- especially worthy of respect." [n.181](#)

This is a brilliant insight, clearly and simply articulated in a way that makes evident the profound challenge awaiting LatCrit theory and practice. By linking respect for difference to the experience of one's own particularity, contingency and finitude, Professor Wells articulates a profoundly revolutionary perspective on the reasons why respect for difference is, always and in every respect, a moral, existential and epistemological imperative. The suppression of difference and enforced assimilation are not only attacks on the dignity of another, but acts of self-destruction that confine us even further in the limitations of our own contingency, for it is precisely through the other that our finite ways of being and knowing are expanded and enriched. [n.182](#) The implications are profound. Otherness and difference are a gift, an avenue of insight beyond our own particularities, a window on the world we might behold if ever we could see beyond our own contingency and live beyond our finitude--a glimpse of God. An equality norm based on the imperative of treating others as equals operationalizes this understanding in ways⁶⁵⁴ that the norm of equal treatment neither does nor can, for it is only by treating others as equals that we activate an equality norm that enables us to focus, as Professor Wells suggests, on "the gift of otherness, the opportunities of multi-lingualism and the possibility that through difference we can find wholeness." [n.183](#)

Professor Wells makes another point worth further reflection. The power of self-expression is crucial to self-determination. Both presuppose access to language, not just any language, but a language in which the world, as one sees it, and one's own self-understandings can be meaningfully formulated and expressed. The language of law and economics has not been popular among critical legal scholars. Part of the reason is, as Professor Wells indicates, its failure to incorporate precisely those values, interests and

cultural processes that resist translation into a cost-benefit analysis. The not-so implicit suggestion is that LatCrit theory should avoid speaking the language of law and economics. [n.184](#) Some might dismiss this suggestion out of hand: not only are the costs and benefits of any proposal substantively relevant to its proper assessment, but law and economics is the language of choice among policy-making elites and, increasingly, evident in the interpretative practices of many judges. [n.185](#)

Speaking the language of power is, from this perspective, imperative precisely because, and so long as, power is power. Indeed, there is no question that Professor Bratton's efforts to recast the debate over English-only laws in terms that destabilize the economic justifications routinely invoked to support the nativist agenda constitute a major contribution to the anti-nativist struggle precisely because law and economics analysis is the language of power. More importantly, however, the indeterminacy revealed by Professor Bratton's creative subversion of the law and economics analysis underlying English-only suggests that law and economics discourse may have become such a ready conduit for regressive and elitist political agendas precisely because critical legal scholars have rarely contested its articulation on its own terms. [n.186](#) Learning and using the language of power may thus be the best way to combat the legal production of subordination. Though not all LatCrit scholars need use law and economics analysis, certainly this suggests there is ***655** room for, and value in, counting it among the repertoire of critical methodologies through which we expand the scope of our anti-subordination agenda and enhance the depth of our analysis. [n.187](#)

Nevertheless, Professor Wells' cautionary words give me reason to pause--not because I doubt the possibility or apparent usefulness of strategically deploying a language whose basic assumptions one does not embrace. Instead, my concern stems from the way increased fluency in the language of law and economics tends to reaffirm and consolidate its dominant position within the legal academy and profession. In *Language & Symbolic Power*, Pierre Bourdieu writes incisively of the way linguistic hierarchies are created and the way these hierarchies operate in the organization of social power. [n.188](#) Two points are particularly pertinent here. First, he argues that linguistic hierarchies are produced through "the dialectical relation between the school system and the labour market--or more precisely between the unification of the educational (and linguistic) market, . . . and the unification of the labour market." [n.189](#) He further argues that "recognition of the legitimacy of the official language . . . [is] impalpably inculcated, through a long and slow process of acquisition, by the sanctions of the linguistic market, and which are therefore adjusted, without any cynical calculation or consciously experienced constraint, to the chances of material and symbolic profit which the laws of price formation characteristic of a given market objectively offer to the holders of a given linguistic capital." [n.190](#)

There is no question that a cost/benefit analysis would suggest, at least at first glance, that acquiring fluency in the language of law and economics makes for a better career investment than acquiring fluency in the methodologies, references and critical frameworks of outsider jurisprudence. Those who master the dominant language reap the rewards of assimilation. In this case, those rewards are directly linked to the labor market. Law and economics aficionados get hired by elite law schools, appointed to the federal

bench, recruited for high-level policy-making positions and published in prestigious law journals at higher rates than exponents of any of the major strains of critical legal discourse. [n.191](#) By contrast, legal scholars working to articulate critical perspectives *656 and promote legal transformation in and through the discourses of Critical Legal Studies, Critical Race Theory, Critical Race Feminism, Queer Theory, LatCrit Theory and even of Law and Society are channeled into the "interesting visitor" circuit, cast as "too political" for judicial appointment and "too abstract and theoretical" for the nitty-gritty of policy-making. For young scholars, the choice of an academic discourse can make the difference between being cast as "an insider" or "an outsider," and that difference can cost you tenure.

The stakes are high. Understanding their full scope requires understanding not only that legal education is training for hierarchy, [n.192](#) but also the extent to which those hierarchies can, consciously and unconsciously, infuse everything we do and aspire to achieve. It can infuse our assessments as to who should be our audience--whether we write to impress the powerful and well-positioned or to engage, enlighten and empower each other and thus to consolidate our otherwise dispersed and diverse community. It can also infuse our assessments as to where and how to publish our works--whether we seek to acquire prestige through fancy placements in top-ten law journals or, rather, seek instead to confer prestige by submitting our best works to the "secondary" journals run by minority law students eager to work with, and learn from, us.

Certainly, these matters would not concern me so much if I believed that the language of law and economics was infinitely indeterminate such that it really could, with sufficient effort, be made to formulate, communicate and construct the world as I, and other others, see it and, perhaps more importantly, as we aspire to imagine and transform it. It cannot--for the reasons Professors Bratton, Cornell and Wells have each alluded to in different ways. At the same time, critical legal discourses, that might, won't ever develop their full potential unless we collectively invest our human capital and professional careers in their further development and dissemination. The stakes are high indeed. The pay offs are higher, for rather than speaking the language of power--to tinker at the margins and to shift ever so slightly the points of pervasive disequilibrium--the articulation and effectuation of an anti-essentialist, anti-subordination vision and politics requires that we empower other languages by speaking them as much, as well and as often as we can. There is definitely a place for law and economics analysis in LatCrit theory, but, in my view, it is, and should remain, at the margins of our *657 efforts to understand and reconfigure the structures and ideologies of subordination.

Professor Plasencia's comment introduces yet another dimension of the anti-subordination agenda awaiting future LatCrit analysis at the intersection of language rights, meaning-making power and the struggle for self-determination. Focusing on the awesome technological breakthroughs that continue to revolutionize the structure and content of global communications, Professor Plasencia notes the frustrations non-English speakers often encounter in attempting to use the new means of communication that increasingly will mark the difference between "information haves" and "have nots" in the new world information order:

In composing e-mail in Spanish, for example, one cannot readily find the

symbols necessary to communicate fully in Spanish. Of the various templates made available for computerized language production, Spanish accents and other symbols often do not match the font of the original text in which the document was composed. The e-mail I have drafted in Spanish often arrives to its addressee with circles where I had placed accents. Therefore, I look like some sort of chaotic writer. [n.193](#)

While the personal embarrassment experienced when one's communicative efforts are distorted into gibberish may seem, to some, a minor frustration, the issues it raises are profound. The Internet and the World Wide Web have been heralded as engines of a new world information order and as the most recent advances that increasingly are making the dream of universal communications a reality. They may be all this, but they also constitute a major challenge for the critical task of giving substantive meaning and anti-subordination content to the international and historical commitment to cultural pluralism and universal service. [n.194](#) From fiber optics to cyberspace networks, new communications technologies are speeding the flows of information. Being plugged into these flows means having the power of virtually instantaneous communications: the power to send and receive messages, to and from multiple audiences, instantaneously, to transfer documents, to reallocate capital, to purchase goods, to download and print out the world of information, it previously took hours or days or weeks to compile. Not being *658 "plugged- in" can mean knowing too little too late. For some this is a personal choice. Others have no choice.

These developments suggest the pressing need for LatCrit theory to examine the ongoing communications revolution and its impact on the reproduction of Latina/o subordination, both domestically and internationally. This is because taking self-determination seriously means taking seriously the information inequalities that link the issue of meaningful access--to the historical development and future evolution of the legal regimes that regulate international and domestic communications technologies, information infrastructures, services and networks. The compelling social and racial justice issues implicated by the recent privatization and increasing monopolization of the broadcast spectrum by large multinational corporations, [n.195](#) by the redlining practices of for-profit telecommunications companies, [n.196](#) by the struggle for minority access to media ownership, [n.197](#) as well as the struggles of Third World states for access to the geo-stationary orbit for satellite communications-- all these suggest the broad field of critical analysis awaiting LatCrit attention in ensuring that Latinas/os and other peoples of color are not shut out of the information age.

In pursuing this line of inquiry, LatCrit scholars would, as always, do well to draw on the writings and analyses of other Third World peoples and peoples of color, for example, by excavating the economic and political claims underlying earlier proposals to create a New World Information and Communication Order (NWICO) and the various reforms NWICO articulated for the information and communications regimes governed by the World Intellectual Property Organization (WIPO), the International Telecommunications Union (ITU) and the Universal Postal Union (UPU) [n.198](#) as well as by subjecting to critical anti-*659 subordination analysis the more recent trend to shift decision-making authority formerly delegated to these international organizations to venues like the World Trade Organization (WTO). [n.199](#) From another perspective, this

inquiry might entail mapping and deconstructing homologies in the way the discourse of "politicization" has been used to delegitimize Third World peoples as a legitimate perspective on the way international communications should be structured for the common good and the way the ideology of "free market competition" has been used to legitimate legal reforms and public policies that channel the achievement of universal service through the market imperatives of profit maximization, rather than the promotion of democratic governance and equal access norms. These brief observations demonstrate some of the wide range of issues and methods of analysis that will become increasingly relevant to the LatCrit project and our efforts to understand the relationship between the struggle for self-determination, for meaning-making power and for access to, and control over, the new means of communication.

Toward an Ethic and Politics of Mutual Recognition: Counteracting Exclusionary Practices, Elitist Pretensions and Intellectual Appropriations

The last three essays in this cluster by Professors Tamayo, Hom and Hayakawa Torok focus LatCrit attention on the complex and varied problems confronted by any project aimed at communicating across cultural differences and translating the untranslatable. Professor Tamayo's essay takes up these issues through a critical analysis of the arguments proffered by English-only advocates in *Yniguez v. Arizonans for Official English*. [n.200](#) In that case, English-only advocates argued that laws mandating use of English as a common language were appropriate and necessary means of combating the social disunity, political instability and public distrust and suspicion purportedly triggered when the English-speaking majority hears public business conducted in a language they do not understand. In addition to recounting the reasoning that ultimately persuaded the Ninth Circuit Court of Appeals to strike the Arizona Language *660 Initiative as an invalid regulation violating the rights of Arizona public employees to speak and of non-English speaking Arizonans to hear public information spoken in Spanish, Professor Tamayo makes a point of linking her analysis to a narrative account of her own difficulties in attempting to translate meanings across Spanish and English. It is precisely these difficulties, and the "untranslatability" of certain meanings, that make the suppression of languages other than English a direct assault on the personal identity and self-expression of those persons, whose means of effective communication are thereby contracted solely in order to maintain English as the privileged and dominant means of communication in this country. Rather than fostering genuine integration based on mutual respect for, and accommodation of, these different means of self-expression, English-only laws seek to coerce a false sense of unity through the enforced silence of non-English speakers in, and their ensuing exclusion from, the public realm of American social life.

Professor Hom's essay also takes up the problem of "untranslatability." However, she substantially expands our analysis by providing concrete examples of the kinds of words and meanings that do not easily translate across language differences and the political implications of these barriers for cross-cultural understanding and exchange. Drawing on her experiences co-editing the first and only English-Chinese Lexicon on

Women and Law, [n.201](#) Professor Hom describes the process of identifying and collecting a list of English terms that have been central to the development of feminist legal theory and political activism, but that Chinese women report to be particularly confusing, unclear or incoherent when presented in Chinese translation. Terms such as Affirmative Action, Empowerment, Gender and Sex defy ready translation into Chinese because these terms refer to particular social, political and historical contexts and/or because they are embedded in particular theoretical frameworks. Translating these terms is not impossible, but it does require an in-depth explanation of the broader context that gives each term its particular meanings within feminist legal discourse and politics.

Through her concrete examples and detailed explanations of the interpretative processes through which she and her collaborators sought to identify appropriate Chinese terms that could effectively be made to signify the new and foreign meanings embedded in English feminist terminology, Professor Hom provides an extremely valuable and fascinating avenue of insight into the way language is both the constructed repository and the unfinished instrument of the social and political transformations we have achieved in the past and might seek to imagine in ***661** the future. This is because the terms, whose meanings she struggled to convey through this English-Chinese Lexicon, are linguistic artifacts of particular historical struggles and conceptual breakthroughs. These struggles and breakthroughs generated a need for new ways of signifying new meanings which did not previously, and would not now, exist but for the intellectual and political efforts through which women's struggles for equality and dignity gave birth to the newly shared consciousness referenced in and by the new feminist terminology which developed to express it. Our present ability to convey these meanings quickly and easily by uttering a simple word like "gender" or "empowerment" is a tremendous political resource, whose historical contingency and inestimable value are often invisible--except in precisely those instances where the effort to produce a common political consciousness "goes international" or cross-cultural. Only then can we see the real and material costs of not having the words to reference the ideas we seek to express or the consciousness we seek to construct. [n.202](#)

Professor Hom's essay would have been a major contribution to the future evolution of LatCrit theory if it had simply stopped here. It goes even further. Like her brilliant performance at LatCrit III, Professor Hom's essay is an imaginative and multiply nuanced interrogation of the normative and political implications embedded in the practice of cultural and intellectual appropriation. [n.203](#) In particular, her essay links an engaging narrative of a playful mother-son exchange, in which her son asserted that her use of his life stories might be a copyright infringement, to her own thoughts about the way she should interpret and respond to the massive underground xeroxing and distribution inside China of her copyrighted Lexicon. Linking these two instances of "copyright infringement" enables her, on a more serious note, to reflect critically on the possessive individualism that underlies western copyright and intellectual property regimes. To this end the linkage is entirely successful. The conjured image of a son proposing to charge his mother "by the story" provides a compelling backdrop against which to critically question the appropriateness of seeking to enforce copyright restrictions against a continent of Chinese women. In both instances, the assertion of

copyrights ruptures bonds of solidarity and interconnection *662 because it operates, in effect, to commodify the interpersonal experiences and shared political objectives that produced, and are otherwise embedded in, the copyrighted "product." Only someone completely ensconced in the (lack of) values of possessive individualism would seek to commodify these artifacts of a shared reality and a common cause.

Not surprisingly, Professor Hom continues to use her son's life stories even as she expresses hope that her copyrights in the *Lexicon* will continue to be violated by women in China. However, her reflections beckon further inquiry because they raise the question whether there are any instances in which LatCrit scholars should resist the appropriation of our intellectual work and the erasure of our individual authorship. For example, many scholars of color, in private discussions and public fora, have criticized the network of self-referential cross-citations through which majority scholars exclude minority authors, even as they appropriate and seek to preserve their dominant positions, in producing "the normal science" of mainstream legal scholarship, by ignoring any critical analysis they cannot rebut. [n.204](#) Beyond these instances of exclusion, scholars of color have also noted instances in which their intellectual work has been cannibalized in subsequent works by majority scholars, whose analysis uncannily tracks the same sources and articulates the same, or related, observations and conclusions with no citation, or a mere *see generally*, to the original work from which they have lifted the major theoretical insights or chain of analysis they present as their own.

From any objective standard of scholarship, the failure to reference and engage major critical works directly pertinent to the issues under discussion is at best poor scholarship and often reflects the intellectual dishonesty of either an ideologue or, more often, an imposter. However, when confronted with evidence that their work has been appropriated without appropriate citation or acknowledgment, many scholars of color flounder in the very sorts of internal conflict Professor Hom's essay conjures. To assert one's authorship and demand individual recognition for ideas whose purpose is to transform the world seems self-promoting and counter to the political aspirations underpinning the production and dissemination of critical scholarship. Put differently, too often minority scholars find themselves caught between the sense of being individually wronged by the unacknowledged appropriation of our intellectual labor *663 and a deeper sense that our individual authorship is simply not the issue that matters.

It is precisely because LatCrit theory seeks to transform the production of legal scholarship from an experience of individual isolation into a practice of collective engagement and empowerment that LatCrit scholars should theorize the difference between the kinds of intellectual appropriations we should permit or encourage and the kinds we should challenge and resist. We should also explore different strategies for identifying instances of, and collectively implementing appropriate responses to, the erasure of minority authorship. Certainly, one ready response is to self-consciously practice a politics of mutual recognition by reading and citing the works of other LatCrit scholars as often, and in as many venues, as possible. It is politically significant when we choose, for example, to cite the works of dead European philosophers rather than living LatCrit colleagues. This is because who we cite (or fail to cite) reflects and defines the participants we acknowledge and engage as our intellectual and political community.

Beyond this practice of mutual recognition, LatCrit scholars might explore other strategies through which collective action might effectively be marshaled to combat the erasure of minority authors. For example, LatCrit scholars might consider the possibility of "outing" works by majority legal scholars that inappropriately ignore or appropriate theoretical insights and analysis previously forwarded by minority scholars. Collectively compiling and publishing a list of such works, with appropriate commentary, might go a long way toward revealing the extent of erasure and appropriation individual minority scholars too often suffer in silence. On the other hand, this particular strategy might be more work than it's worth. Perhaps a different strategy is in order. Rather than seeking recognition from the legal academy's "normal scientists" and gatekeepers of the status quo, LatCrit scholars might work, collectively, proactively and self-consciously, to forswear the elitist pretensions too often evident in the politics of citation and commit ourselves, instead, to a politics of mutual recognition through which the persistent dissemination and consistent cross-referencing of LatCrit scholarship may, thereby, actually trigger the paradigm shifts already embedded in the critical insights of LatCrit theory and discourse.

The final essay by John Hayakawa Torok closes this cluster with reflections on language acquisition and loss drawn from his experiences as a participant observer at the LatCrit III conference. Like the other essays in this cluster, his comments focus on the role of language in the construction and expression of personal and political identities. Reflecting on the many distinct and diverse perspectives articulated during the *664 conference, he raises fundamental questions about the possibility of inter-group translation and cross-cultural recognition. Through personal narrative, he highlights the processes of individual language acquisition and challenges the wisdom of enforcing language uniformity. Read in tandem with the other essays in this cluster, his reflections reassert the centrality of language in the de/construction of communities, the affirmation of identity, the organization of power and the demarcation of insider/outsider relations.

C. Inter/National Labor Rights: Class Structures, Identity Politics and Latina/o Workers in the Global Economy

The essays by Professors Romero, Corrada and Cameron constitute the third and final cluster in Part II. [n.205](#) Like the essays in the first two clusters, these essays explore the relationship between regimes of il/legality, identity politics and the struggle for individual and collective self-determination. While the first two clusters examine these relationships through a critical analysis of the disjunctures between democratic theory and the realities of anti-democratic practices and institutions, on the one hand, and the ongoing struggle over language rights and communicative power, on the other, these last three essays focus LatCrit attention on the struggle for worker rights. In doing so, they explicitly center the issue of class in the articulation of LatCrit legal theory.

Attention to class issues has been acknowledged as a pending, but as yet underdeveloped, trajectory in the further evolution of LatCrit theory and the consolidation of LatCrit social justice agendas. [n.206](#) Class-based analysis is a particularly pressing matter for LatCrit attention precisely because so much ink has been

spilt and so much intergroup solidarity has been squandered in abstract theoretical debates about the relative priority of class and "identity," particularly racial, ethnic and gender identity, in the subordination of peoples of color, as well as by *665 the counter-positioning of race and class in more concrete debates over the future of public policies like affirmative action, minority business set-asides, public assistance eligibility rules, trade liberalization and immigration policies.

On the one hand, calls to ground the articulation of social justice reforms in a class-based analysis have too often ignored the very real impact of racism and sexism as strategic instruments in the material dispossession and anti-competitive exclusion of women and minorities. From this perspective, class-based legal reforms and empowerment strategies cannot eliminate the impact of racism or sexism precisely because they do not really engage the reality of racism and sexism. [n.207](#) Conversely, however, calls to emphasize the centrality of racial subordination, rather than class or gender-based subordination, have too often ignored the material realities of intra-racial stratifications and hierarchies that are organized around relations of gender and class privilege within minority communities, while calls to focus on gender-based subordination have often ignored the problems of class and racial hierarchies among women. [n.208](#)

Against this backdrop, the three essays by Professors Romero, Corrada and Cameron illustrate the analytical power gained by articulating an anti-essentialist, anti-subordination analysis of the complexities of class subordination within and between Latina/o communities. This is because all three essays locate the economic dispossession of Latina/o workers at the intersection of national and international legal regimes and the ongoing transformation and restructuring of an increasingly internationalized global economy. They reveal, in different ways and from different perspectives, the failure of domestic and international labor law regimes to establish a fair and just framework for preventing the exploitation of Latina/o labor and the expropriation of the real value it creates. They also challenge us to further examine and more clearly articulate the relationship between the class biases reflected in these *666 legal regimes, their politics of (non)enforcement and the reproduction of racial and gender subordination both within and beyond the United States.

The Dynamics of Dispossession: Labor Wrongs, the Fantasies of Market Ideology and the Realities of Economic Power/lessness

Professor Romero's essay opens the cluster with a narrative of her personal experiences at the home of a colleague who employed a Latina domestic servant. Professor Romero contextualizes this story of class privilege and gendered exploitation by linking it to a critical analysis of the unfair labor standards regulating domestic labor in the United States, as well as to a sophisticated critique of the theoretical assumptions that undermined, and ultimately betrayed, the anti-subordination potential otherwise embedded in early feminist efforts to recast the unpaid domestic labor performed by women in the home as a form of class exploitation. Professor Romero's analysis provides a particularly valuable point of departure for articulating an anti-essentialist class

analysis in LatCrit theory because it shows how the material dispossession of Latina domestic servants is effected through a complex interaction of race, class, gender and immigrant status-based subordination-- even as it reveals the methodological limitations of neoliberal micro-economic analysis.

In a nutshell, Professor Romero criticizes the fact that feminist efforts to cast women as an economic class and to theorize the economic value of women's unpaid labor structured the so-called "domestic labor debate" in ways that completely ignored the experiences of the women of color, who oftentimes must bear the burden of domestic work both within their own homes and in the homes of other (upper-class) women who hire them as domestic servants. Though early feminist theory sought to establish the value of women's unpaid domestic labor and to thereby reveal the full extent of unjust enrichment conferred on men through the cultural circulation and performance of patriarchal norms casting housework as "women's work," these early feminist efforts ignored the realities of "the market" for domestic service. In this reality, immigrant women of color often work long hours, at less than minimum wage, with no employment benefits, and under personally intrusive and otherwise exploitative working conditions. Instead of confronting this reality, feminists turned to the fantasy world of micro-economic analysis. They sought to establish the monetary value of the many services women render in their own homes by calculating the costs of securing these same services through the voluntary arms length transactions of a *667 market exchange. This analysis revealed that the vast majority of household units would be completely priced out of the market for domestic services because few could afford the accumulated costs of acquiring the services of a cook, a house cleaner, a teacher, a nurse, a chauffeur, a babysitter (and one might now add--of a surrogate mother) in the market. In this way, the economic viability of every patriarchal family was clearly linked to the exploitation and uncompensated expropriation of women's labor.

This domestic labor debate eventually erupted into public consciousness, as the "Nannygate" controversy, when President Clinton's woman nominee for Attorney General was discovered to have illegally employed undocumented workers as domestic servants in her home. The Nannygate affair, as recounted by Professor Romero, brings into sharp relief the contradictions in the way (some) white feminists have engaged the problem of domestic labor. On the one hand, the earlier feminist efforts to establish the "market value" of domestic labor cast women's services as ultimately priceless. On the other hand, the dominant feminist response--to the public controversy over Nannygate--was to minimize the criminal aspects of employing undocumented domestic workers by insisting that current immigration restrictions were out of step with "women's needs" for stable and affordable domestic help--meaning low wage workers owed no expensive benefits obligations.

But, as Professor Romero's analysis suggests, if the reproductive labor involved in maintaining a home is "priceless" when performed by white women in their own homes, certainly it should also be priceless (or at least remunerative) when performed by women of color in the homes of other women. The fact that it is not shows that wages for domestic service are determined not by "the market value," let alone the use value, of the services rendered, but rather by the asymmetrical power relations that are constructed

through the compulsion of economic necessity, the vulnerability of being "illegal" or undocumented, and the cultural and racial prejudices that devalue the labor value produced by immigrant women of color. The fact that dominant feminist discourse has yet to acknowledge and address its internal contradictions reveals the essentialist assumptions through which feminist theory delimits the category of "women's interests" to privilege the particular interests of upper-class white women, while neglecting the "women's interests" of lower class immigrant women of color. By revealing this contradiction, Professor Romero's analysis enables us to see the full extent of unjust enrichment conferred on upper-class household units through the cultural circulation and performance of elitist classist and ***668** racist norms that legitimate the uncompensated material expropriation of the labor value of immigrant women of color.

Class Crimes and the Politics of Non-Enforcement: Law's Complicity in the Unjust (and Illegal) Expropriation of Latina/o Labor Value

Against the backdrop of Professor Romero's critical analysis of the asymmetrical power relations that "distort" the supposedly voluntary exchange transactions upon which micro-economic analysis builds its house of cards, the essays by Professors Corrada and Cameron further develop and expand the theoretical parameters and thematic concerns of an anti-essentialist class analysis in LatCrit theory. They also offer additional insights into the role of law in facilitating the material expropriation of Latina/o labor value as well as the poverty, marginality and economic dispossession this expropriation visits upon Latina/o families and communities.

Professor Corrada offers these insights by focusing LatCrit attention on the labor dispute between a Mexican labor union and Sprint Corporation after Sprint purchased La Connexion Familiar (LCF). This dispute is particularly noteworthy because it became the subject of the first complaint ever filed by a Mexican labor union against the United States under the NAFTA Labor Side Accord. LCF was a small Hispanic telephone company based in San Rafael, California. Its business involved marketing long distance telephone services to recent immigrants who speak mainly Spanish and who frequently make long distance calls to friends and family in Mexico. After the purchase, Sprint discovered that a large majority of LCF's employees were undocumented workers and sued to recind the purchase. Though Sprint eventually went through with the deal, they paid substantially less money for the company and canceled the employment contracts in which they had agreed to retain the former Hispanic owners of LCF.

According to Professor Corrada, there was no further information about the fate of the undocumented workers whose employment at the company triggered Sprint's efforts to recind the purchase. In particular, there was no information as to whether these workers were kept on or replaced by "legal" Spanish-speaking employees, though as Professor Corrada notes, this information would have been relevant to determining whether Sprint's efforts to recind were pretextual. Alas, the fact that Sprint's scruples about buying a company staffed by undocumented workers might have been pretextual and strategic was not directly relevant "within the four corners" of the labor dispute at issue in the NAFTA complaint. Nevertheless, what is evident is that Sprint initially ***669**

decided to purchase LCF based on projections that increasing immigration by Spanish speaking persons into the United States would make LCF's niche market a growing profit center. Thus, Sprint's apparent scruples about employing undocumented workers did not affect its readiness to make a calculated business decision based on the expected profits to be earned from the consumption practices of illegal immigrants.

This point is key. Read in tandem with Professor Romero's analysis of the under-enforcement that makes the (unfair) employment of undocumented workers a low-risk white collar crime, it shows that the politics of immigration enforcement is not so much about stopping illegal immigration, but rather about who will be allowed to profit from the increased migration flows that are all but inevitable given the push-pull factors of an increasingly interconnected and global economy. [n.209](#) The fact that U.S. companies can with impunity profit from, and proactively plan their business projections around, the labor influxes and consumption patterns of illegal immigrants is a field of sociolegal analysis crying out for further exploration by LatCrit scholars interested in theorizing the political economy of Latina/o subordination.

But Professor Corrada's story goes on. After Sprint purchased LCF, the company started to perform below projected profit levels. At about the same time, the Communications Workers of America began an organizing campaign at the company in response to worker complaints of unfair treatment and failure to pay promised sales commissions. An administrative law judge issued a cease and desist order, finding that Sprint managers had violated Section 8(a)(1) of the NLRA by interfering with union organizing activity through threats of plant closure and employee interrogations. Just before the union election was to be held, Sprint closed LCF and terminated the employees. Part of LCF's customer base was transferred to Dallas, Texas, where Sprint hired additional Spanish speaking employees to deal with the influx of new business. There is no information as to whether these additional workers were documented or unionized. After an administrative law judge and a federal district court judge both ruled that Sprint's course of conduct in closing LCF did not violate federal labor laws, a Mexican labor union filed a submission under the NAFTA labor side accord alleging that United States was not enforcing its own labor laws as required by its commitments under the accord.

It was at this point that Professor Corrada was asked to testify as an ***670** expert witness for Sprint at a U.S. NAO hearing on the Mexican submission. He agreed and ultimately testified that U.S. labor laws had been properly enforced. Much of his essay is a searching, honest, self-revealing and self-critical effort to explore the broader implications of his decision to testify on Sprint's behalf. His essay is structured as a dialogue between himself and an inquiring Latina law student, perplexed by the seeming contradictions between his classroom discourse, his Latino identity and his decision to testify in support of a major U.S. company charged with the flagrant violation of Latina/o workers rights. It is, in fact, a moving demonstration of the way the intersectionalities of Latina/o identity can trigger the sorts of existential crises that expand political identity and enable new ways of seeing and being.

The more immediate point stems, however, from the fact that Professor Corrada's legal conclusion, that the United States government had properly enforced its

labor laws in the Sprint case, was, on its face, a legally correct and entirely defensible expert assessment. After all, the NLRB had vigorously prosecuted the case up to and including its efforts to secure a district court injunction. The district court and the ALJ, for their part, were enforcing labor laws that have systematically and increasingly expanded the realm of employer business prerogatives and of unreviewable discretion in making "core entrepreneurial decisions" such as whether to close or relocate a plant--regardless of the foreseeable and profoundly negative impact of such decisions on union organizing and collective bargaining. [n.210](#) The fundamental un/fairness of U.S. labor laws is, however, simply not an issue relevant to the resolution of a labor dispute under the NAFTA labor side accord. The only issue there is whether the U.S. government enforced them properly, and that, therefore, was the only issue Professor Corrada was called to address.

Read, however and once again, in tandem with Professor Romero's analysis of the lack of enforcement that makes the employment of undocumented workers a low-risk white collar crime, these two essays reveal the many and profound inadequacies of domestic and international labor law regimes. Not only are domestic labor law violations routinely unenforced-- even when enforced, these laws fail to establish a fair and just framework for preventing the exploitation of labor and the expropriation of the real value it produces. This is precisely because the hyper-technicalities, of which Professor Corrada writes, are simply the *671 masks that hide the asymmetrical power relations these anti-labor laws and interpretative rulings are designed to institutionalize, preserve and enforce. The resulting consequences are well documented in Professor Cameron's essay linking the decline in union organization to the increasing impoverishment of labor and the simultaneous increase in business profitability.

Focusing specifically on Los Angeles County, Professor Cameron notes that in communities experiencing 20% or higher poverty rates, "over 15,000 manufacturing firms were generating annual revenues of over \$54 billion, due largely to the low-wage labor of 357,000 Latino employees." [n.211](#) Moreover, three enormous construction projects, totaling 12-14.5 billion dollars in investment, are currently in the works for the region. Professor Cameron asks whether anything could be done to help Latina/o workers share more equitably in this enormous wealth. Certainly, he is right to suggest that a larger share of the value their labor produces would go a long way toward ending, or at least substantially mitigating, the destitution that keeps so many Latinas/os at the margins of the social and political life of this country. This is just as surely certain as the fact that if poor immigrant Latina domestic servants were paid the fair "market value" of their labor in upper-income households, they would make enough money to lift themselves and their families out of "the culture of poverty" and criminality they purportedly are so wont to inhabit. Certainly, Professor Cameron is also right to suggest that securing a fair and equitable share of the value Latina/o workers produce depends ultimately on Latina/o self-determination through collective action and solidarity. No employer, union boss, labor board, ALJ, or district court is going to solve the problem. Only the concerted action and mutual assistance of Latina/o workers will do the job. [n.212](#)

In this vein, Professor Cameron's essay reviews a number of recent examples of

successful union activity by Latina/o workers. His thesis is that the future of Latina/o workers and the American labor movement are intricately interconnected. Just as the increasing "Latinization" of the U.S. workforce makes Latina/o organizing power an important resource for revitalizing the American labor movement, the significant wage gaps between union and nonunion jobs, particularly when analyzed by race and ethnicity, make it clear that Latinas/os have a lot to gain from unionization. Professor Cameron also offers a valuable analysis of the kinds of collective action and strategies most likely to work, *672 for example, strategies involving non-strike alternatives--like corporate campaigns and community based boycotts-- and, not surprisingly, strategies that do not depend or rely on the vindication of worker rights through legal process.

III. Mapping the Intellectual and Political Foundations and Future Trajectories of LatCrit Theory and Community

The six essays in Part III appropriately close the LatCrit III symposium by raising important questions about the purpose, history and future trajectories of the LatCrit project. [n.213](#) These essays reflect the rich and varied intellectual heritage of the many different scholars and activists who have committed their energies to finding, or planting, their roots in the LatCrit community. The unprecedented and rapid expansion of LatCrit discourse over the last three years reflect the synergies embedded in these diverse perspectives and constitute the substantial pay-offs of our concerted, self-conscious and collective efforts to release these synergies through respectful and inclusive intergroup discourse based on our shared commitment to an anti-essentialist vision of substantive justice. At the same time, the rapid expansion and many diversities of position and perspective coalescing in the LatCrit movement raise substantial questions about the future trajectories and sustained viability of this imagined, and still very young, community of scholars and activists.

To my mind, that future depends, both theoretically and politically, on the degree to which the LatCrit community is able to forge a common consciousness and generate a shared discourse for articulating and manifesting, in concrete ways, a new vision of the relationship between the universal and the particular. It depends, ultimately and in other words, on the degree to which each of us is able to see the many different ways in which the relationship between the LatCrit community and the many particularities of which it is composed and into which it might at any point fracture--is not a relationship between "the universal and the particular," but rather is, at every moment and in every instance, a relationship *673 of the universal to itself. [n.214](#) What this means, in effect, is that the challenge we confront, directly and immediately over the next few years, is a challenge that most of us cannot even really imagine. This is, in no small part, because there are simply no words, no readily accessible sound-bites, no immediately obvious and easily recognized formulations that convey the conceptual implications, political parameters, ethical substance and practical consequences, as yet to be manifested in and as--an anti-essentialist vision of human interconnection. [n.215](#) Not only are we challenged to imagine the ineffable and make manifest the unimaginable, but

to do so concretely and effectively,--not at some unspecified time in some distant and abstract future, but rather--in the here and now of this moment, as it reflects itself in our collective efforts to further the objectives and foster the growth of a particular and historically contingent group of scholars and activists, who have chosen to coalesce around this imagined community and its aspirations for a new way of seeing and being in the world.

It is with these thoughts in mind that I take up the last six essays of the LatCrit III symposium. The first section focuses on the theoretical dimensions and directions of the LatCrit project as reflected in these particular essays. The second section takes up the practical challenges involved in ensuring the continued institutional and programmatic evolution of the LatCrit project.

A. Of Intellectual Debts, Theoretical Directions and the Challenge of Anti-Essentialism

From its title, the opening essay by Professors Johnson and Martinez would seem to suggest that the LatCrit movement originates, and is rooted, in the history of Chicana/o activism and scholarship. [n.216](#) A fair and fully informed historical account of the initial beginnings and subsequent evolution of the series of conferences, publications and related events that now constitute the historical record of the LatCrit project would not support such a claim. [n.217](#) However, a close reading of their essay quickly reveals a very different and altogether appropriate message. Indeed, the opening paragraphs of their essay make it quite clear that Professors Johnson and Martinez are not claiming that the LatCrit movement is, in fact, historically rooted in Chicana/o studies. Not only do they acknowledge the central importance LatCrit theory has, *674 since its inception, accorded the project of promoting a discourse and politics of pan-ethnic solidarity among Latinas/os, but the recorded history, thus far developed, unequivocally illustrates the degree to which LatCrit theory has also, from its inception, aspired to articulate an inclusive anti-essentialist politics of intergroup justice and solidarity that goes far beyond the politics of Latina/o pan- ethnicity. [n.218](#)

Rather, Professors Johnson and Martinez's claim, as I understand it, is that LatCrit theory should be rooted in Chicana/o studies or, more precisely, that LatCrit scholars should view the long history of Chicana/o activism and scholarship as a rich resource worth further study and serious engagement. It is to this end that they append the bibliography of Chicana/o history compiled by Professor Dennis Valdes, and it is in this respect that their claims are entirely appropriate and consistent with the historical development and the theoretical and political aspirations of the LatCrit project.

LatCrit scholars should indeed study and learn from the significant body of scholarship and history of activism reflected in and recorded by a long tradition of Chicana/o studies. The particular perspectives and experiences of Chicanas/os are as central to the LatCrit project as the perspectives and experiences of any other multidimensional and intersectional collective political identity group committed to the struggle against white supremacy and the articulation of a substantive vision and political practice of social justice and solidarity. Only an unfortunate regression to the failed

politics and limited consciousness of an ethnic or racial essentialism would view Professor Johnson's and Martinez's call for attention to the particularities of Chicana/o histories and experience as a threat to the LatCrit project. As Professor Roberts noted in her own contribution to this symposium, an anti-essentialist commitment to anti-subordination politics does not mean a commitment to an abstract universalism stripped forever of any particular content. [n.219](#) It is, instead, a commitment to see and respect the universal claims of justice and dignity reflected in and asserted by every particularity, as well as by the multidimensional and intersectional identities that oftentimes are suppressed *675 within each particularity. [n.220](#)

What this means, more concretely, is that Professors Johnson and Martinez are right on point when they assert the need for a distinctive emphasis on the particularities on Chicana/o perspectives and experiences, both within and beyond the institutional and programmatic parameters of the LatCrit project. They are also right to suggest that Chicana/o Studies and LatCrit theory may ultimately converge if, and as, Chicana/o Studies become more inclusive and LatCrit theory continues to encourage a theoretical and political attention to the particularities of subordination experienced by the many different Outgroups that have coalesced in the LatCrit movement. [n.221](#) LatCrit III sought to operationalize precisely this theoretical and political commitment to addressing the particularities of subordination by self-consciously and intentionally organizing the BlackCrit focus group discussion as a programmatic event through which a tradition of "rotating centers" might be definitively launched and effectively institutionalized in the organization of LatCrit conferences. [n.222](#) Within this context, a Chicana/o Studies focus group discussion would not be difficult to imagine or to organize for a future LatCrit conference.

Conversely, of course, Chicana/o activists might likewise effectuate and expand upon Professors Johnson's and Martinez's call for attention to and respect for Chicana/o particularities, for example, by centering the experiences and perspectives and listening to the stories of Chicanas/os, who have experienced Chicana/o activism from positions located outside the parameters of identity and relations of solidarity defined and delimited by Chicana/o intellectual and political elites. [n.223](#) Beyond that, Chicana/o Studies activists and scholars might, as Professors Johnson and Martinez suggest, invite the comments and perspectives of non-Chicana/o Latinas/os, who share their commitment to an anti-subordination social justice agenda. Making these and other similar moves might indeed produce the ultimate convergence of Chicana/o Studies and the *676 anti-essentialist, anti-subordination agenda that, thus far, has defined LatCrit theory as the collective and collaborative project of a diverse group of critical scholars and activists.

In this vein, the essays by Professors Mutua and Mahmud offer very different, but equally appropriate, reference points for the future development of LatCrit theory. Professor Mutua draws on her experiences at LatCrit III, and particularly her reflections on the BlackCrit focus group featured at the conference, in order to develop a deeply moving analysis and theoretically sophisticated framework for comparing the racialization of Latinas/os and Blacks. Professor Mahmud's essay, by contrast, draws upon, and introduces for the first time ever in a LatCrit symposium, the rich discourse of post-colonial theory and scholarship. Both essays acknowledge and explore the broader

political implications of the fact that white supremacy operates through the ideological articulation and legal machinery of multiple racial systems. Both essays thus call upon LatCrit scholars to focus attention and deepen our comparative analysis of the various and varied modalities through which these different racial systems produce the subordination of peoples of color, both within and beyond the United States.

Professor Mutua's immediate objective is to articulate a theoretical framework that can effectively ensure that the LatCrit practice of "rotating centers" will trigger meaningful substantive analysis of the different ways in which white supremacy configures relations of relative privilege and oppression among different non-white groups and the intergroup rivalries that are thereby activated--as much by an uncritical embrace of the privileges conferred on one's own group, at the expense of another--as by an uncritical emphasis on the oppression endured by one's own group, but not the other. Focusing specifically on the intergroup tensions between Blacks and Latinas/os, Professor Mutua shows how the notion of "shifting bottoms" provides the necessary theoretical framework for linking the practice of "rotating centers" to a careful and critical analysis of the different racial systems through which Blacks and Latinas/os are relegated to their respective "bottoms." Once these different racial systems are identified and deconstructed, LatCrit scholars will be better able to understand the many obstacles confronting our hopes of achieving genuine intergroup solidarity and justice. These hopes confront profound challenges because Latinas/os, Blacks and Asians are privileged and oppressed by different racial systems. Dismantling one racial system, will not necessarily dismantle the others. On the contrary, it may actually reinscribe the remaining systems and enable their more virulent entrenchment in American society. Thus non-white groups are really and always potentially in conflict--absent a genuine and self-conscious commitment to anti-essentialist intergroup justice. [n.224](#)

To this end, Professor Mutua's analysis makes three distinct, yet interconnected, theoretical moves of particular salience to the future development of LatCrit theory. The first is to recognize that the practice of "rotating centers" is not about "celebrating diversity." LatCrit organizers want to institutionalize the practice of rotating centers because it offers a valuable lens through which to examine, among other things, the different ways in which white supremacy configures relations of privilege and subordination within and between non-white groups. By articulating the notion of "shifting bottoms" Professor Mutua offers a valuable guidepost for deciding where the center should rotate next. This is because, as her analysis suggests, the practice of rotating centers will maintain its critical edge and effectuate its anti-subordination objectives only so long as it remains relentlessly committed to seeking and asserting the perspectives of those at the bottom of any particular context in which white supremacy is present and operative. [n.225](#)

Professor Mutua's second move links the notion of "shifting bottoms" to a detailed and comparative analysis of the different racial systems operating in the United States. Through a detailed analysis of these different systems, Professor Mutua makes a compelling case for concluding that Blacks, Asians and Latinas/os are racialized in different ways--such that Blacks are raced as "colored," Asians are raced as "foreign," and "Latino/as when they are not raced as black or white are 'raced' as hybrid (being

"raced" both as partially foreign and partially colored in a way that racializes their ethnicity and many of its components.)" [n.226](#) These different racial systems structure intergroup relations in ways that produce "shifting bottoms" between Blacks, Asians and Latinas/os, so that "different faces appear at the bottom of the well depending on the issue analyzed." [n.227](#) Thus, while (some) Latinas/os may be relatively privileged by the "racial mobility" of putative whiteness in the racial system that marks Blacks as colored, (some) Blacks may be relatively privileged by the presumption of an American national and cultural identity in the racial system that marks Latinas/os as hybrids and foreigners.

Her third and final move links the intergroup tensions between Blacks and Latinas/os, over such issues as language rights, immigration ***678** policies and affirmative action, to the shifting configurations of privilege and oppression created by these different racial systems. The aspiration underlying the theory and practice of coalitional politics has repeatedly been cast as a collective struggle to move beyond the divide and conquer dynamics of inter-group competition within white supremacy to a collaborative project aimed, instead, at eliminating white supremacy through a politics of intergroup solidarity and a commitment to intergroup justice. Professor Mutua's detailed analysis of the different racial systems organizing Black and Latina/o subordination furthers this project by revealing how tensions between Blacks and Latinas/os reflect the different configurations of privilege and oppression visited upon these different groups by the particular dynamics of different racial systems. Even more importantly, it clearly and powerfully drives home the point that achieving intergroup justice is not simply a matter of eliminating oppression, but also of giving up privilege. This means that each group will have to confront and forswear the privileges conferred on them by the racial systems that oppress groups other than themselves-- if there is ever to be genuine solidarity based on a shared commitment to objective justice. [n.228](#)

At the same time, however, it is important to recognize the limitations of Professor Mutua's theoretical framework--not so as to undermine or discount the substantial advances it makes in the articulation of LatCrit coalitional theory, but rather so as to mark future directions for LatCrit analysis. More specifically, I wonder how the experiences of Black Haitians, and other immigrant Black identities would be mapped within and across the various racial systems delimited by Professor Mutua's framework. [n.229](#) More generally, I wonder what focusing specifically on marginalized and intersectional identities of Black Latinas/os, Black Asians, Asian Latinas/os and so on and so forth, would teach us about the interconnections and disjunctures between the various racial systems and other racial systems, we have yet to identify and deconstruct. Indeed, in this respect, Professor Mahmud's essay closes this section as if by design.

Focusing specifically on the various racial systems constructed in and through the British colonial project in India, Professor Mahmud illustrates the tremendous mileage to be gained from of a serious LatCrit encounter with post- colonial theory and discourse. Like Professor Mutua, his essay offers a detailed analysis of the discourses and practices through which different racial systems were constructed in the past ***679** and are reflected in the present conflicts and tensions among different racialized groups. By locating this analysis in the particularities of European colonialism, Professor Mahmud provides a valuable framework for expanding the critical analysis of

racialization beyond the territorial boundaries, cultural ideologies and domestic concerns of the United States. There is no question that his essay marks a future trajectory for LatCrit theory.

B. Institutionalizing Solidarity and Practicing Mutual Recognition

The cluster afterword submitted by Professor Montoya in conjunction with her cluster introduction, as well as the essays by Professor Phillips and by Professors Ortiz and Elrod provide an appropriate occasion to shift the focus of attention from the theoretical foundations and future trajectories of LatCrit theory to the more concrete and practical challenges of ensuring the continued institutional and programmatic evolution of the LatCrit project. Some of the challenges thus far confronted, as well as the various strategies LatCrit organizers have implemented to meet these challenges, are detailed in Professor Valdes' Afterword. [n.230](#) Nevertheless, these last three essays each raise important issues concerning (1) the internal dynamics, historical development and future evolution of LatCrit conferences and the organizational practices and structures needed to sustain this movement; [n.231](#) (2) the relationship between LatCrit and other networks and organizations of critical scholars; [n.232](#) and (3) the overarching necessity of ensuring that these concerns are mediated in ways that preserve and enhance a common ethic of authentic human sharing, inclusivity and connection. This last point is key. The LatCrit community can and should continue to grow and expand, even as we continue also, rigorously and honestly, to explore our substantive differences of position and perspective in the spirit and expectation of lively and lasting friendship based on a shared commitment to an anti-essentialist anti- subordination vision and politics. [n.233](#)

To these ends, Professor Montoya's cluster afterword features interviews with two Chicana scholars involved in the National Association for Chicana/Chicano Studies. Through a candid and detailed narrative of the problems confronted in that particular context, these interviews offer valuable insights into the difficulties any collective project can eventually encounter as its participants confront the consequences of their own success. One such consequence, noted in these ***680** interviews, is the activation of an all- too-human tendency to abandon the ethic of mutual recognition and the aspirations it embodies, and to jockey instead for positions of individual prominence, whether real or imagined. This cannot be allowed to happen again. Too much is at stake in the here and now of this moment of retrenchment and hostility to the cause of social justice and genuine human interconnection. [n.234](#)

Operationalizing an ethic of mutual recognition, in this context, means recognizing the efforts and contributions of particular individuals, rather than attributing current collective achievements to impersonal historical forces or to the heroes (or heroines) of a distant past. Though there can be no question that the LatCrit movement draws its energy and substantive value from the many scholars, who have chosen to find, or to plant, their roots in the LatCrit community, it is also true that the organization of appropriate venues, the construction of appropriate contexts for performing community and producing a collective learning process and the negotiation of publication commitments that enable these efforts to be recorded and broadly disseminated do not

happen automatically without the efforts and energy of particular individuals, who at specific points in time, take up the burdens and challenges of creating the opportunities that enable community. The history of these efforts in the development of LatCrit theory has yet to be told. As Professor Montoya's afterword suggests, much could be learned from the telling. That history, in its full detail, has much to teach about the meaning and value of perseverance, solidarity and intellectual, professional and personal generosity. That history, in its full detail, will have to await another moment and venue, but the lessons embedded in Professor Montoya's cluster afterword underscore the necessity and value of recorded history. [n.235](#) With that in mind, a few notes for the record are highly in order.

Though the future of the LatCrit movement has yet to unfold, its history began, without question or doubt, in the Critical Race Theory Workshop. It began there because, in its most proximate and concrete form, LatCrit began with the vision and efforts of my friend and colleague Francisco Valdes. That vision is reflected in Frank's *681 Afterword, [n.236](#) but his many efforts on behalf of the LatCrit community are not. From the initial gathering of law professors which produced the first ever Colloquium seeking to locate Latinas/os in the discourse of Critical Race Theory and, in doing so, gave birth to the "LatCrit" movement, [n.237](#) and ultimately to this LatCrit III conference, Frank's efforts to build an inclusive community of scholars and activists, to promote a theoretically sophisticated and analytically rigorous anti-essentialist critical legal discourse and, above all, to combat the marginalization of Latina/o communities in American legal culture have been a driving force behind, and an unselfish source of energy and practical assistance to, the organization of LatCrit conferences, the publication of LatCrit scholarship and the consolidation of the LatCrit community. To locate the roots of LatCrit theory in any other venue, history or project, without accounting for the efforts of this particular man and the immediate context that inspired these efforts, would be an unfortunate distortion of the unrecorded history of the LatCrit movement.

Just as Professor Montoya's cluster afterword counsels LatCrit organizers to negotiate the future growth and the institutionalization of structures and procedures for the LatCrit project with care and fidelity to the ethic of mutual recognition, the commitment to unequivocal inclusiveness and the aspirations of collective solidarity and transformative social justice praxis that initially gave it birth, Professor Phillips's contribution counsels LatCrit organizers and scholars to attend to the needs and concerns of other networks and organizations of critical legal scholars. Whether her institutional proposal to coordinate LatCrit conferences and Critical Race Theory Workshops through an every-other-year rotation, or some other appropriate variation, is ultimately adopted, the objectives, concerns and aspirations that inform her proposal warrant serious LatCrit attention and consideration. Working out the programmatic and institutional details of the relationship between LatCrit conferences and activities and the Critical Race Theory Workshops, as well as the details of LatCrit participation in venues like APACrit conferences, Law and Society, People of Color Conferences, the NAIL and TWAIL networks focusing on New and Third World Approaches to International Law, INTEL's International Network on Transformative Employment & Labor Law and the Critical

Legal Studies Network, to name but a few, are pending matters of increasing importance. Ultimately, taking seriously the commitment to social transformation through law means taking *682 seriously the coordinated synergies that only our collaborative efforts can produce.

Finally, the essay by Professors Ortiz and Elrod provides a vivid image of the community spirit, collegiality and cultural ethos the LatCrit movement must not ever lose. Though the LatCrit project aspires to the serious objective of producing transformative anti-essentialist legal theory and praxis, it aspires also to the realization of the human need for genuine community, solidarity and friendship. Whether LatCrit conferences and activities will continue to provide an intellectual and political home for scholars and activists committed to the project of social justice depends on the degree to which we continue to structure our gatherings as spaces where the personal and professional are equally valued and accommodated.

Conclusion

LatCrit III undoubtedly marked a watershed event in the evolution of the LatCrit movement, both as the most recent intervention in outsider jurisprudence and as a community of scholars and activists. This Foreword has sought, in a caring, careful and analytically rigorous manner, to highlight the advances and engage the problems embedded in the essays that now constitute the only record of this wonderful event. Heeding prior calls and applying the methodologies advocated in earlier LatCrit scholarship, this Foreword has worked to situate the contributions of this symposium within the broader discursive background that has already been developed through substantial efforts, and at great cost, by other critical scholars. [n.238](#) This positioning, as previously explained and once again repeated, "requires a broad learning and caring embrace of outsider jurisprudence and, in particular, of the lessons and limits to be drawn from its experience, its substance and its methods." [n.239](#) It also counsels LatCrit scholars to recognize the importance of critical engagement and mutual recognition. Through our critical and focused engagement in each other's work and ideas, we will ourselves, grow intellectually and politically, even as we foster each other's growth and development. Through our commitment to mutual recognition, we will promote the dissemination of LatCrit anti-essentialist, anti-subordination theory and, thereby--with a little luck and a lot of hard work--trigger the paradigm shifts that are imperative for the 21st century. The future is as bright as we make it together.

NOTES:

- [n.1.](#) LatCrit scholarship has virtually exploded in the last three years. In addition to the published proceedings of LatCrit I, see Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 Harv. Latino L. Rev. 1 (1997) and LatCrit II, see Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, [19 Chicano-Latino L. Rev. 1](#) (1998), LatCrit scholars have also produced a first- ever

- symposium exploring major issues in international law and international human rights from a critical race perspective. See [Symposium, International Law, Human Rights and LatCrit Theory, 28 U. Miami Inter-Am. L. Rev. 1 \(1997\)](#). LatCrit scholarship has also been published in a stand-alone volume, see [Symposium, LatCrit Theory, Latinas/os and the Law, 85 Cal. L. Rev. 1087 \(1997\)](#), [10 La Raza L. J. 1 \(1998\)](#). For proceedings of the gathering of Latina/o Law Professors that gave birth to the LatCrit project, see Colloquium, Representing Latina/o Communities: Critical Race Theory and Practice, [9 La Raza L. J.S 1 \(1996\)](#). For a particularly insightful overview of the purposes and commitments of the LatCrit movement, see [Francisco Valdes, Under Construction: LatCrit Consciousness, Community and Theory, 85 Cal. L. Rev. 1087, 93-96 \(1997\)](#), [10 La Raza 1, 7-10 \(1998\)](#) [hereinafter Valdes, Under Construction]. For proceedings of the LatCrit IV conference, see Symposium, Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections, [33 U.C. Davis L. Rev. \(forthcoming 2000\)](#).
- [n.2.](#) For a sense of the substantive issues that triggered the eruptions at LatCrit II, see Elvia R. Arriola, Foreword: March!, [19 Chicano-Latino L. Rev. 1, 26-7 \(1998\)](#) [hereinafter Arriola, Foreword: March!]; Nancy K. Ota, Falling From Grace: A Meditation of LatCrit II, [19 Chicano-Latino L. Rev. 437 \(1998\)](#); Reynaldo Valencia, On Being an Out Catholic: Contextualizing the Role of Religion at LatCrit II, [19 Chicano-Latino L. Rev. 449 \(1998\)](#); Emily Fowler, Disturbing the Peace, [19 Chicano-Latino L. Rev. 479 \(1998\)](#); Margaret E. Montoya, Religious Rituals and LatCrit Theorizing, [19 Chicano-Latino L. Rev. 417 \(1998\)](#); Elizabeth M. Iglesias & Francisco Valdes, Afterword: Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas, [19 U.C.L.A. Chicano-Latino L. Rev. 503, 539 \(1998\)](#) (declining to engage in retrospective accounts of events, in favor of reflecting instead on the substantive issues raised by the clash of perspectives).
- [n.3.](#) The eruptions at LatCrit II raised substantial doubts about the continuity of the project. Communities may form spontaneously, but they do not evolve automatically, particularly not communities of choice and will that are little more than an imagined act of solidarity amongst people separated by so many differences. The organization of appropriate venues for performing community is critical to its evolution, but this also does not happen automatically. It falls to particular individuals at specific points in time to create the venues that enable community. Thus these communities are as fragile as the individuals upon whose energy, initiative and good will they depend. LatCrit II drained us.
- [n.4.](#) See [Elvia R. Arriola, LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Dispair in INS Raids, 28 U. Miami Inter-Am. L. Rev. 245 \(1996-97\)](#) [hereinafter Arriola, INS Raids (emphasizing the importance of LatCrit community building); Arriola, Forward: March!, supra note 2 (same)].
- [n.5.](#) See Elizabeth M. Iglesias, The Inter-Subjectivity of Objective Justice: A Theory and Praxis for Constructing LatCrit Coalitions, [2 Harv. Latino L. Rev. 467-71 \(1997\)](#); Elizabeth M. Iglesias, Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. NOT!, [28 Harv. C.R.-C.L. L. Rev. 395, 476-78 \(1993\)](#) [hereinafter Iglesias, Structures of Subordination (the intersubjectivity of equals: moral imperative and institutional blueprint)]; id. at 493 n.324 (intra-feminist solidarity must be based on more than "touchy-feely" sentiments); id. at 475-78 (solidarity among women of color based on justice, not sentimentality).
- [n.6.](#) See infra note 105 and accompanying text (discussing objectives and drawing lessons from the LatCrit III focus group discussion entitled From Critical Race Theory to LatCrit to BlackCrit? Exploring Critical Race Theory Beyond and Within the Black/White Paradigm, see <<http://nersp.nerdc.ufl.edu/~tilde>malavet/latcrit/archives/lciii.htm>>).
- [n.7.](#) See, e.g., [Stephanie L. Phillips, The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History, 53 U. Miami L. Rev. 1247 \(1999\)](#); Francisco Valdes, Afterword: Theorizing "OutCrit" Theories: Coalitional Method and comparative Jurisprudential Experience-RaceCrits, QueerCrits and LatCrits, [53 U. Miami L. Rev. 1265 \(1999\)](#) [hereinafter Valdes, "OutCrit" Theories].
- [n.8.](#) See, e.g., [Dorothy E. Roberts, BlackCrit Theory and the Problem of Essentialism, 53 U. Miami L. Rev. 855 \(1999\)](#) [hereinafter Roberts, BlackCrit Theory; Athena Mutua, Shifting Bottoms and

Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm, [53 U. Miami L. Rev. 1177 \(1999\)](#); see also The Meanings and Particularities of Blackness in Latina/o Communities, LatCrit IV Substantive Program Outline (reflecting the intellectual growth and theoretical development generated by the BlackCrit focus group discussion), <<http://nersp.nerdc.ufl.edu/<tilde>malavet/latcrit/lcivdocs/lcivsubs.htm>>.

- [n.9.](#) To be sure, lounging on the pool deck of the luxurious Eden Roc Hotel, I did experience a moment of cognitive dissonance, which I was quickly able to resolve because I've never bought the line that our commitment to anti- subordination might be rendered any less authentic by sharing some moments of privilege. To my mind, that view reflects a crabbed and myopic misunderstanding of the ethical substance, political objectives and emotional dimensions of the practice of liberation politics. See, e.g., Jose Miranda, Marx and the Bible: A Critique of the Philosophy of Oppression (John Eagleson trans., 1974) (distinguishing the structural concept of "differentiating wealth" from the individual ownership of property). Like John Hayakawa Torok, I think LatCrit scholars need to find ways to provide ourselves and each other respite from the conflict and controversy to which our anti-subordination commitments routinely expose us--precisely so that we never give up or burn out. See [John Hayakawa Torok, Finding the Me in LatCrit Theory: Thoughts on Language Acquisition and Loss, 53 U. Miami L. Rev. 1019 \(1999\)](#).
- [n.10.](#) See, e.g., [Charles R. Lawrence III, The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 \(1987\)](#) (unconscious racism pervasive); Angela J. Davis, Prosecution and Race: The Power and Privilege of Discretion, [67 Fordham L. Rev. 13 \(1998\)](#) (unconscious racism in criminal justice system); Sylvia R. Lazos-Vargas, Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity, [58 Md. L. Rev. 150, 263-64 \(1999\)](#) (unconscious racism in interpretation of affirmative action); Susan Sturm, Race, Gender, and the Law in the Twenty-first Century Workplace: Some Preliminary Observations, 1 U. Pa. J. Lab. & Emp. L. 639 (1998) (unconscious racism in labor and employment policies and practices).
- [n.11.](#) See Francisco Valdes, Outsider Scholars and 'OutCrit' Perspectivity: Postsubordination Vision as Jurisprudential Method, 49 De Paul L. Rev. 3 (forthcoming 2000).
- [n.12.](#) The LatCrit III Substantive Program Outline can be found by visiting the LatCrit webpage at <<http://nersp.nerdc.ufl.edu/<tilde> malavet/latcrit/archives/lciii.htm>>.
- [n.13.](#) See id. (for webpage address).
- [n.14.](#) This emphasis on the local politics in South Florida is consistent with prior practice of planning LatCrit conferences to use the location of our conferences to increase our collective knowledge of the particularities of Latina/o realities across geographical areas. See Iglesias & Valdes, *supra* note 2, at 574 n.185 (discussing the economic tour of San Antonio as another instance of engaging the particularities of the areas in which the conference is held).
- [n.15.](#) Elizabeth M. Iglesias, Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debate, [28 U. Miami Inter-Am. L. Rev. 361 \(1996-97\)](#) [hereinafter Iglesias, International Economic Law (exploring the way different intra-Latina/o collective identities and political alliances-- some more progressive than others--are triggered by the discourses of development, dependency and neo-liberalism and the very different impact these alliances would have on the project to link enforcement of human rights to trade and finance regimes regulated by international economic law). My point here is that the configuration of collective identities and political alliances is not "naturally" given. Nor do they flow directly from our position within any particular "group." Instead, these identities and alliances are constructed in and through the discourses we deploy. Historical comparisons are precisely the kinds of discourse that organize political alliances and construct collective identities, for better or worse. It is therefore critical to subject any inter-group comparisons to the kind of political alignment analysis I am again suggesting here. For a different, but allied, vision of the kind of political impact analysis that is needed, see Sumi Cho, Essential Politics, 2 Harv. Latino L. Rev. 433 (1997) [hereinafter Cho, Essential Politics].
- [n.16.](#) See [Catherine Peirce Wells, Speaking in Tongues: Some Comments on Multilingualism, 53 U. Miami L. Rev. 983 \(1999\)](#) (providing a clear and beautiful account of the way our ethic of inter-

- group relations needs to progress beyond a level where mutual recognition and regard depends on the identification of commonalities to a level where we learn to value difference itself).
- n.17. See, e.g., [Alice Abreu, Lessons from Latcrit: Insiders and Outsiders, All at the Same Time, 53 U. Miami L. Rev. 787 \(1999\)](#) (critiquing tendency to channel Latinas/os into fields deemed particularly relevant to Latinas/os).
- n.18. See *infra* notes 108-117 and accompanying text (reconstructing relationship between universal and particular in the articulation of anti-essentialist critical legal theory).
- n.19. Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, [9 La Raza L.J. 1, 11-12 \(1996\)](#) (noting that the publication of LatCrit conferences serves "to build relationships among and between Latina/o legal scholars and journals; [and in this way ... foster the work and success of both]").
- n.20. [Guadalupe T. Luna, On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sandford, 53 U. Miami L. Rev. 691 \(1999\)](#) [*hereinafter* Luna, *Complexities of Race*; Cheryl Little, *Intergroup Coalitions and Immigration Politics: The Haitian Experience in Florida*, [53 U. Miami L. Rev. 717 \(1999\)](#); Lyra Logan, *Florida's Minority Participation in Legal Education Program*, [53 U. Miami L. Rev. 743 \(1999\)](#); Virginia P. Coto, *LUCHA, The Struggle for Life: Legal Services for Battered Immigrant Women*, [53 U. Miami L. Rev. 749 \(1999\)](#)].
- n.21. Luna, *Complexities of Race*, *supra* note 20; see also [Guadalupe Luna, Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a Naked Knife, 4 Mich. J. Race & L. 39 \(1998\)](#).
- n.22. I follow Professor Luna's terminology, which itself follows Professor Matsuda's earlier rejection of the term "minority" in favor of the term "outsider" on the grounds that the former terminology contradicts "the numerical significance of the constituencies typically excluded from jurisprudential discourse." Luna, *Complexities of Race*, *supra* note 20, at 695 n.20 (citing [Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 \(1989\)](#)).
- n.23. See *Arriola, INS Raids*, *supra* note 4; Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, [28 U. Miami Inter-Am. L. Rev. 263 \(1997\)](#); Enid Trucios-Haynes, *The Role of Transnational Identity and Migration*, [28 U. Miami Inter-Am. L. Rev. 293 \(1997\)](#).
- n.24. See [Stuart A. Streichler, Justice Curtis's Dissent in The Dred Scott Case: An Interpretive Study, 24 Hastings Const. L.Q. 509, 534 \(1997\)](#) (noting Taney's position that "[an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws could hardly be dignified with the name of due process of law.>").
- n.25. Dred Scott's substantive claim was that he was a free man by virtue of his years of residency in Illinois, a free state, and in the territories of the Louisiana Purchase that were designated free by the Missouri Compromise. Scott had traveled to these areas from his original place of residence in Missouri, a slave state, in the company and with the permission of his owner, John Emerson. Scott had married and resided in free territory for a number of years before returning to Missouri with his wife and children at Emerson's request. Back in Missouri, Emerson died and Scott sued for his freedom in state court. Settled precedents at the time held that slaves who traveled to and resided within the jurisdiction of a free state or territory, with permission of their owners, were automatically free. Residence within these jurisdictions effected this emancipation precisely because slavery was not legally recognized in these areas. It was further settled that once emancipated by residence in a free state or territory, the free individual was not re-enslaved by mere act of returning to or residing within a slave state, but was rather entitled to have her/his free status legally recognized within the slave state. When the Missouri Supreme Court reversed the jury verdict rendered in Scott's favor and, in the process, reversed these established precedents, Scott brought suit in federal court, invoking the court's diversity jurisdiction, which applies to cases "between Citizens of different States." Scott asserted Missouri citizenship in his suit against John Sanford, who was the brother of his owner's widow and was, at the time of the lawsuit, a citizen of New York. See [Jane Larson, A House Divided: Using Dred Scott to Teach Conflict of Laws, 27 U. Tol. L. Rev. 577 \(1996\)](#); Mark A. Graber, *Desperately Ducking Slavery: Dred Scott*

- and Contemporary Constitutional Theory, [14 Const. Comment. 271](#) (1997).
- [n.26.](#) See Peter L. Reich, Western Courts and the Privatization of Hispanic Mineral Rights Since 1850: [An Alchemy of Title](#), [23 Colum. J. Envtl. L. 57](#) (1998); Robert V. Urias, The Tierra Amarilla Grant, Reises Tijerina, and the Courthouse Raid, [16 Chicano-Latino L. Rev. 141](#) (1995).
- [n.27.](#) See [Symposium, The Long Shadow of Korematsu](#), [40 B.C. L. Rev. 1](#); [19 B.C. Third World L. J. 1](#) (1999).
- [n.28.](#) See, e.g., [Adrienne D. Davis, The Private Law of Race and Sex: An Antebellum Perspective](#), [51 Stan. L. Rev. 221](#) (1999) (examining the impact of slave/master sexual relations through lens of antebellum wills and estate cases); Margalynne Armstrong, Race and Property Values in Entrenched Segregation, [52 U. Miami L. Rev. 1051](#) (1998) (exploring the impact of racism on value of Black-owned property and the interpretation of the anti-discrimination mandate in the struggle for fair housing); Keith Aoki, No Right to Own?: The Early Twentieth-Century "Alien Land Laws" As a Prelude to Internment, [40 B.C. L. Rev. 37](#); [19 B.C. Third World L. J. 37](#) (1998) (laws barring agricultural land ownership by Asians); Gloria L. Sandrino, The NAFTA Investment Chapter And Foreign Direct Investment in Mexico: A Third World Perspective, [27 Vand. J. Transnat'l L. 259](#) (1994) (providing critical analysis of First/Third World battles over scope of duty to compensate expropriation).
- [n.29.](#) See, e.g., [Jose E. Alvarez, Critical Theory and the North American Free Trade Agreement's Investment Chapter Eleven](#), [28 U. Miami Inter-Am L. Rev. 303](#) (1996-97) (critical analysis of investor rights regime established by NAFTA reveals how economic and political interests of privileged are given priority of over economic and political rights of poor); Keith Aoki, Neocolonialism, Anticommons Property, And Biopiracy in The (Not-So-Brave) New World Order of International Intellectual Property Protection, [6 Ind. J. Global Legal Stud. 11](#) (1998) (new wave expropriation of indigenous peoples through "biocolonialism"); Iglesias, International Economic Law, *supra* note 15, at 386 (noting that the rights of property so centrally featured in the Cuban Liberty and Democracy Act are not equally respected when the property rights at issue are the rights of indigenous peoples displaced from their communal lands without just compensation).
- [n.30.](#) For an analysis calling for critical legal scholarship that centers the legal structures of political economy in the analysis of white supremacy, see Elizabeth M. Iglesias, Out of the Shadow: Marking Intersections In and [Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Theory](#), [40 B.C. L. Rev. 349](#); [19 B.C. Third World L. J. 349](#) (1998) [[hereinafter Iglesias, Out of the Shadow. To this end, a critical comparative analysis of the way economic interests have/not been recognized as property rights across different sociolegal contexts might provide significant insights in developing an anti-essentialist anti-subordination analysis of the legal structure of American political economy. Compare, Reich, *supra* note 26 (recounting the doctrinal manipulations that integrated subsurface mineral rights into ownership of surface lands), with [Local 1330 United Steel Workers of America v. United States Steel Corp.](#), [631 F.2d 1264](#) (6th Cir.1980) (refusing to recognize community property rights as basis for enjoining management to sell factory it had decided to close despite evidence of profitability, and devastating impact of closure on community that had assisted company with public subsidies and other "giveback").
- [n.31.](#) Luna, Complexities of Race, *supra* note 20, at 710.
- [n.32.](#) See Claud Anderson, Black Labor, White Wealth: The Search for Power and Economic Justice (1994).
- [n.33.](#) See, e.g., Dorothy Roberts, Racism and Patriarchy in the Meaning of Motherhood, [1 Am. U. J. Gender & L. 1, 7-10](#) (1993) (recounting brutality of slave system); see also [Sumi K. Cho, Multiple Consciousness and the Diversity Dilemma](#), [68 U. Colo. L. Rev. 1035, n.103](#) (1997) (arguing for a unified racial critique of white supremacy based on commonalities in the racial trauma of slavery visited upon indigenous peoples and Blacks).
- [n.34.](#) See [Angela P. Harris & Leslie Espinoza, Afterword: Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race](#), [85 Cal. L. Rev. 1585](#); [10 La Raza 499](#) (1997) (exploring the tensions between the rhetoric of Black exceptionalism and multiracial coalitions).
- [n.35.](#) Luna, Complexities of Race, *supra* note 20.

- [n.36.](#) See [Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 Fla. St. U. L. Rev. 1 \(1998\)](#); Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901- 1922)*, [65 Rev. Jur. U.P.R. 225 \(1996\)](#).
- [n.37.](#) Luna, *Complexities of Race*, supra note 20, at 713, quoting Dred Scott opinion: 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. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizen' 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 the Government might choose to grant them. *Id.*
- [n.38.](#) For example, a discourse of common oppression might reveal otherwise invisible interconnections in the denial of political rights to non-citizens and the felony disenfranchisement laws that operate defacto to construct many Blacks as non-citizens. Compare Nora V. Demleitner, *The Fallacy of Social "Citizenship," or The Threat of Exclusion*, [12 Geo. Immigr. L. J. 35 \(1997\)](#) (arguing that permanent residents have a compelling claim to political representation and participation), with Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, [48 Case W. Res. L. Rev. 727 \(1998\)](#) (noting that "[of a total voting age population of 10.4 million Black men in the United States, approximately 1.46 million have been disqualified from voting because of a felony conviction. Of these, 950,000 are in prison, on probation, or parole, and more than 500,000 are permanently barred by convictions in the 13 states that disenfranchise prisoners for life.").
- [n.39.](#) Thus, for example, in [United States v. Verdugo-Urquidez](#), 494 U.S. 1092, 110 S. Ct. 1839 (1990), the present-day court reasoned that the 4th Amendment did not apply extraterritorially to U.S. enforcement activities taken abroad against non-U.S. citizens because the latter did not constitute part of "the people" protected by the Constitution. Though the majority at no time cited the Dred Scott decision, its reasoning reveals the legacy of Dred Scott: a discursive order that can be readily reactivated to consolidate an imperial state. Because noncitizens are not part of "the people," they can, at any moment, be made the objects of unlimited state power.
- [n.40.](#) [Saenz v. Roe](#), 119 S. Ct. 1518 (1999), illustrates another way the "dead hand" of the Dred Scott decision reaches into present day legal controversies. In *Saenz*, a majority of the Supreme Court struck down a California statute imposing durational residency requirement by limiting Temporary Assistance to Needy Families (TANF) benefits through the recipients' first year of residence on the grounds it violated 14th Amendment right to travel. In dissent, Clarence Thomas cites the Dred Scott decision to support his contention that the rights and privileges of U.S. citizenship do not include welfare rights. *Id.* Cf. Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 Yale L. Rev. 1563 (1996) (exploring the implications of racism through analysis linking welfare rights to a substantive vision of social citizenship).
- [n.41.](#) See [Gil Gott, *A Tale of New Precedents: Japanese-American Internment As Foreign Affairs Law*, 40 B.C. L. Rev. 179; 19 B.C. Third World L. J. 179 \(1998\)](#) (arguing national security ideology legitimates deployment of imperial power to enforce white supremacy both within and beyond the territorial jurisdiction of the United States); Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians - A Case Study*, [40 B.C. L. Rev. 275; 19 B.C. Third World L. J. 275 \(1998\)](#) (same).
- [n.42.](#) Luna, *Complexities of Race*, supra note 20, at 711.
- [n.43.](#) See [Iglesias, *Out of the Shadow*](#), supra note 30 (calling for more collaborative projects organized self-consciously around the exploration and comparison of particular histories). These kinds of

comparisons show us commonalities even as they challenge us to confront and overcome our internal racisms, sexism, etc. They do not constitute a war of positions because the point is not to establish which group is more oppressed, but to understand how they are/were oppressed in order to change the way we are in community.

- [n.44.](#) See David Harlan, *The Degradation of History* at xx-xxii (1997). Lamenting the impact of postmodern thought on historical practice, Harlan asks "What now becomes of the "historical fact," once so firmly embedded in its proper historical context--firmly embedded rightly perceived, and correctly interpreted from a single immediately obvious and obviously appropriate perspective? The overwhelming abundance of possible contexts and perspectives, the ease with which we can skip from one to another, and the lack of any overarching metaperspective from which to evaluate the entire coagulated but wildly proliferating population of perspectives--all this means that the historical fact, once the historian's basic atomic unit, has jumped its orbit and can now be interpreted in any number of contexts, from a virtually unlimited range of perspectives. And if the historical fact no longer comes embedded in the natural order of things ... then what happens to the historian's hope of acquiring stable, reliable, objective interpretations of the past? Id. at xx.
- [n.45.](#) See Jerome McCristal Culp, Jr., *Latinos, Blacks, Others & The New Legal Narrative*, 2 Harv. Latino L. Rev. 479 (1997); Elizabeth M. Iglesias, *The Inter-Subjectivity of Objective Justice: A Theory and Praxis for Constructing LatCrit Coalitions*, 2 Harv. Latino L. Rev. 467 (1997); George Martinez, *African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, [19 Chicano-Latino L. Rev. 213](#) (1998).
- [n.46.](#) *Nicaraguan Adjustment and Central American Relief Act (NACARA)*, Pub. L. No. 105-100, 111 Stat. 2160 (1997). NACARA is part of the Fiscal Year 1998 appropriations bill for the District of Columbia (H.R. 2607).
- [n.47.](#) Little, *supra* note 20, at 732. The interdiction, detention and parole policies aptly call attention to the disparities in our treatment of Cuban and Haitian refugees.
- [n.48.](#) See *supra* notes 15-16 and accompanying text.
- [n.49.](#) See, e.g., Anderson, *supra* note 32 (complaining that immigrants are assisted at the expense of Black Americans); Toni Morrison, *On the Backs of Blacks*, in *Arguing Immigration* 98 (Nicolaus Mills ed., 1994) (arguing that hatred of Blacks is a central step in the "Americanization" of immigrants so that "the move into mainstream America always means buying into the notion of American Blacks as the real aliens"); Juan Perea, *The Black/White Binary Paradigm of Race*, in *The Latino/a Condition: A Critical Reader* 365 (Richard Delgado & Jean Stefancic eds., 1998) (quoting Morrison and acknowledging that Latinas/os participate in this paradigm of "Americanization" by engaging in racism against Blacks or darker-skinned members of the Latino/a community" but noting that "[current [anti-immigrant events ... belie Morrison's notion of American Blacks as "the real aliens").
- [n.50.](#) See Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 Harv. Latino L. Rev. 101 (1997) [hereinafter Johnson, *Latino Legal Scholarship* (discussing Chicano perceptions of Mexican immigrants).
- [n.51.](#) Little, *supra* note 20, at 734.
- [n.52.](#) See [Ari Weitzhandler, Temporary Protected Status: The Congressional Response to the Plight of Salvadoran Aliens](#), 64 U. Colo. L. Rev. 249, 252 ("Two factors contributed significantly to the denial rate: the characterization of Salvadoran nationals as economic immigrants, and the Reagan and Bush Administrations' foreign policies toward El Salvador."); Note, *Political Legitimacy in the Law of Political Asylum*, 99 Harv. L. Rev. 450, 458-64 (1985) (the political dimensions of economic conditions).
- [n.53.](#) Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, [28 St. Mary's L. J. 833](#) (1997).
- [n.54.](#) Cuban-American leaders in Miami have long called for the kind of intervention in Cuba that was undertaken to dislodge the Haitian military dictatorship that overthrew President Aristide. For statistics on the percentage of Miami Cubans who support military interventions of different sorts

- in Cuba, see <<http://www.fiu.edu/orgs/ipor/cubapoll/index.html>>.
- [n.55.](#) Gott, *supra* note 41.
- [n.56.](#) For a substantive vision of the way the international legal order might mediate the relation between the sovereignty of states and the self-determination of peoples, see Henry J. Richardson, III, "Failed States," Self-Determination and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations, [10 Temp. Int'l & Comp. L. J. 1](#), 75 (1996) (revealing irrationality and offering alternatives to international legal doctrines designed to uphold concept of sovereignty by ignoring claims of liberation movements within nation-states until they "earn" such recognition through successful military actions- thus constituting civil war as only recourse).
- [n.57.](#) According to Attorney Little, "Nicaraguan activists have said that Republican members of Congress carried out a jihad in obtaining legal status for them. They didn't do that for Haitians and others excluded and punished by the new law." Let's hope they do that now. Little, *supra* note 20, at 741.
- [n.58.](#) Attorney Little notes that when it became apparent that there was a powerful effort to exclude Haitians in the legislation, "NACARA's architects maintained that if the Haitians were included the bill would die, and supporters of the Haitians in Congress agreed to permit the Central American refugee relief legislation to move forward without including them." *Id.* at 740.
- [n.59.](#) [Derek Bell, Brown v. Board of Education & the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 \(1980\).](#)
- [n.60.](#) See [John A. Powell, An Agenda for the Post-Civil Rights Era, 29 U.S.F. L. Rev. 889 \(1995\)](#) (linking disorganization of civil rights movement among other things to rise of colorblind ideology); Michael J. Klasman, Brown, Racial Change and The Civil Rights Movement, [80 Va. L. Rev. 7 \(1994\)](#) (recounting history); Eric K. Yamamoto, Critical Race Praxis: Race Theory and Political Lawyering in Post-Civil Rights America, [95 Mich. L. Rev. 821 \(1997\)](#) (suggesting strategies for meaningful revival of civil rights agenda).
- [n.61.](#) Iglesias & Valdes, *supra* note 2; Berta Esperanza Hernandez-Truyol, Building Bridges: Latinas and Latinos at the Crossroads, in *The Latino/a Condition*, *supra* note 49, at 24, 30-31 [hereinafter Hernandez-Truyol, Building Bridges (explaining the many ways Latinas/os can tap the experience of intersectionality and multidimensionality to build bridges across differences both within Latina/o communities and between Latina/o and other minority communities); Eric K. Yamamoto, Conflict and Complicity: Justice Among Communities of Color, *2 Harv. Latino L. Rev.* 495 (1997).
- [n.62.](#) Logan, *supra* note 20, at 743.
- [n.63.](#) *Id.* at 747.
- [n.64.](#) See *Where the Injured Fly for Justice, Report and Recommendations of Florida's Supreme Court Racial and Ethnic Bias Study Commission, Part I* (Dec. 11, 1990); see generally Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976).
- [n.65.](#) In 1998, the problems caused by the high number of pro-se litigants in family court prompted the Florida Supreme Court to approve a family law self-help program. See *Court Approves Family Law Self-help Centers*, Fla.BarNews, Dec. 15, 1998, at 5. The problem, however, remains. See, e.g., Jan Pudlow, *Court Asks Family Law Section to Turn Attention to Pro Se Problem*, Fla. Bar News, Aug. 15, 1999, at 17.
- [n.66.](#) See, e.g., Talbot D'Alemberte, *Tributaries of Justice: The Search For Full Access*, 73-APR Fla. B.J. 12, 14 (1999) (noting that after Republican Party took control of Congress in 1995, Congressional funding of legal services for the poor dropped, in real dollars, to its lowest level ever - 12% below what it was when Reagan took office in 1981).
- [n.67.](#) See, e.g., [Bruce A. Green, Foreword: Rationing Lawyers: Ethical And Professional Issues in The Delivery of Legal Services to Low-Income Clients, 67 Fordham L. Rev. 1713 \(1999\)](#); cf. [Lewis A. Kornhauser & Richard L. Revesz, Legal Education And Entry Into The Legal Profession: The Role of Race, Gender, And Educational Debt, 70 N.Y.U. L. Rev. 829 \(1995\)](#) (advocating scholarships rather than loan repayment assistance based on analysis linking public interest career choices to factors other than debt burden).
- [n.68.](#) Margaret E. Montoya, *Masks and Resistance*, in *The Latino/a Condition*, *supra* note 49, at 276; Alex

- M. Johnson, Jr., The Under- Representation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective, [95 Mich. L. Rev. 1005 \(1997\)](#); Alex M. Johnson, Jr., Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School And Law Practice, [64 S. Cal. L. Rev. 1231 \(1991\)](#).
- [n.69.](#) Coto, *supra* note 20.
- [n.70.](#) Enrique R. Carrasco, Collective Recognition as a Communitarian Device: Or, Of Course We Want to Be Role Models!, [9 La Raza L. J. 81](#) (1996) (arguing that the project of radical reform requires connected critics acting as role models within institutional contexts of legal education and the profession where power is created and distributed); Phoebe A. Haddon, Keynote Address: Redefining Our Roles in The Battle For Inclusion of People of Color in Legal Education, [31NewEng.L.Rev.709 \(1997\)](#).
- [n.71.](#) See [Eric K. Yamamoto, LatCrit III: Introduction to Plenary Session Four, 53 U. Miami L. Rev. 683 \(1999\)](#) (discussing SALT Action Campaign); see also Phoebe A. Haddon, Education for a Public Calling in the 21st Century, [69Wash.L.Rev.573 \(1994\)](#); Joan Howarth, Teaching in the Shadow of the Bar, [31 U.S.F. L. Rev. 927 \(1997\)](#).
- [n.72.](#) More recently, minority legislators have reportedly put aside their differences and agreed to sponsor a joint proposal to establish two new public law schools in Florida, one at FAMU and the other at FIU. See Mark D. Killian, FAMU/FIU Join Forces for Law Schools, Fla. Bar News, July 1, 1999, at 1. Only time will tell whether this marks the beginning of a more substantive alliance based on mutual commitment to intergroup justice or just another variation on, and instance of, the interest-convergence politics of the past.
- [n.73.](#) Laura M. Padilla, Social and Legal Repercussions of Latinos' Colonized Mentality, [53 U. Miami L. Rev. 769 \(1999\)](#); Abreu, *supra* note 17; Berta Hernandez-Truyol, Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex, [53 U. Miami L. Rev. 811 \(1999\)](#) [hereinafter Hernandez-Truyol, Culture, Gender, and Sex; Siegfried Wiessner, Esa India! LatCrit Theory and the Place of Indigenous Peoples Within Latina/o Communities, [53 U. Miami L. Rev. 831 \(1999\)](#); Roberts, BlackCrit Theory, *supra* note 8.
- [n.74.](#) See, e.g., Ignacio Martin-Baro, Writings for a Liberation Psychology (1996); Nancy Caro Hollander, Love in a Time of Hate: Liberation Psychology in Latin America (1997); Geraldine Moane & Jo Campling, Gender and Colonialism: A Psychological Analysis of Oppression and Liberation (1999); A Guide to Dynamics of Feminist Therapy (Doris Howard ed., 1986).
- [n.75.](#) Valdes, Under Construction, *supra* note 1, at 1106 (noting that Latina/o communities are characterized by high degree of mestizaje or racial intermixture and internal diversity).
- [n.76.](#) Hernandez-Truyol, Building Bridges, *supra* note 61, at 30.
- [n.77.](#) Iglesias & Valdes, *supra* note 2, at 557; see also *infra* at pp. 622-29.
- [n.78.](#) Padilla, *supra* note 73, at 779-84.
- [n.79.](#) Abreu, *supra* note 17, at 794.
- [n.80.](#) *Id.* at 800.
- [n.81.](#) *Id.* (attributing the term minoritized to Celina Romany).
- [n.82.](#) See, e.g., [Elizabeth M. Iglesias, Rape, Race and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality, 49 Vand. L. Rev. 869, 878 n.18 \(1996\)](#) [hereinafter Iglesias, Rape, Race and Representation (challenging the characterization of male power in feminist theory as an inescapable force in women's lives by arguing that the content and exercise of agency is guided more by the different cultural narratives we internalize than by "the reality" of the world we inhabit).
- [n.83.](#) See Iglesias, Structures of Subordination, *supra* note 5 (arguing structures may not determine our fate but they do raise the costs of finding ourselves and each other).
- [n.84.](#) Professor Abreu asks whether, as a Cuban, she would want to embrace a pan-ethnic Latina/o identity: "If the price of counting [as a Latina/o is being cast in the role of victim, do I want to count?" Abreu, *supra* note 17, at 801-02. Cuban-American culture not only eschews any connection to a victim identity, but has also been exceedingly successful at affirming Cuban identity in Miami and everywhere and elsewhere - so much so that Cuban self-affirmation is the subject of internal jokes and external criticism. See, e.g., Earl Shorris, Latinos: A Biography of the People 62-76 (Avon

Books, 1992). At the same time, Professor Abreu's narrative provides an additional and often suppressed perspective on the politics of Cuban inclusion in the "Hispanic category" when she recalls being told that, as a Cuban, she didn't really count. Abreu, *supra* note 17. Her experiences at Cornell University are not unique. Indeed, Cuban-Americans and Ameri-Cubans have long been excluded from the minority category for admissions purposes at the University of Miami School of Law.

[n.85.](#) Padilla, *supra* note 73, at 779.

[n.86.](#) Robert Westley, Lat Crit Theory and the Problematics of Internal/External Oppression: A Comparison of Forms of Oppression and InterGroup/IntraGroup Solidarity, [53 U. Miami L. Rev. 761 \(1999\)](#).

[n.87.](#) Abreu, *supra* note 17, at 801.

[n.88.](#) See U.S. Andersen, *Three Magic Words* (Melvin Powers Wilshire Book Co. 1954).

[n.89.](#) See Iglesias, Rape, Race and Representation, *supra* note 82, at 929- 43 (discussing impact of virgin-whore dichotomy on Latina/o sexuality and offering image of sacred prostitution as resource and example of psycho- cultural resistance), and at 918-29 (discussing gender ideology underlying maternal roles in Latina/o culture and arguing for a culturally nuanced psycho- analytical model of identity formation that recognizes the significance of maternal power and the centrality of familial interdependence in Latina/o culture); see also Jenny Rivera, Domestic Violence against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials, in Adrien K. Wing, *Critical Race Feminism* 259, 260 (1997) [hereinafter Wing, *Critical Race Feminism* (critically analyzing Latina/o cultural constructs of "El Macho" and the sexy latina).

[n.90.](#) Hernandez-Truyol, Culture, Gender, and Sex, *supra* note 73, at 823.

[n.91.](#) See Mutua, *supra* note 8 (analyzing white racism as function of obsession with refusal of Black people to accept their dehumanization).

[n.92.](#) See Iglesias, Structures of Subordination, *supra* note 5, at 488-97 (linking Latina lesbian experience of multiple exclusions/inclusions in different political communities to argument that anti-essentialist institutional arrangements must be designed in ways that effectively mediate and simultaneously enable both individual autonomy and collective action). See also Francisco Valdes, Notes on the Conflation of Sex, Gender and Sexual Orientation: A QueerCrit and LatCrit Perspective, in *The Latino/a Condition*, *supra* note 49, at 543 (discussing the strong heteronormativity of Latina/o cultures). For critical discussion of sexual orientation in Miami, the site of LatCrit III, see Francisco Valdes, Below All Radars: An Ethnographic Portrait of Latinas/os Sexual Orientation and the Law in the Making of Miami's 'New Enclave,' 33 Mich. J. L. Reform; 5 Mich. J. Race & L. (forthcoming 2000). See generally Francisco Valdes, Acts of Power, Crimes of Knowledge: Some Observations on Desire, Law and Ideology in the Politics of Expression at the End of the Twentieth Century, 1 IowaJ. Gender, Race & Justice 213, 223-28 (1997) (discussing various strategies focused on increasing sexual minority visibility as central to Queer politics and self-empowerment); Francisco Valdes, Sex and Race in Queer Legal Culture: Ruminations on Identities and Interconnectivities, 5 So. Cal. L. Rev. & Women's Stud. 25 (1995) (preferring 'interconnectivity' as a strategic concept enabling intra- and inter-group coalitions that accept difference and make respect for it integral to antisubordination theory and praxis).

[n.93.](#) Wiessner, *supra* note 73.

[n.94.](#) Professor Wiessner bases this assertion on the fact that "a recent 'Annotated Bibliography of Latino and Latina Critical Theory' manages to painstakingly describe seventeen distinct 'themes' of 'critical Latino/a scholarship,' and fails to mention the indigenous condition in any one of them." Id. at 838. But see Luz Guerra, LatCrit y la Des-colonizacion: Taking Colon Out, [19 Chicano-Latino L. Rev. 351](#) (1998); Iglesias & Valdes, *supra* note 2, at 568-73 (reflecting on themes inspired by plenary panel on indigenous peoples at LatCrit II).

[n.95.](#) Wiessner, *supra* note 73, at 837.

[n.96.](#) Professor Wiessner recounts an incident in which a Chilean friend responded to an automobile incident in Miami by hurling an anti-Indian epithet at the other driver. Other LatCrit scholars have noted the anti-Indian prejudices expressed in Latina/o cultural practices. See, e.g., Elvia Arriola, *Voices from the Barbed Wires of Evil: Women in the Maquiladoras*, Latina Critical Legal Theory

- and Gender at the U.S.-Mexico Border, 49 De Paul L. Rev. 3 (forthcoming 2000) (recounting anti-Indian references invoked to deter childhood conduct deemed inappropriate for a muchachita).
- [n.97.](#) Wiessner, *supra* note 73, at 840. "By contrast [to Hispanic colonization, the British colonization relied much less on brute force and the destruction of indigenous political structures and society; its subjugation strategies included to a much larger degree the mechanisms of negotiation and persuasion." *Id.*
- [n.98.](#) *Id.* at 840 n.38 (citing Steven P. McSloy, "Because the Bible Tells Me So": Manifest Destiny and American Indians, 9 *St. Thomas L. Rev.* 37, 38 (1996)). More specifically, he quotes McSloy's account of the way American Indian lands were taken:
- How were American Indian lands taken? The answer is not, as it turns out, by military force. The wars, massacres, Geronimo and Sitting Bull - all that was really just cleanup. The real conquest was on paper, on maps and in laws. What those maps showed and those laws said was that Indians had been "conquered" merely by being "discovered." *Id.*
- [n.99.](#) For an alternative perspective on the relative virulence of anti-Indian racism in Latin American and U.S. cultures, see, for example, Martha Menchaca, Chicano Indianism, in *The Latino/a Condition*, *supra* note 49, at 387 (recounting how racial caste system was dismantled in Mexico by the 1812 Spanish Constitution of Cadiz, only to be reinstated by U.S. racial laws in the territories ceded by Mexico after the Mexican War of 1846).
- [n.100.](#) See, e.g., Adrien K. Wing, Critical Race Feminism and the International Human Rights of Women in Bosnia, Palestine and South Africa: Issues for LatCrit Theory, 28 *U. Miami Inter-Am. L. Rev.* 337 (1996-97) (noting that male elites often resist compliance with basic human rights laws prohibiting discrimination against women by declaring their sexist customs and traditions essential elements of their culture).
- [n.101.](#) See Wiessner, *supra* note 73, at 832 n.5 (quoting Margaret Montoya, *Masks and Identity*, in *The Latino/a Condition*, *supra* note 49, at 40).
- [n.102.](#) See Iglesias & Valdes, *supra* note 2, at 555-61 (noting attention to particularities critical to actualization of substantive justice); Enrique R. Carrasco, Opposition, Justice, Structuralism and Particularity: Intersections Between LatCrit Theory and Law and Development Studies, 28 *U. Miami Inter-Am. L. Rev.* 313 (1997) [hereinafter Carrasco, *LatCrit Theory and Law and Development* (emphasizing the importance of particularity in LatCrit theory)].
- [n.103.](#) See Johnson, *Latino Legal Scholarship*, *supra* note 50; Ediberto Roman, *Common Ground: Perspectives on Latino-Latina Diversity*, 2 *Harv. Latino L. Rev.* 483 (1997).
- [n.104.](#) Roberts, *BlackCrit Theory*, *supra* note 8.
- [n.105.](#) For a description of the substantive themes of the focus group, see <[n.106.](http://nersp.nerdc.ufl.edu/~tilde>malavet/latcrit/archives/lcii.htm>.</p>
<p><a href=) See Iglesias & Valdes, *supra* note 2, at 562-74 (urging LatCrit scholars to remain cognizant and vigilant lest in rejecting the Black/White paradigm, we uncritically equate Black and white positions within a paradigm that emerged from the very real oppression of whites over Blacks, as well as by non-Black minorities who have sought their own liberation in the delusions of a white identity); Chris Iijima, The Era of We-construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm, 29 *Colum. Hum. Rts. L. Rev.* 47, 50 (1997) (warning that moves beyond the Black/White paradigm may be coopted by racist status quo); Taunya Lovell Banks, Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building, 5 *Asian L.J.* 7 (1998) (articulating critique of "the middle position" as constituted by pervasiveness of Black/White paradigm in both dominant and minority consciousness and practices and advocating coalition-building among minority groups as alternative); see also Mutua, *supra* note 8.
- [n.107.](#) See, e.g., Iglesias, *Out of the Shadow*, *supra* note 30, at 351-72 (exploring points of commonality between emerging Asian Pacific American Critical Legal Scholarship and LatCrit theory).
- [n.108.](#) See Wing, *Critical Race Feminism*, *supra* note 89.
- [n.109.](#) Roberts, *BlackCrit Theory*, *supra* note 8, at 857.
- [n.110.](#) See, e.g., Cho, *Essential Politics*, *supra* note 15 (expressing concern that the "anti-essentialist critique" may undermine collective solidarity and political engagement); see also A. Sivananda,

- All that Melts into Air Is Solid: The Hokum of New Times, Race & Class, Jan.-Mar. 1990 (expressing concern that the post-modern politics of proliferating subject positions forsakes commitment to universality and solidarity); cf. Iglesias, Structures of Subordination, *supra* note 5, at 486-502 (challenging notion that proliferation of political identities undermines pursuit of "common good" and arguing, instead, that the genuine common good can only be discovered and achieved through the reconfiguration of anti-democratic institutional power structures that suppress the self-representation and expression of multidimensional and intersectional identities).
- [n.111.](#) For example, in the labor context, the commitment to racial and/or gender equality has sometimes been expressed through the formation of separate racially marked or gender based caucuses within the broader collectivity, where members of the subgroup meet separately to discuss their particular problems and needs. For a critical analysis of the pros and cons associated with different institutional structures or arrangements that might be used to operationalize a commitment to anti-essentialist intergroup justice, see Iglesias, Structures of Subordination, *supra* note 5, at 478-86.
- [n.112.](#) See, e.g., Mutua, *supra* note 8 (reporting discussions at LatCrit III).
- [n.113.](#) See, e.g., Phillips, *supra* note 7, at 1256 (representing Critical Race Theory Workshop as "a place where, among other things, the experiences of all groups of color are articulated and where narrow conceptions of group interest are critiqued").
- [n.114.](#) See Peter Brimelow, *Alien Nation* (1995) (articulating a nativist agenda).
- [n.115.](#) See, e.g., Marvin Dunn, *Black Miami in the Twentieth Century* 99 (1997) (noting that Black Bahamians, proud of their British roots, "thought themselves to be less servile than American-born Blacks in Miami").
- [n.116.](#) See Symposium, *The Long Shadow of Korematsu*, *supra* note 27; see also Iglesias, *Out of the Shadow*, *supra* note 30 (offering one vision of the intellectual and political agenda that might be collaboratively pursued at the intersection of APACrit and LatCrit theory).
- [n.117.](#) See, e.g., Guadalupe T. Luna, *Zoo Island: LatCrit Theory*, Don Pepe and Senora Peralta, [19 Chicano-Latino L. Rev. 339, 341](#) (1998) (locating Chicana/o subordination in the ideological and rhetorical struggles between universal and particular through which the white perspective is cast as universal in contrast to the particularity of the Chicana/o perspective); Iglesias, Structures of Subordination, *supra* note 5, at nn. 21 & 22 and accompanying text (implying need for gestalt-shift that would enable recognition of the way women of color constitute a universal perspective). See also generally [Francisco Valdes, Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory and Politics of 'Sexual Orientation,' 48 Hastings L.J. 1293 \(1997\)](#) (urging similar points in the context of Queer legal theory). See also Valdes, "OutCrit" Theories, *supra* note 7.
- [n.118.](#) The theory is that mass political mobilization triggers such undeliverable demands that it causes the democratic political system to internally implode. Thus, the discourse of democratic ungovernability has proven a valuable resource in legitimating political repression by casting mass mobilization as a threat to the democratic political form. Of course, the question this raises is whether a system that represses its people because it cannot meet their demands is really worth preserving. For an overview and critique of the way the problem of "democratic governability" has been addressed by both the left and the right, see Claus Offe, *The Separation of Form and Content in Liberal Democracy*, in *Studies in Political Economy* (1980); for an extensive analysis of the reasons why "the liberal democratic state" cannot effectively respond to the demands of a politically mobilized polity, see Claus Offe & Volker Ronge, *Theses on the Theory of the State*, in *Classes, Power, and Conflict: Classical and Contemporary Debates* (Anthony Giddens & David Held eds., U.Cal.Press 1982) (linking the political limitations of the democratic state to the material bases of state power in liberal capitalism).
- [n.119.](#) See Rachel F. Moran, *What if Latinos Really Mattered in the Public Policy Debate?*, [85 Cal. L. Rev. 1315, 1328-9](#); 10 *La Raza* 229, 242-43 (1998) (noting limitations of traditional race-neutral model of inclusion and advocating alternative model of immigration which recognizes that bilingualism and biculturalism are assets rather than threats to national integrity).
- [n.120.](#) See Iglesias, Structures of Subordination, *supra* note 5 (critiquing impact of labor law doctrine of "exclusive representation" on self-determination of women of color in American workplaces).

- [n.121](#). See [Max J. Castro, Democracy in Anti-Subordination Perspective: Local/Global Intersections: An Introduction](#), 53 U. Miami L. Rev. 863 (1999) (using the phrase 'really existing democracy' to measure the difference between democratic theory and the democracy in which we actually live).
- [n.122](#). Ivelaw Griffith, Drugs and Democracy in the Caribbean, 53 U. Miami L. Rev. 869 (1999); Irwin P. Stotzky, Suppressing the Beast, 53 U. Miami L. Rev. 883 (1999); Mario Martinez, Property as an Instrument of Power in Nicaragua, 53 U. Miami L. Rev. 907 (1999); Julie Mertus, Mapping Civil Society Transplants: A Preliminary Comparison of Eastern Europe and Latin America, 53 U. Miami L. Rev. 921 (1999); Ediberto Roman, Reconstructing Self-Determination: The Role of Critical Theory in Positivist International Law Paradigm, 53 U. Miami L. Rev. 943 (1999) [hereinafter Roman, Reconstructing Self-Determination].
- [n.123](#). See, e.g., Antonio Benitez-Rojo, The Repeating Island: The Caribbean and the Postmodern Perspective 35-36 (Duke U. Press, 2d ed. 1996) (noting the indeterminacy of "the Caribbean" and observing further that organizing "the Caribbean" construct around the plantation economy would redraw its boundaries to include the Brazilian northeast as well as the southern United States); see also H. Michael Erisman, Pursuing Postdependency Politics: South-South Relations in the Caribbean at 27, n. 1 (1992) (suggesting that "the Caribbean" be conceptualized in terms of three concentric circles: its inner circle comprised only of the English-speaking Caribbean islands, including the Bahamas; the second circle delimited by the Caribbean archipelago, meaning all the islands plus the mainland extensions of Guyana, Suriname, and French Guiana (Cayenne) in South America, along with Belize in Central America; and its outer circle constituted by the Caribbean Basin, which would include all the countries in the first two categories as well as the littoral states of South America (e.g. Colombia and Venezuela), all of Central America, and Mexico). These are, of course, only a few of many ways to imagine the meaning and parameters of "the Caribbean."
- [n.124](#). See Modern Caribbean Politics 4-6 (Anthony Payne & Paul Sutton eds., 1993).
- [n.125](#). See generally Benitez-Rojo, *supra* note 123, at 35 (of course, Benitez-Rojo's construction of "the Caribbean" as "a way of being in the world" incorporates, but is not exhausted by, the musical rhythms that express it).
- [n.126](#). The Caribbean Basin construct was initially forwarded by the United States as part of its project to combat the "leftist threat to the prevailing pro-western ideological order and U.S. influence in the Caribbean Basin." See Erisman, *supra* note 123, at 132 n.12 (discussing the purpose and scope of the Reagan Administration's Caribbean Basin Initiative (CBI) which defined the Caribbean Basin to encompass Central America, Panama, all the independent islands plus Guyana and Belize). But the struggle to delimit a broader map of the Caribbean has also been central to the CARICOM project to promote the kind of regional integration that will enable the small countries of the Caribbean to coordinate the diversification of their otherwise competing economies and to leverage their political objectives by articulating a unified position. See Erisman, *supra*, at 111-12 (discussing the Pan-Caribbean perspective underlying Mexican and Venezuelan pledges to provide oil at preferential prices to various Central American and Caribbean states, as well as the vision underlying CARICOM itself).
- [n.127](#). United Nations estimates that the international trade in illegal drugs is worth \$400 billion--approximately 8% of world trade--more than the trading in iron, steel or motor vehicles. See International Narcotics Control 2 Dep't St. Dispatch 503 (1991).
- [n.128](#). Griffith, *supra* note 122, at 873.
- [n.129](#). Stotzky, *supra* note 122, at 890 (explaining the fundamental elements of a deliberative democracy).
- [n.130](#). *Id.* at 893-903 (describing and critiquing the Aristide Plan).
- [n.131](#). As Professor Stotzky notes, the economic aspects of the Aristide Plan reflect the influence of the World Bank, the IMF and the Agency for International Development in their boilerplate responses to the economic crisis in Haiti. *Id.* at 899. Trade "liberalization," privatization, reduced social spending and similar policies are a familiar fare served up for Third World consumption by these international agents of transnational capitalism. Unfortunately, these policies have, since the 1980s, only further impoverished and politically destabilized the countries that adopt them. It doesn't take a rocket scientist to see this--thus leading anyone with half an open mind to wonder at

- the relentless insistence with which these failed policies are repeatedly prescribed. See, e.g., Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 *Vill. L. Rev.* (forthcoming 2000) [hereinafter Iglesias, *Global Markets, Racial Spaces* (assessing structural adjustment policies through a critical analysis of the institutional class structures of the international political economy)].
- [n.132.](#) See James H. Street, *The Reality of Power and the Poverty of Economic Doctrine*, in *Latin America's Economic Development: Institutional and Structuralist Perspectives* 16-32 (James L. Dietz & James H. Street eds., 1987). Street's analysis is particularly interesting because it shows the symbiotic relationship linking authoritarian political regimes and international financial organizations. The call for structural adjustment by institutions like the IMF may well serve the political needs of authoritarian elites. When the people mobilize against the impact of austerity policies, their mobilization is cast as civil disorder (instigated by subversive communist influences) and used to justify the kinds of repression to which these elites are already inclined. Only from this perspective can an authoritarian dictatorship be made to appear a solution rather than a problem for the nation.
- [n.133.](#) For a more hopeful perspective on the potential role for Bretton Woods institutions to contribute to the evolution of a more just international political economy, see Carrasco, *LatCrit Theory and Law and Development*, *supra* note 102; Enrique R. Carrasco & M. Ayhan Kose, *Income Distribution and the Bretton Woods Institutions: Promoting an Enabling Environment for Social Development*, 6 *Transn'l Law & Contemp. Probs.* 1 (1996).
- [n.134.](#) See, e.g., Holly Sklar, *Washington's War on Nicaragua* 57-8 (1988) (noting that "[i]n a March 1979 radio broadcast, Reagan seconded Idaho Rep. Steve Symms' concern that 'the Caribbean is rapidly becoming a Communist lake in what should be an American pond.'" ' Reagan added: 'The troubles in Nicaragua bear a Cuban label also. While there are people in that troubled land who probably have justified grievances against the Somoza regime, there is no question but that most of the rebels are Cuban-trained, Cuban-armed, and dedicated to creating another Communist country in the hemisphere.').
- [n.135.](#) *Id.*
- [n.136.](#) Gary Ruchwarger, *People in Power: Forging a Grassroots Democracy in Nicaragua* (1987) (noting that the revolution would have been impossible without widespread support and recounting extent of popular participation in the struggle against Somoza).
- [n.137.](#) See Jeffrey M. Paige, *Coffee and Power: Revolution and the Rise of Democracy in Central America* (1997) (explaining role of agro-export elite in consolidating national unity alliance that enabled overthrow of Somoza, even as it laid seeds for eventual failure of Sandinista reform project).
- [n.138.](#) For a variety of perspectives on the Sandinista's land reforms and Nicaraguan property law, see generally [Symposium: The Nicaraguan Property Regime After Sandinista Land Reform](#), 22 *Cap. U. L. Rev.* 833-963 (1993). Compare [Jaime Wheelock Roman, Changes in Agrarian Property in Nicaragua](#), 22 *Cap. U. L. Rev.* 853 (1993), with O. Herodocia Lacayo, *The Current State of Nicaraguan Property Law*, 22 *Cap. U. L. Rev.* 839 (1993).
- [n.139.](#) See, e.g., Peter Dale Scott & Jonathan Marshall, *Cocaine Politics: Drugs, Armies and the CIA in Central America* (1991); Alfred W. McCoy, *The Politics of Heroin: CIA Complicity in The Global Drug Trade* (1991).
- [n.140.](#) See William Blum, *Killing Hope: U.S. Military and CIA Interventions Since World War II* (1995). As Blum recounts, the Duvalier family ruled Haiti from 1957-1986, when Jean Claude was forced to take flight for the French Riviera on U.S. Air Force jet. *Id.* at 370. In Nicaragua, Anastasio Somoza was installed as director of the Nicaraguan National Guard by departing U.S. military forces in 1933. The United States had invaded the country to quash the revolutionary uprising, supported by Augusto Cesar Sandino of the Liberal Party and purportedly financed by the Mexican government. In the years between 1933 and 1979, when Anastasio Somoza II was finally forced into exile by the Sandinista revolution, the Somoza family had amassed a fortune in land and businesses then worth \$900 million, even as they left behind a country where two-thirds of the people earned less than \$300 a year. *Id.* at 290.

- [n.141.](#) See [Ileana M. Porras, A LatCrit Sensibility Approaches the International: Reflections on Environmental Rights and Third Generation Solidarity Rights, 28 U. Miami Inter-Am. L. Rev. 413, 419-20 \(1996-97\)](#) (urging a LatCrit perspective sensitive to both sameness/difference that can mediate the USLat/OtroLat identities).
- [n.142.](#) Iglesias, *Out of the Shadow*, *supra* note 30, at 379-83 (examining linkage between U.S. anti-terrorism interventions abroad and the devolution of domestic civil rights).
- [n.143.](#) Mertus, *supra* note 122; Roman, *Reconstructing Self-Determination*, *supra* note 122.
- [n.144.](#) See, e.g., Sklar, *supra* note 134, at 61 (quoting several of Ronald Reagan's radio broadcasts in support of the Argentine military dictators and Chile's Pinochet); see generally Blum, *supra* note 140 (recounting U.S. role in installing and/or assisting the military dictatorships in Guatemala, Haiti, Ecuador, Brazil, Peru, Dominican Republic, Uruguay, Chile, Bolivia, Nicaragua, Panama and El Salvador as well as its various efforts to topple the democracy in Costa Rica).
- [n.145.](#) See Sklar, *supra* note 134, at 60-61 (attributing the totalitarian/authoritarian dichotomy to Jeanne Kirkpatrick, U.S. Ambassador to the United Nations under Reagan and deconstructing its incoherence and hypocrisy).
- [n.146.](#) Mertus, *supra* note 122, at 939-40.
- [n.147.](#) See, e.g., [Philip J. Power, Note, Sovereign Debt: the Rise of the Secondary Market and its Implications for Future Restructurings, 64 Fordham L. Rev. 2701 \(1996\)](#) (providing excellent overview of Latin American debt crisis and legal mechanisms through which balance of power between debtor countries and international financial organizations has since been reconfigured).
- [n.148.](#) Cf. Rafael X. Zahraiddin-Aravena, *Chile and Singapore: The Individual and The Collective, A Comparison*, [12 Emory Int'l L. Rev. 739](#) (1998) (noting and criticizing assumptions embedded in representations of Chile as the "model for necessary authoritarianism"); Enrique R. Carrasco, *Autocratic Transitions to Liberalism: A Comparison of Chilean And Russian Structural Adjustment*, [5 Transnat'l L. & Contemp. Probs. 99](#) (1995) (Chile cast as model for Russian transition).
- [n.149.](#) Compare, e.g., [Kent Klaudt, Hungary After the Revolution: Privatization, Economic Ideology and the False Promise of the Free Market, 13 Law & Ineq. 303 \(1995\)](#) (documenting the impact of neoliberal economic ideology on the production of poverty, unemployment, massive inequality and crime on a scale previously unknown in the centrally planned statist economies of the former Soviet Union), with *Structural Adjustment and the Spreading Crisis in Latin America*, (1995) <<http://www.igc.apc.org/dgap/crisis.html>> (visited August 27, 1999) (providing overview of impact of neoliberal structural adjustment policies on the political instability and economic underdevelopment in Latin America).
- [n.150.](#) See, e.g., Walter Adams & James W. Brock, *The Sherman Act and the Economic Power Problem*, *The Antitrust Bulletin*, Spring 1990. Conversely, neoliberals argue that democracy promotes capitalism because private companies must be free of state interventions and bureaucratization in order to innovate. See Bob Jessop, *Capitalism and Democracy: The Best Possible Political Shell? in Power and the State* (Gary Littlejohn et al. eds., 1978); F.A. Hayek, *The Road to Serfdom* (1946).
- [n.151.](#) See, e.g., Milton Friedman, *Capitalism and Freedom* 9 (1962):
Viewed as a means to the end of political freedom, economic arrangements are important because of their effect on the concentration or dispersion of power. The kind of economic organization that provides economic freedom directly, namely, competitive capitalism, also promotes political freedom because it separates economic power from political power and in this way enables the one to offset the other.
- Indeed, in some versions of this second account, even concentrated markets promote freedom because only large economically powerful private corporations can counterbalance the power of a centralized, bureaucratic, interventionist state. See Jessop, *supra* note 150.
- [n.152.](#) See Adams & Brock, *supra* note 150, at 44 (discussing the capacity of giant firms (and labor unions) to threaten economic catastrophe if their demands are not met); see also Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051, 1057 (1979) (excessive concentration of economic power will breed anti-democratic political pressures).

- [n.153](#). See Offe & Ronge, *supra* note 118; Offe, *supra* note 118.
- [n.154](#). See, e.g., Elizabeth M. Iglesias, "Confronting Race" by Mapping the Construction of Institutional Power: LatCrit Reflections on Law and the Anti-Political Economy, 33 Mich. J. L. Ref.; 5 Mich. J. Race & L. (forthcoming 2000) [hereinafter Iglesias, *The Anti-Political Economy* (tracing interpretative manipulation of the state/market dichotomy through cases adjudicating constitutionality of minority business set-asides and political boycotts seeking racial justice in the market); see also Iglesias, *Global Markets, Racial Spaces*, *supra* note 131 (illustrating how economic/political dichotomy is invoked to obstruct democratization of economic institutions).
- [n.155](#). See Iglesias, *The Anti-Political Economy*, *supra* note 154 (for deconstructive analyses revealing the strategically manipulated indeterminacy of the purported separation of economics and politics).
- [n.156](#). See Roman, *Reconstructing Self-Determination*, *supra* note 122, at 947.
- [n.157](#). L.C. Green, Low Intensity Conflict and the Law, 3 *ILSA J. Int'l & Comp. L.* 493, 503-04 (1997) (noting that none of the guerrilla movements in Latin America have ever been recognized by the Organization of American States on the theory that they are not national liberation movements, but only "revolutionary groups seeking to replace the local government rather than to overthrow domination, alien occupation or a racist regime").
- [n.158](#). See Offe & Ronge, *supra* note 118; Offe, *supra* note 118.
- [n.159](#). See [Shelley Inglis, Re/Constructing Right\(s\): The Dayton Peace Agreement, International Civil Society Development, and Gender in Postwar Bosnia-Herzegovina](#), 30 *Colum. Hum. Rts. L. Rev.* 65, 79-80 (1998) (describing the ethnonationalistic structure of the constitutional regime established by the Dayton Peace Accords, which divide all components of the central government into thirds, ensuring both equal representation of Croats, Serbs, and Bosniaks and the paralysis of a central government mired in ethnic politics).
- [n.160](#). Mertus, *supra* note 122, at 942.
- [n.161](#). See, e.g., Elizabeth M. Iglesias, Foreword: International Law, Human Rights and Lat Crit Theory, 28 *Inter-Am. L. Rev.* 206-07 (1996-97) [hereinafter Iglesias, *Foreword*].
- [n.162](#). See *id.* (citing references).
- [n.163](#). See, e.g., Iglesias, *International Economic Law*, *supra* note 15; G. Richard Shell, Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization, 44 *Duke L.J.* 829 (1995) (advocating trade stakeholder's model as vehicle to incorporate social welfare and human rights into WTO); Patricia Stirling, The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization, 11 *Am. U. J. Int'l. L. & Pol'y* 1 (1996).
- [n.164](#). See, e.g., Iglesias, *Global Markets, Racial Spaces*, *supra* note 131 (critical analysis of legal reforms needed to promote community participation in decisionmaking processes through which investment capital is allocated in the inter/national political economy).
- [n.165](#). See, e.g., Steven W. Bender, Direct Democracy and Distrust: The Relationship Between Language, Law, Rhetoric and the Language Vigilantism Experience, 2. *Harv. Latino L. Rev.* 145 (1997); Christopher David Ruiz Cameron, How the Garcia 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; 10 *La Raza* 261 (1998) (critical analysis of Title VII's anti-discrimination framework given its failure to prohibit the imposition of arbitrary and intrusive restrictions on the use of languages other than English in the workplace).
- [n.166](#). To this end, LatCrit III featured a plenary panel entitled Anti-Subordination and the Legal Struggle over Control of the "Means of Communication:" Technology, Language and Communicative Power. A description of its substantive objectives can be found at <<http://nersp.nerdc.ufl.edu/~malavet/latcrit/archives/lciii.htm>>.
- [n.167](#). See, e.g., [Bank of Boston v. Bellotti](#), 435 U.S. 765 (1977) (striking down restrictions on corporate political expenditures on theory that such expenditures constitute speech protected by 1st Amendment); [Buckley v. Valeo](#), 424 U.S. 1 (1976) (expenditures of money constitute protected speech).
- [n.168](#). See, e.g., [Madeleine Mercedes Plasencia, The Politics of Race on the Electronic Highway: An](#)

- [Analysis of the Video Dialtone Redlining Cases, and the Nynex Consent Decree in Roxbury, 15 Touro L. Rev. 513 \(1999\)](#) [hereinafter Plasencia, Video Dialtone Redlining (describing how discriminatory redlining practices of telecommunications companies threaten to shut minority neighborhoods out of communications revolution).
- [n.169.](#) See [Keith Aoki, Introduction: Language is a Virus, 53 U. Miami L. Rev. 961 \(1999\)](#) (Long Live Keith Aoki!); see also Mark D. Alleyne, International Power and International Communication 2-5 (1995) (explaining difference between communication, understood as systems and infrastructures for dissemination of information, (e.g. telephones, satellites, news agencies, and languages) and information, understood as 'raw matter' or data, whose content is circulated through the means of communication).
- [n.170.](#) William Bratton, The Law and Economics of English Only, [53 U. Miami L. Rev. 973 \(1999\)](#); Drucilla Cornell, The Imaginary of English Only, [53 U. Miami L. Rev. 977 \(1999\)](#); Wells, *supra* note 16; Madeleine Plasencia, "Suppressing the Mother Tongue": Anti-Subordination and the Legal Struggle Over Control of the Means of Communication, [53 U. Miami L. Rev. 989 \(1999\)](#) [[hereinafter Plasencia, Suppressing the Mother Tongue; Yvonne Tamayo, Literal Silencing/Silenciando la Lengua, [53 U. Miami L. Rev. 995 \(1999\)](#); Sharon K. Hom, Lexicon Dreams and Chinese Rock and Roll: Thoughts on Culture, Language, and Translation as Strategies of Resistance and Reconstruction, [53 U. Miami L. Rev. 1003 \(1999\)](#); Hayakawa Torok, *supra* note 9.
- [n.171.](#) See [Drucilla Cornell & William W. Bratton, Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom and Legal Suppression of Spanish, 84 Cornell L. Rev. 595 \(1999\)](#).
- [n.172.](#) Bratton, *supra* note 170.
- [n.173.](#) According to Bratton, "at some point, [this assumption has to be qualified by the counter-assumption that diversity leads to creative interaction." *Id.* at 974.
- [n.174.](#) Professor Tamayo further buttresses this argument by noting the unmet high demand for English classes among immigrant populations. Tamayo, *supra* note 170, at 998-99 (5,000 immigrants turned away from ESL classes in Washington D.C.; 40,000 wait-listed in Los Angeles).
- [n.175.](#) See, e.g., Alex Stepick et al., Brothers in the Wood, in *Newcomers in the Workplace* 145, 148 (Louise Lamphere et al. eds., 1994) (recounting how Cuban construction workers excluded from Anglo dominated unions in Miami responded by creating their own non-union firms and ultimately taking over the industry: "When the unions finally recognized that excluding Cubans was a mistake, it was too late.").
- [n.176.](#) Bratton, *supra* note 170, at 974.
- [n.177.](#) See, e.g., Owen M. Fiss, A Theory of Fair Employment Laws, 38 U. Chi. L. Rev. 235 (1971) (discussing difference between equal treatment and equal results in context of fair employment laws).
- [n.178.](#) For further reflections on this important theme, see, for example, Soren Kierkegaard, *Works of Love* 72 (Howard & Edna Hong trans., Harper Torchbook 1964). Kierkegaard puts the thought like this:
- One's neighbor is one's equal. One's neighbor is not the beloved, for whom you have passionate preference, nor your friend, for whom you have passionate preference ... Your neighbor is every man, for on the basis of distinctions he is not your neighbor, nor on the basis of likeness to you as being different from other men. He is your neighbor on the basis of equality with you before God; but this equality absolutely every man has, and he has it absolutely.
- Id.* (emphasis added). Like many male philosophers, Kierkegaard's otherwise expansive vision was truncated by the gender myopia of his times. That, however, would be another article.
- [n.179.](#) Professor Wells' critique notes the limitations of grounding the equality norm in a Kantian framework. Wells, *supra* note 16, at 987. A close reading of Professor Cornell's argument reveals, however, that her analysis draws as much on Franz Fanon's insistence on the right to be recognized "as a legitimate point of view" as it does on Kant. See Cornell, *supra* note 170 (reflecting on meaning of Fanon's observations that evil of racism is in being "denied existence as a legitimate point of view."). The claim embedded in the demand the I be recognized as a "legitimate point of view" is precisely the claim that my difference be respected and my different

perspective be recognized as an equally valid point of reference in defining the common good. See, e.g., Iglesias, Structures of Subordination, *supra* note 5, at 468, 473-78 (challenging "the complete and total absence of women of color as a legitimate agent or remedial reference point and the structure of power that is thereby established and maintained," and developing account of "the inter-subjectivity of equals" as "a moral imperative and institutional blue print"). Thus Professors Wells and Cornell are not as far apart as an initial reading of Professor Wells' critique might suggest.

[n.180.](#) Wells, *supra* note 16, at 987.

[n.181.](#) *Id.* (emphasis added).

[n.182.](#) See, e.g., Iglesias, Structures of Subordination, *supra* note 5, at 478 ("Through the suppression of the other, we are all denied the opportunity to transcend the limitations of our contingent perspectives. We are denied, in short, the opportunity for authentic self-determination grounded on the objectivity of a collective truth.").

[n.183.](#) Wells, *supra* note 16, at 988 (emphasis added).

[n.184.](#) *Id.* (suggesting that we avoid getting caught up in "the cost of multilingualism").

[n.185.](#) See, e.g., Carrasco, LatCrit Theory and Law and Development, *supra* note 102, at 331 (challenging LatCrit scholars to become fluent in the language of law and economics analysis, in part because that is the language to which policymakers respond).

[n.186.](#) See also [Frank J. Garcia, NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession, 35 Va. J. Int'l L. 539 \(1995\)](#) (demonstrating that law and economics analysis can be made to further anti-subordination objectives).

[n.187.](#) See, e.g., Iglesias, Foreword, *supra* note 161, at 177, 182, 187, 191 (noting the critical methodologies embraced or advocated by LatCrit scholars).

[n.188.](#) Pierre Bourdieu, Language & Symbolic Power (Raymond & Adamson trans., 1991).

[n.189.](#) *Id.* at 49.

[n.190.](#) *Id.* at 51.

[n.191.](#) Owen M. Fiss, The Death of the Law, 72 *Corn. L. Rev.* 1, 2 (1986) (contrasting critical legal studies and law and economics in terms of their representation within faculties at elite schools and on federal bench); Ian Ayres, Never Confuse Efficiency with a Liver Complaint, [1997 Wis. L. Rev. 503, 504-05](#) (noting that economic analysis has been dominant social science in analyzing legal issues and that economists and J.D.s with Ph.D.s in economics are more likely to be hired to teach in law schools than J.D.s with Ph.D.s in other social sciences).

[n.192.](#) See Duncan Kennedy, Legal Education and the Reproduction of Hierarchy (1983).

[n.193.](#) Plasencia, Suppressing the Mother Tongue, *supra* note 170, at 994.

[n.194.](#) See, e.g., [Arturo Gandara, Equity in an Era of Markets: The Case of Universal Service, 33 Wake Forest L. Rev. 107 \(1998\)](#) (critiquing rupture of telecommunications social compact based on universal service by Federal Communications Commission's Universal Service Order); Margaret Chon, Radical Plural Democracy and the Internet, 33 *Cal.W. L. Rev.* 143 (1997) (mediating cultural pluralism and liberal normativity in cyberspace).

[n.195.](#) See Herbert I. Schiller, Information Inequality: The Deepening Social Crisis in America (1996)

[n.196.](#) See Plasencia, Video Dialtone Redlining, *supra* note 168.

[n.197.](#) Schiller, *supra* note 195, at 84 (noting that FCC permitted large corporate investors to acquire 75% of the equity and 49.9% of voting stock of minority businesses receiving set-asides in sell-off of publicly owned broadcast spectrum to private interests). Cf. [Adarand Constructors v. Pena, 515 U.S. 200 \(1995\)](#) (overruling [Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 \(1990\)](#) on grounds that enhancing broadcasting diversity through minority ownership set-asides is not compelling government interest); see generally Marcelino Ford-Livene, The Digital Dilemma: Ten Challenges Facing Minority-Owned New Media Ventures, [51 Fed. Comm. L. J. 577](#) (1999).

[n.198.](#) See, e.g., Alleyne, *supra* note 169, at 118-53 (explaining how each of these regimes advantaged first world interests at expense of third world interests and the reform proposals propounded by third world representatives); see also Ingrid Volkmer, Universalism and Particularism: The Problem of Cultural Sovereignty and Global Information Flows, in *Borders in Cyberspace* (Brian Kahin & Charles Nesson eds., 1997) (re-mapping the center/periphery of the global informatics world

around the "spillover environments" marked by in/access to major satellite systems and telecommunications infrastructure and noting that "Africa has "12% of the world's people, but just 2% of the world's main telephone lines").

- [n.199.](#) See, e.g., Taunya L. McKarty, Liberalized Telecommunications Trade in the WTO: Implications for Universal Service Policy, [51 Fed. Comm. L.J. 1](#) (1998); see also [Keith Aoki, \(Intellectual\) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship](#), [48 Stan. L. Rev. 1293, 1338-52](#) (1996) (intellectual property rights under TRIPS/GATT regime).
- [n.200.](#) [69 F.3d 920](#) (9th Cir. 1995) (declaring unconstitutional English-only provision in State constitution), vacated as moot and remanded to district court for dismissal, [Arizonans for Official English v. Arizona](#), [117 S. Ct. 1055](#) (1997); see also Plasencia, Suppressing the Mother Tongue, *supra* note 170 (providing further critical analysis of arguments advanced in support of Arizona Language Initiative invalidated in this case).
- [n.201.](#) See Sharon K. Hom and Xin Chunying, English-Chinese Lexicon of Women and Law (Yinghan Funnu Yu Falu Cehuishi) (1995).
- [n.202.](#) The implications for LatCrit theory are profound--not only because so much of LatCrit theory's anti-essentialist agenda is focused on exploring and activating Latina/o transnational identities and international solidarity, but also because, and precisely to the extent that, LatCrit theory seeks to articulate a politics of anti-essentialist, anti-subordination intergroup justice and interconnectivity that defies expression in readily processed sound-bites. See, e.g., *infra* notes 213-15 and accompanying text.
- [n.203.](#) Professor Hom's presentation was, without question, one of the many highlights of the LatCrit III program. As my own son would say, her multimedia presentation rocked.
- [n.204.](#) Richard Delgado, The Imperial Scholar: Reflections on a Review of Civil Rights Literature, [132 U. Pa. L. Rev. 561](#) (1984). For an account describing the practice of "normal science" and the politics through which its practitioners seek to suppress paradigm shifts, see Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2nd ed.1970). See also Juan F. Perea, The Black/White Paradigm of Race: The "Normal Science" of American Racial Thought, [85 Cal. L. Rev. 1213](#) (1997), [10 La Raza L.J. 127](#) (1998) (applying Kuhn's analysis to legal doctrine and theory).
- [n.205.](#) Elvia R. Arriola, Introduction: The Value of Our Work, [53 U. Miami L. Rev. 1037](#) (1999) (introducing the essays); Mary Romero, Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: "Where Can You Find Good Help These Days!," [53 U. Miami L. Rev. 1045](#) (1999); Roberto L. Corrada, Familiar Connections: A Personal Re/Viewing of Latino/a Identity, Gender, and Class Issues in the Context of the Labor Dispute Between Sprint and La Conexion Familiar, [53 U. Miami L. Rev. 1065](#) (1999); Christopher David Ruiz Cameron, The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers, [53 U. Miami L. Rev. 1089](#) (1999).
- [n.206.](#) See Iglesias & Valdes, *supra* note 2, at 574-82 (mapping historical and regional differences in configuration of class relations and production of poverty among different Latina/o communities and calling for particularized analysis as distinct from generalized and abstract debates); Iglesias, Out of the Shadow, *supra* note 30, at 368-72, 370 (calling for LatCrit theory to move beyond abstract race/class debates by centering political economy and production of class hierarchies in analysis of white supremacy).
- [n.207.](#) See, e.g., Iglesias, Structures of Subordination, *supra* note 5, 488-92 (projection of universal class-based identity and solidarity ignores fact that racial and gender stratifications within working class make race and gender-based solidarity and collective action equally imperative); see also Iglesias, The Anti-Political Economy, *supra* note 154 (deconstructing suggestion that racial structure of "market" for government contracts can be transformed through color-blind reforms to assist small businesses in the inter-capitalist competition between small and large firms).
- [n.208.](#) See, e.g., Iglesias, Structures of Subordination, *supra* note 5, 488-97, 493 (exploring how class-based, gender-based and race-based essentialism of different liberation movements has caused each to ignore the perspectives and claims of justice advocated by the others, analyzing negative consequences for intersectional identities of women of color and suggesting reforms needed to construct anti-essentialist institutional arrangements that enable self-determination through more

- democratic self-representational governance structures and decisional procedures).
- [n.209.](#) See, e.g., Alvarez, *supra* note 29, at 310-11 (noting that investment patterns promoted by NAFTA actually encourage Mexican immigration to the United States and arguing therefore that "the United States is morally obligated to do more than simply build a 'fortress America' in reaction" to push-pull factors it has itself created).
- [n.210.](#) See, e.g., *Textile Workers Union of America v. Darlington Manufacturing Co.* 390 U.S. 263 (1965) (plant closings are matters peculiarly within management prerogative requiring proof of discriminatory intent rather than balancing test); see generally [Francis Lee Ansley, *Standing Rusty and Rolling Empty: Law, Poverty and America's Eroding Industrial Base*, 81 Geo. L.J. 1757 \(1993\)](#) (analyzing doctrinal devolution expanding scope of employer unilateral control over "core entrepreneurial business decisions"--such as whether to sell, close or relocate a business).
- [n.211.](#) Cameron, *supra* note 205, at 1099.
- [n.212.](#) See, e.g., Mary Garcia Castro, What is Bought and Sold in Domestic Service? The Case of Bogota: A Critical Review, in *Muchachas No More* 105-26 (Elsa M. Chaney & Mary Garcia Castro eds., 1989) (recounting the struggle to gain legal recognition for SINTRASEDOM, a domestic workers union in Colombia).
- [n.213.](#) Margaret E. Montoya, LatCrit Theory: Mapping Its Intellectual and Political Foundations and Future Self-Critical Directions, [53 U. Miami L. Rev. 1119 \(1999\)](#) [hereinafter Montoya, LatCrit Foundations]; Kevin Johnson & George Martinez, Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship, [53 U. Miami L. Rev. 1143 \(1999\)](#); Mutua, *supra* note 8; Tayyab Mahmud, Colonialism and Modern Constructions of Race: A Preliminary Inquiry, [53 U. Miami L. Rev. 1219 \(1999\)](#); Phillips, *supra* note 7; Victoria Ortiz & Jennifer Elrod, Reflections of LatCrit III: Finding "Family," [53 U. Miami L. Rev. 1257 \(1999\)](#).
- [n.214.](#) See, e.g., *supra* notes 104 & 109 and accompanying text.
- [n.215.](#) See, e.g., *supra* notes 201-03 and accompanying text.
- [n.216.](#) See Johnson & Martinez, *supra* note 213.
- [n.217.](#) See, e.g., Valdes, "OutCrit" Theories, *supra* note 7 (recounting relationship between CRT workshop and emergence of the LatCrit movement); see also Phillips, *supra* note 7 (same).
- [n.218.](#) These theoretical and political aspirations have been substantially enriched by the active and continuous participation of a highly diverse and extraordinarily talented assortment of APACrit scholars, RaceCrits, QueerCrits and other OutCrit scholars. See, e.g., Aoki, *supra* note 169, at 969 (noting extent of APACrit participation in LatCrit conferences and community); Culp, *supra* note 45 (reflecting on relevance of LatCrit project to African Americans); Barbara J. Cox, Coalescing Communities, Discourses and Practices: Synergies in the Anti-Subordination Project, 2 Harv. Latino L. Rev. 473 (1997) (reflecting on relevance of LatCrit project to white lesbians); Stephanie M. Wildman, Reflections on Whiteness & Latina/o Critical Theory, 2 Harv. Latino L. Rev. 307 (1997) (reflecting on significance of LatCrit project from a white critical feminist perspective).
- [n.219.](#) See, *supra* note 109 and accompanying text.
- [n.220.](#) See Iglesias & Valdes, *supra* note 2, at 556-57 (urging LatCrit scholars to "avoid the essentialist tendency to seek universal truths in generalities and abstractions, rather than seeking universal liberation in and through the material, though limited, transformation of the particular and contingent"); see also, e.g., Iglesias, Structures of Subordination, *supra* note 5 (criticizing different ways in which intersectional particularity of women of color is oftentimes suppressed in the constitution of class, race and gender based collectivities).
- [n.221.](#) Johnson & Martinez, *supra* note 213, at 1157 (noting that "[u]ltimately, Chicana/o Studies and LatCrit theory may move in opposite directions--with Chicana/o Studies becoming more inclusive and LatCrit theory allowing for focused inquiry when appropriate").
- [n.222.](#) See *supra* notes 105-17 and accompanying text (discussing original purpose and intent behind the BlackCrit focus group discussion and controversies it generated at LatCrit III).
- [n.223.](#) See, e.g., Montoya, LatCrit Foundations, *supra* note 213, at Part III (reporting interviews with two Chicana scholars about their experiences as women within the National Association for Chicana/Chicano Studies).
- [n.224.](#) See, e.g., *supra* notes 46-55 and accompanying text (discussing intergroup tensions over racially

restrictive immigration policies).

[n.225](#). See, e.g., Iglesias, *Out of the Shadows*, *supra* note 30, at 374-75 (noting how exclusion of Japanese Latin-Americans from 1998 reparations paid by U.S. government to Japanese-American World War II internees reveals a "bottom" not otherwise evident).

[n.226](#). *Mutua*, *supra*note 8, at 1207.

[n.227](#). *Id.* at 1178.

[n.228](#). See, e.g., Iglesias, *Structures of Subordination*, *supra* note 5 (solidarity must be based on justice, not sentimental rhetoric).

[n.229](#). See, e.g., *supra* notes 46-55 and accompanying text.

[n.230](#). Valdes, "OutCrit" Theories, *supra* note 7.

[n.231](#). Montoya, *LatCrit Foundations*, *supra* note 213.

[n.232](#). Phillips, *supra* note 7.

[n.233](#). Ortiz & Elrod, *Finding "Family,"* *supra* note 213.

[n.234](#). For a critical discussion of legal scholars and scholarships in this time of backlash lawmaking, see Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship, or Legal Scholars as Cultural Warriors*, [75 Denv. U. L. Rev. 1409](#) (1998) (urging progressive legal scholars to use our institutional and intellectual positions to blunt the drive to retrenchment).

[n.235](#). See Montoya, *LatCrit Foundations*, *supra* note 213, at 1135 (quoting Cordelia Candelaria: "Many of the early pioneers in Chicana/o studies have been so used to rolling up our sleeves and just doing what needed to be done without chronicling the process. We just move on to other projects. History is lost is one unfortunate consequence. Another is that later on the history is sometimes re-written in terms of making certain actors look good in ways that are totally unsupported by the facts.").

[n.236](#). See Valdes, "OutCrit Theories," *supra* note 7.

[n.237](#). See Colloquium, *Representing Latina/o Communities: Critical Race Theory and Practice*, *supra* note 1.

[n.238](#). Iglesias & Valdes, *supra* note 2, at 584.

[n.239](#). *Id.*

2. Alice G. Abreu,* *Lessons from LatCrit: Insiders and Outsiders, All at the Same Time*, 53 MIAMI L. REV. 787 (1999)

Legal scholars seem to love binary paradigms. We speak of outsiders and insiders, minorities and majorities, rights and wrongs, black and white. While such polarized categorizations are useful heuristics, eventually we must move beyond the simplicity of the polarity to embrace the complexity of real life. Narrative scholarship has provided a vivid picture of that complexity and has helped to develop a more nuanced characterization of the human experience upon which law ultimately acts. LatCrit scholars have advanced this effort by offering perspectives that further break down the binary paradigms with which much analysis begins but beyond which it must eventually move. n1

Like much critical scholarship, LatCrit scholarship is grounded in the outsider experience. LatCrit scholars have contributed to the critical enterprise by exploring the implications and effects of being outsiders for multiple reasons, such as being simultaneously Black and Hispanic n2 , [788 or Latina and Lesbia n3 This scholarship shows that numerous aspects of identity intersect, and it urges a more holistic, anti-essentialist, view of the perso

The richness of LatCrit scholarship suggests that it might now be time to move beyond the outsider/insider dichotomy and perhaps even beyond intersectionality. The outsider/insider dichotomy and the concept of intersectionality have advanced our thinking and our understanding, but they might now yield to an even more nuanced view of human interactio That more nuanced view would recognize that many of us are outsiders, and many of us are insiders, all at the same time. Aspects of identity don't just intersect, they co-exist. They affect and inform one another. n4

As a participant in LatCrit III, a conference at which most of the participants were Latina/o, I was both an insider and an outsider. I was an insider because I am quite unequivocally Latina: I was born in Cuba, both of my parents are Cuban, and I did not learn to speak English until I was nearly nine; I still speak fluent Spanish and I even kept my Cuban surname when I got married over 26 years ago.

But at LatCrit III I was also an outsider. I am a tax lawyer and my scholarship has, until now, been entirely in tax. I have not written about immigration policy, civil rights, or critical theory, and I have read only sporadically in those fields. The tax law is at the core of my professional identity and has served as the foundation for many of my professional friendships. As a tax lawyer at LatCrit, I was outside and alone.

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Exploring why I felt like an outsider just where I should have felt most like an insider has proven interesting and instructive for me, and I think that my story, and the lessons I have drawn from it, can serve as a vehicle for exploring some of the themes that LatCrit scholars are developing and can help to chart the course of that development. n5 I do not claim to be either the first or the only one to do this and indeed, I have [789 decided to do it because I found reading the narratives of those who have gone before me so helpful and interesting.

I will begin this reflection with a narrative, even though narrative is a new form of discourse for me. n6 I am a tax lawyer, teacher and scholar. As I will describe in somewhat greater detail later, that is a definitional aspect of my identity. While my tax scholarship reflects my experiences as a foreign-born Latina, it is not narrative scholarship. For example, my work on tax-motivated expatriation proceeded from my views on the value of U.S. citizenship and discloses my personal connection to the subject, but it is not written as a narrative. In this Essay, by not only telling the story in narrative form, but connecting it to others I've long wanted to tell, I hope to provide a vehicle for continuing the illuminating discussion that other critical scholars have started.

I. ONE STORY: OF MINORITIZING AND OF COUNTING

I became minoritized relatively late in life. n7 I was born in Cuba, of Cuban parents, both of whom had been born and educated in Cuba, and I had not traveled outside of Cuba until 1960, when I was 8 years old and Fidel Castro's government nationalized the Esso refinery of which my father, though Cuban-born and Cuban-educated, was the manager. n8 I remember heated discussions over Castro's demand that the Esso refinery process the Soviet crude oil which filled the hulls of a ship that had been dispatched to Havana harbor, and I remember my father's strongly held belief that acceding to Castro's demands would be wrong, but it [790 was not until the summer of 1998, when I was writing this Essay, that I learned, while reading a *tax* case, a fuller version of what had occurred. n9

The case describes the role that the U.S. Department of State played in the decision to refuse to process the Soviet crude. While reading the case, I discovered that the order to refuse to process the Soviet crude, which eventually triggered the nationalization of the refinery and my father's departure from Cuba, came from none other than the President of the United States, Dwight D. Eisenhower. n10

My father left Cuba in July, 1960, and my mother, younger brother, and I, who did not even have passports when my father left because we had never been out of the country, followed shortly thereafter. We lived in Miami for about a year and a half, and it was there that I learned to speak English.

My parents valued bilingualism and figured that part of the silver lining borne by the Castro cloud would be that their children would become bilingual.

My brother and I learned quickly, since we were forbidden to speak Spanish at home and had to make do with signs and Anglified approximations of Spanish words. As soon as we had mastered English, however, my parents changed the rules and English became the forbidden language at home so that we would not lose our fluency in Spanish. Later, when we lived in other countries, the pattern continued. If Spanish was the language we spoke at school, as it was in El Salvador and Argentina, we had to speak English at home. When we spoke English at school, as we did in Aruba, the rule was that we had to speak Spanish at home. At the time, I thought it was perverse that my parents denied me the ability to speak in whatever language seemed easier. Now that I also value bilingualism, I know differently.

My brother, my twin cousins, and I, were the only Cuban—indeed, the only non-American n11—children in what is now an almost [79] exclusively Cuban school in Southwest Miami. n12 I started the 4th grade in September, 1960, having learned to speak English during the summer, spurred by my parents' draconian no-Spanish rule. (I'll save you the need to do the math by telling you: I am 47.) The problem was that although I could speak English, I could neither read it nor write it. I therefore did terribly on all tests, except for math. The Cuban school system had forced me to cover fractions and long division the year before, so in math, I excelled. Unfortunately, my ability to get the right answer was not enough for my teacher, who could either not abide that an otherwise illiterate foreign child could outshine all the blonde and blue-eyed Americanitos, or he wanted to leave no stone unturned in my own Americanization. He therefore told me that in America the number seven did not have a little bar across its stem, and decreed that if I wrote the number seven as I had been taught to do in Cuba, with the little bar across its stem, he would mark the answer wrong. He succeeded in teaching me to write what I've always thought of as an American seven, and even now, almost 40 years later, I still think of him when I write a seven and defiantly put a little bar across its stem.

Reflection shows that throughout this time I was an insider and an outsider, at the same time. As a member of my family and a native Spanish speaker, I was an insider, but as a non-English speaker when the rule at home was to speak English, I was an outsider there as well. At school, my ability to speak unaccented English and my apparent mathematical prowess made me an insider, but my inability to read English and my unusual sevens branded me an outsider.

'While feeling like an outsider could have minoritized me—could have caused me to long for inclusion in the group that formed the numerical majority—it did not, chiefly because I saw my being in Miami as a temporary detour and that allowed me to preserve my insider identity. At that time, being in Miami as a refugee was simply the lesser of two undesirables (living in Cuba under Castro was the other), and it was not one which I expected to have to endure for very long. Since I did not see myself as belonging in Miami or as wanting to belong there, the legitimacy of my identity was not impaired by the demeaning

experiences I endured there. In Miami, I was a “mere transient or sojourner,” n13 and that made all the difference. For many Cubans, it still [792 does. n14

Seeing myself as a mere transient or sojourner meant that I did not perceive the ill-treatment I sometimes received as representative of a pattern which would follow me for the rest of my life and which I should therefore work to eradicate. As a child who felt powerless because of her status as a child, particularly one that had been uprooted from her home, country and language and been deposited in a strange place where all the rules were different, it was easy for me to catalogue these events as one more example of adult, or American, imponderability. More over, the circumstances under which we left Cuba, leaving both family and possessions behind, and the knowledge that only the United States’ willingness to take us in had allowed us to leave the malestorm that was, for us, Cuba, generated a sense of gratitude that was incompatible with feelings of entitlement.

Like travelers who crash a party because their car has stalled in a storm, we were grateful for the food and for the shelter. It did not bother us that the food consisted of leftovers or that it was perhaps cold and sometimes spoiled. It was food. It did not permanently damage our sense of self that some of those at the party treated us less courteously than if we had been invited guests, for we had not come seeking their friendship or acceptance, or wanting to insinuate ourselves into their circle. We knew that had the Castro storm not occurred, we would have continued on our way. Like stranded travelers, we intended to get back in our car and return to our lives just as soon as we could get the car, our country, fixed. Since we were grateful for the refuge and did not expect to be treated like invited guests, it was neither surprising nor symbolic of [793 some greater evil that we were not. Like travelers or visitors every where, we were insiders to our own culture even though we were outsiders to the foreign culture. Like an American who does not think less of herself because a French waiter in Paris treats her rudely, whatever shabby treatment we received here did not compromise our sense of self. Being outside is not so bad if one is also inside.

Like the travelers we felt ourselves to be, we expected to return to Cuba soon, and even though we have not yet returned to Cuba, my family did not stay in Miami long. My father continued to work for Exxon and was transferred to El Salvador, and later, to Aruba and to Argentina. In those days, my mother’s career always took a back seat to my father’s. My mother had been a kindergarten teacher in Cuba but was not certified as a teacher in the U.S. She later earned a U.S. college degree and became the Director of the Day Care Division of Catholic Community Services in Miami, a position from which she only recently retired after having made a difference in the lives of thousands of children and having had new day care center building dedicated in her name as a tribute.

By the time I finished the 9th grade the choices for schooling were either high school in Dutch in Aruba or Catholic girls’ school in Miami, where I could board during the week and spend weekends with my aunt. My parents, feeling

that I was in need of a Catholic education, decided that a Catholic girls' school in Miami would be the best place for me. We had also considered a Catholic girl's boarding school in West Palm Beach but unlike the school in Miami, the West Palm Beach school seemed primarily to attract wealthy American girls. I felt out of place the moment I walked in and was grateful that my parents chose the Miami school.

Going to high school in Miami was crucial to the development of my identity. In that high school there were only two American girls in the entire 10th grade class of 24 girls, and the American girls were the outsiders. n15 Most of us were Cuban, but there were also girls from Nicaragua, Venezuela, Haiti, the Dominican Republic, and even Surinam. Although classes were held in English, outside of class we spoke a comfortable mixture of Spanish and English, reserving for each language those things that seemed most fitting to it. n16

[794 My Cuban classmates and I had a strong sense of entitlement to our identities as Cubanas. We could communicate and feel at home any where in Miami, and indeed, as Cubanas, felt that we were where it was at. We did not think of ourselves as Cuban-American for we did not claim an American identity. While we were not unaffected by American culture, the rituals and traditions of Cuban culture provided the primary structure for our lives. Thus, our parents required that we be chaperoned on dates, and chaperones even accompanied us when we went out, as a group, after that most American of institutions, the Senior Prom. We eschewed the teen and young adult American culture of the 60's, whose apparent acceptance of drugs and free love made it as foreign to us as if we had been living in another country. We dated Cuban boys, danced to Cuban music at parties and thought of ourselves as quite simply Cuba We were insiders to the culture that mattered to us, and outsiders to the American culture. Being outside, in that context, was good. We were inside where it counted.

Things changed radically when I went to college, for I ended up going to Cornell University in Ithaca, New York. I went to Cornell for a number of complicated reasons, many of which boil down to going to the place where the nuns least wanted me to go.

As a freshman at Cornell I filled out numerous forms, some of which asked me to identify myself by race and ethnicity. I had not given much thought to either my race or my ethnicity as separate constructs—I simply thought of myself as Cuban—and I certainly hadn't been introduced to the concept of race as a social construct. n17 I thought that my race, as a biological construct, was Caucasian and therefore white. n18 [795 I don't remember giving the matter much thought during the application process, and I don't remember how I identified myself, but I suspect I had simply identified myself as white, although my status as a foreigner was patent: I was a non-citizen and my parents, also non-citizens, were living out of the country, (in Argentina), at the time. n19

Nevertheless, as a freshman at Cornell I was intensely conscious of my Cuban identity, for I knew I was very different from most of my classmates. For

someone who had gone to a Catholic girl's boarding school in Miami, where phone calls were monitored by a nun who spoke six languages lest we attempt to arrange a tryst with a boy, Cornell in 1969 was quite a shock. The contrast between my Latina Catholic girl's school experience and the freshman dorm at Cornell in 1969 could not have been more stark: even though the dorms did not become officially co-ed until the following year, I often saw men in other student's rooms, in the halls and in the bathrooms. I felt like I was in an alien land. I missed being able to switch into Spanish whenever the Spanish words seemed more apt and I resented having been transformed from Alicia Abreu (pronounced "A-lee-see-a A-breh-oo"), into "A-lee-sha A-brew," which is how Americans pronounce my name until they are told other wise. n20 I was living the difference of my Cuban identity every day. I [796 was an outsider everywhere, even with respect to my Cuban friends, none of whom had gone away to college. It was awful.

Even speaking was awkward. I recall vividly how difficult it was to carry on conversations wholly in English during the first few weeks at Cornell after having come from an environment where it seemed that everyone was fully bilingual. I was disconcerted by the monolingualism that surrounded me. Probably because of that, when filling out the obligatory stack of forms, I noticed that although the form didn't list Cuban, it did list Hispanic as an option. To me, Hispanic meant having to do with Spanish, and the label beckoned. Checking it seemed like a way of connecting to and claiming the identity that had once seemed so right. Moreover, the label, though imperfect and overbroad, seemed unquestionably to fit. n21 I was not even an American citizen at the time, and as I have already explained, I was born in Cuba of Cuban parents and had not even learned to speak English until I was nearly 9. I therefore checked the box for Hispanic.

What happened next is a metaphor for the uneasy relationship between Cubans and other Latina/os and people of color, n22 and affected the way I identified myself for more than a decade thereafter. What happened is that I was summoned to the Dean of Students' office, where I was asked where I had gotten the idea that I might be Hispanic. When I explained that I was born in Cuba, of Cuban parents, was not even an American citizen yet and had not learned to speak English until I was nearly 9 years old, I was nevertheless told that I was mistaken. Only Mexicans and Puerto Ricans counted as Hispanic, I was told. Cubans did not. n23 I was then accused of trying to gain the benefit of programs not meant for me and was so humiliated that even a return to the nuns in Miami began to look good.

I then learned a lesson: Since I did not want to be accused of attempting to steal privilege, I never checked Hispanic again.

I graduated from Cornell in 1973, magna cum laude in psychology, worked in drug abuse and delinquency prevention programs, became the Executive Director of one such program, and then went back to Cornell [797 for

law school. I became a tax lawyer, worked for a big firm in Philadelphia and eventually decided to do what I had wanted to do since I was an undergraduate, so I entered the Academy. It was then, more than 15 years after that initial encounter with the term Hispanic as a freshman at Cornell, that the classifications on those ubiquitous forms returned to haunt me.

After I had accepted the offer of a position on the Temple faculty, I received the obligatory stack of forms. I filled them out, returned them and then received a telephone call from a then-Assistant to the Dea “Aren’t you Cuban?” she asked. “Of course,” I replied. “Then why haven’t you checked “Hispanic”?” she continued. If you’ve read this far, you know what my answer was: “Because I thought that being Cuban didn’t count as being Hispanic—only Mexicans and Puerto Ricans count,” I replied. “Oh, no,” she said, “Cubans count here. Do you mind if we count you as Hispanic?” Of course I didn’t mind, and of course she could count me as Hispanic, but I again felt accused and humiliated. This time, I felt accused of hiding my identity and humiliated at having been unmasked.

II. SOME REFLECTIONS

Counting as Hispanic at Temple, while potentially affirming, was not completely positive. It essentialized, or made dominant to the exclusion of others, one aspect of my identity—my ethnicity. It was as if no other part of me was worthy of note. I now think that not having counted as Hispanic during all those pre-Temple years had some salutary effects and helps to answer some of the questions I’ve had since.

For example, I have long wondered why I did not feel like an outsider, or like a minority, as those terms have been constructed in legal scholarship, until I entered the Academy, 25 years after I first arrived in the United States. By any objective criteria (to the extent that such a thing even exists), I was both. As a Cuban in the United States I was an outsider and a minority. I was certainly not in Cornell’s political main stream in 1969, and as a woman, a Cubana, and a founder of a Cuban organization that had only 3 members, I was certainly not in any numerical majority. ⁿ²⁴ As the only Cuban or Latina/o lawyer at the law firm [798 with which I practiced, I was hardly in the mainstream. But although I knew I was different, I did not feel inferior. I now think that this was because even though I was outside in some ways, I was inside in others. Being both inside and outside was key to preventing the essentializing of my outsider status.

Being granted membership in the group “Hispanic” when I joined the Academy not only essentialized the outsider aspect of my status, but it undercut the ways in which my ethnicity also makes me an insider. The classification “Hispanic” obliterates the ways in which my ethnicity makes me an insider because it is a homogenized view of Spanish-speaking people, a view that has been constructed and defined by Americans. When I was in high school in Miami with a diverse group of Latinas, it would not have occurred to me to describe all

of us as belonging to the same group. The non-Cuban Latinas were very different from us. Not only were the non-Cuban Latinas all very wealthy, but they spoke Spanish differently, with different accents and different colloquialisms. They were in the U.S. voluntarily and could and could go home to their countries, and their extended families, when school was over. With the Cuban girls I shared a culture, a history, a language, an accent and a longing for the relatives we had left behind. Our stories were variations on a theme of diaspora. Only an outsider to our culture could have considered us to be part of the same group as the non-Cuban Latinas.

The homogenization of the Latina/o identity that is wrought by lumping all of us within the classification Hispanic, dilutes our ethnicity and thus dilutes the sphere in which we are insiders. As a Cuban, I am an insider, and being an insider in some ways is what makes it alright to be an outsider in other ways. As a Catholic attending a bar mitzvah, I am an outsider, but that is not troublesome to me because I am also an insider, to my own religion, at the same time. Outside is negative when it is constructed as such, but it is less likely to be constructed as such if we are insiders in other respects.

The homogenization of ethnicity, and the destructive way in which it undercuts the spheres in which we are insiders, does not stop with the attempt to classify all Spanish-speaking people as members of one undifferentiated group. n25 It is also evident when we are referred to as [799 hyphenated Americans, as if we needed to be labeled American to be legitimate. I born in Cuba. I am Cuba I am not Cuban-America

Like the classification Hispanic, the designation Cuban-American is a construct, and it is an American construct. The Cuban-American label not only dilutes my Cuban identity, but it also suggests that the “American” modifier is necessary to legitimize it. Although I am now an American citizen and I value that status, I am still Cuba I have absorbed a tremendous amount of American culture, and I am grateful for all it has given me, but I am still Cuba My children, who were born in this country, are, to me, the real Cuban-Americans, but I am Cuba

It should be enough for me to be Cuba So why do I now only count as a Cuban-American? If I had been born in Canada, Britain, or Australia, would I be described as a Canadian-American, a British-American or an Australian-American? No, because I would not need to be cleansed. Being Canadian, or British, or Australian would be enough.

Of course, I may be overstating my case. Perhaps since I have been away from Cuba for nearly 40 years, I can no longer claim to be just Cuba I’ve probably become too Americanized for that. I am not Cuban in the same way that my parents, who grew up and came of age in Cuba, are Cuban, nor am I Cuban in the same way that someone who has grown up in Cuba and still lives in Cuba now is Cuba American life and American culture have had too much influence to allow me to claim that. But neither can I say that I am America To claim that

would be to deny the foundational influence that having been born in Cuba has had on me and to appropriate an identity that is not my birth right. I am different from people born here. For many years, first as a refugee and later a resident alien, I was here at sufferance, and even now that I am a naturalized citizen I feel quite keenly the difference between me and those who can claim U. S. citizenship as a result of their birth. Even the Constitution acknowledges the fundamental difference between citizenship by birth and citizenship by ex-post act of law, so I can never be President.

If I am too Cuban to be American and too American to be just Cuban, what, then, am I to be? One obvious response is to say that I am Cuban-American, but, I reject that label as well. To call me a Cuban-American is to put my core at the periphery. It is to pluck the nucleus and relegate it to the status of modifier. To refer to me as a Cuban-[800 American is to take the place where I am most inside and put it on the outside.

So where does this conundrum leave me? If I am not Cuban and I am not American and I find the label Cuban-American offensive, what am I? For me the answer is that classification depends upon context. To full-fledged, natural born Americans, I am Cuba That's what makes me different from them and it is, all by itself, legitimate and enough. To Cubans who are still, or until recently were, living in Cuba, I am an Americanized Cuba

The term Americanized Cuban, which can be shorted to Ameri-Cuban, is not one which I've ever heard anyone use. Nevertheless, I find it appealing. Unlike the term Cuban-American, the term Ameri-Cuban leaves the Cuban at the center. It acknowledges the impact of nearly 40 years of exile but keeps the Cuban core on center stage. It is less homogenizing, less assimilationist. Perhaps we should give it a try.

But change is hard. A very long time ago, in reading through a self-study prepared by a Faculty Committee, I noted that I was described as a Cuban-American and I asked why I couldn't just be Cuba After all, if the point is to highlight the difference between me and other members of the faculty, referring to me as Cuban is most apt, for to the extent I am American, I am the same. While my listener was vaguely amused by the notion that I would find the label Cuban-American not only inaccurate but vaguely demeaning, the classification remained unchanged. In a more recent self-study, pie charts set out the percentages of faculty who are Puerto Rican Hispanics or Mexican Hispanics, but a Cuban Hispanic is just an "other" Hispanic. Still marginalized, after all these years.

It has been suggested to me that my objection here is not to essentializing, but to essentializing the wrong thing. I disagree. I am arguing in the alternative. I would prefer not to have one aspect of my identity—my ethnicity—highlighted to the apparent exclusion of all others. Nevertheless, if an aspect of my identity is going to be essentialized, I'd at least like it to be something that is as central to my own view of myself as its essentialization would suggest that it is. In other

words: I'd prefer that you don't essentialize, but if you're going to essentialize, at least get it right.

I now think that perhaps being told I was not Hispanic when I was at Cornell was probably a good thing. It helped me to preserve my Cuban identity by making my ethnicity non-essential. It allowed me to view myself, and, I believe, to be viewed, as a whole person. A person different from others, to be sure, but difference is not per se negative.

Difference is negative only when it is constructed as such. The [801] talent that makes Luciano Pavarotti or Kathleen Battle different from the rest of us is not negative because it is not viewed negatively. Albert Einstein's intellect was different from that of most people, but its difference did not make it negative. Throughout my professional life, until I joined the Temple faculty and became minoritized, I did not feel that the differences that came from being Cuban were negative. In my life as a student and later as a tax lawyer with a big Philadelphia firm, the differences that come from being Cuban (bilingualism, understanding Latina/o culture, knowledge of the Caribbean and Central and South America), were and are assets, not liabilities. I saw them that way and I believe others did as well.

For my honors thesis at Cornell, *Coping with Culture Conflict*,²⁶ I studied the ways in which the conflicts between the Cuban and American cultures were reflected in the degree to which children spoke English with a Spanish accent, and my work was not only encouraged but praised. When I became a tax lawyer, my fluency in Spanish brought me into transactions that were on the cutting edge of tax practice.²⁷ I could revel in these differences because with them I was also an insider. I was an insider to a culture and group that I valued.

Of course, being denied admission to a group, (in my case, the group labeled Hispanic), can be disempowering when it stands in the way of redressing wrongs. Refusing to acknowledge victimization does not transmute a victim into a non-victim. But we should question whether there is another way of righting those wrongs—a way that doesn't disempower us,²⁸ and a way that doesn't essentialize one aspect of our identities to the exclusion of others.²⁹ While being encouraged to check Hispanic when I came to Temple was empowering because it recognized my ethnicity, it was also marginalizing because it essentialized that aspect, and it essentialized it in a homogenized and therefore incomplete and inaccurate way.

So, what am I (we) to do? If the price of counting is the homogenization of my Cuban identity, do I want to count? If the price of counting is being cast in the role of victim, do I want to count? Does counting as Hispanic essentialize my ethnicity so that all other aspects—woman, mother, wife, daughter, tax lawyer, friend—dissolve? LatCrit scholars have begun to ponder these questions, and have offered a number of useful insights. Work on intersectionality has helped to reveal us as multidimensional individuals capable

of functioning and delighting in a variety of roles. It has shown that we can move between worlds and between languages while valuing and being a part of each, and it has applauded the diversity that exists within us. Yet, I want to offer a few words of caution

First, in our zeal to reveal ourselves as multidimensional whole people whose many characteristics intersect in interesting ways, we should resist the urge to appropriate intersectionality itself. We should celebrate it, but we should not claim exclusive ownership of it. Intersectionality is part of the human experience and we should not fall into the trap of essentializing the very vehicle we have chosen as a de-essentializing device. Intersectionality, while a useful tool for deconstructing essentialism, should not itself be essentialized as a phenomenon either unique to or amplified by the Latina/o experience, for to do so will only divide us further. We should avoid getting into an intersection contest.

Second, we should neither forget nor denigrate professional intersections. I am a tax lawyer, teacher, and scholar. I became a tax lawyer because I found tax challenging and fascinating as a law student when I took my first tax course. I love the intellectual challenge and the rigor of it, but I am also drawn by the deeper meaning of taxation, for in a tax system a society reveals its values. While a tax system developed through the democratic process will reveal all of the imperfections of that process, it can also provide an antidote to the ills that befall a society plagued by dramatic income inequality. Tax policy, developed and implemented through a democratic process that values human rights, can prevent the rise of dictators like Fidel Castro, who used force to obtain and retain the power to redistribute wealth, and who abrogated human rights in the process. n30

Tax systems reflect who and what we care about, and in studying a tax system we study who we really are. In debating tax policy we debate who we think we should be. As Professors Blum and Kalven noted in their classic article on progressive taxation,

[In the end it is the implications about economic inequality which impart significance and permanence to the issue and institution of [803 progression] Ultimately a serious interest in progression stems from the fact that a progressive tax is perhaps the cardinal instance of the democratic community struggling with its hardest problem. n31

My work with Professor Marty McMahon addresses issues of income inequality and progressive taxation and reflects that perspective. n32

Despite the importance of tax policy for the preservation of human rights, property, and other things we value, within the Academy I have felt more like an outsider as result of being a tax lawyer and scholar than as a result of any other aspect of my identity. Colleagues seem to think nothing of saying about tax lawyers as a group things that they would be pilloried for saying about many other groups. I have heard colleagues refer to us as dull, narrow, intellectually shallow, and pedestrian. Evaluation of tax scholarship for tenure or promotion often expresses surprise that the work is interesting, creative, or well-written, and the

one area that aspiring law teachers seem to have no compunction about listing under “Subjects Not Preferred” in the AALS recruitment conference form, is Tax. In two years as Chair and several more years as a member of Temple’s Faculty Selection Committee I looked at several thousand AALS forms, as there are typically about one thousand a year. I think fewer than 20, out of all of those thousands of applicants, listed anything other than tax as “not preferred,” and only one listed Constitutional Law. I confess that I wanted to interview that applicant just because of that.

Being a tax lawyer made me feel like an outsider when I arrived at LatCrit III. Exploring that intersection—the intersection of our identities and our chosen fields of scholarly interest—can help the LatCrit movement to grow and can advance some of its objectives. Perhaps a second story will provide useful insight into the point I will try to make.

III. A PIANIST’S STORY

One evening during the summer I was writing this essay, I went to a concert by the Philadelphia Orchestra at the Mann Music Center, an outdoor venue which serves as the Orchestra’s summer home. The program that evening was billed as “Scandinavian Summer” and promised a selection of “Scandinavian Favorites,”ⁿ³³ including Grieg’s Piano Concerto, a beautiful, difficult, and well-known piece of the classical repertoire. The pianist was Terrence Wilson, a Juilliard student who had made his professional debut with the Philadelphia Orchestra in 1992, at [804 the age of 17.ⁿ³⁴

When Mr. Wilson walked onto the stage the audience surprise was polite but apparent. Not only is Mr. Wilson young, (now 22), but he is Black. Although there was a picture of Mr. Wilson in the program for the evening, there was no picture of him in the pamphlet that announced the season, which is where subscribers get information about the schedule of works and performers, and given the relaxed atmosphere of the Mann, where many people picnic on the grass surrounding the stage and the covered seating area during the performance, I suspect that many had not paid close attention to the program.

At that performance Terrence Wilson was a soloist not only because he was the pianist, but because he was the only Black person on the stage. Although other Black classical concert pianists exist (Andre Watts comes prominently to mind), it is fair to say that Blacks are under-represented within the ranks of classical instrumentalists.ⁿ³⁵

Terrence Wilson gave a marvelous performance that night and received a richly-deserved standing ovatio Still, after it was over I found myself reflecting on the possible parallels between his life as a Black classical concert pianist and mine as a Cuban tax lawyer and academic.

IV. REFLECTIONS

Both Terrence Wilson and I are playing against type. He, because he is Black and a classical concert pianist and I, because I am Cuban and a tax lawyer. Our identities create expectations that we breach. Although the civil rights movement has resulted in a climate in which the existence of Black professional musicians and Latina/o lawyers is, happily, no longer remarkable, we have not yet succeeded in creating a climate in which our race or ethnicity does not limit the ways in which we are expected to use our talents. Audiences are not surprised when a Black musician plays jazz, or hip hop. Black jazz musicians and hip hop artists are commonplace, as are Latina/o constitutional, immigration and criminal defense lawyers. But Black classical concert pianists cause a stir and Latina/o business lawyers in the U. S. are often regarded with [805 incredulity. Reviews and announcements of Terrence Wilson's performances often mention that he is Black even though they never mention the race of a white concert pianist, n36 and at least one very prestigious prospective employer insisted that I had to be interested in developing an immigration practice, not in being a tax lawyer.

To open the doors of opportunity fully for those who come behind us, legal discourse should move beyond these narrow taxonomies. Entire fields should be available. This process of expanding the field, of opening the doors fully, is slow and often woefully incremental, but it is the next step in developing an inclusive society. Just as women had first to fight to be admitted into law school and then fight to be allowed to practice law and then fight to be hired by large and prestigious Wall Street law firms and then fight to be accepted as tax, banking and finance lawyers, so must Latina/os. n37 We should be able to celebrate our race, gender, ethnicity, sexual orientation, and myriad other defining characteristics and allow them to enhance what we choose to do, but they should not cost us the chance to do what we want to do. As a community we should nurture the development of interest in many different aspect of the law (yes, including even tax) not only because it is the right and inclusive thing to do but because it is also the practical thing to do. Many law faculties face limits in the number of experts in particular fields than they can afford to hire, but by diversifying the areas of our academic expertise, Latina/os can increase our numbers in the academy. If we all do the same thing, we reduce our chances of securing greater representatio

What I am suggesting is not assimilation, with its subtext of homogenization and erasure of ethnicity. Just as it is important for law students to be exposed to a diverse faculty because it offers them a variety of role models and allows them to experience diversity in the possession of power, so it is important that diversity extend to the subject matter areas we pursue. n38 This more complete vision of diversity, which [806 extends to subject matter, will make the range of career and life options most graphically visible to students. As Latina/os become more visible throughout the spectrum of areas of practice and professions

generally, others will become accustomed to seeing us in those roles and we will be seen as rightful participants in those endeavors. We don't have to surrender our ethnicity to do that.

When Terrence Wilson commands the piano in the classical repertoire he proclaims both that race is not a bar to the classics and that classical music must not remain a whites-only club. Of course, I am not suggesting that a Black pianist can be taken seriously only by performing the classics or that the classics are more worthy than other types of music with which Black musicians are more closely identified. What I am suggesting is that Black musicians can and should perform whatever type of music they choose to perform and that all types of music, including classical music, should be seen as within their province, just as they are for whites and just as whites are not barred from performing jazz. Terrence Wilson's race should not limit what he plays, any more than Alicia De Larrocha's nationality (she is from Spain) ought to prevent her from playing Mozart. Madame De Larrocha has probably done more to disseminate the music of the Spanish composer Enrique Granados than any other pianist, but she is also renowned as an exceptional interpreter of Mozart.

When he speaks to groups of students and young musicians Terrence Wilson demonstrates that Blacks can reach for the stars as classicists, and all students can profit from that message. n39 I hope that seeing me teach tax opens similar doors for my students n40 and that reading my tax scholarship broadens the perspective of my colleagues. n41

[807 Terrence Wilson does not want his race to be essentialized, although he is keenly aware of its importance. As he has said in inter views, "There are dangers in being a black concert pianist ... I'm worried that I'll only be a role model. I'll probably get work because of my color ... [and these can be great opportunities for me. But these advantages also have a downside—I don't want to be ghettoized.... Just because I'm black ... doesn't mean that my favorite pianist is Andre Watts." n42 I concur, on both counts, and I believe that it is possible, if difficult, to achieve that goal.

The essentializing of race has imposed on Terrence Wilson a burden other pianists do not have. Thus he has been criticized for playing classical standards, such as Tchaikovsky's Piano Concerto No. 1, rather than concerti written by Black composers. n43 In effect, his critics would deny him the pleasure of playing Tchaikovsky's Piano Concerto No. 1 because of his race. n44

[808 I have felt similar pressures. I have been told that I should not waste my time on tax but that, because I am Latina, I should devote my professional life to areas of the law which bear a more direct relation to the Latina/o, *conditio* I have rejected that advice. I have as legitimate a claim to being a tax lawyer as any white American male and neither my gender nor my ethnicity should stand in the way. My experiences in Cuba and later as an exile have no doubt shaped my view of the role and importance of tax policy, just as they have shaped other aspects of my identity, but even if I could see no connection between my experiences as a

Cubana and my interest in tax policy, it would still be legitimate for me to be a tax lawyer.

I will continue to be a tax lawyer, just as Mr. Wilson has continued to play Tchaikovsky's First Piano Concerto, but my plea here is for greater understanding and acceptance from my own community. Being a Cuban tax lawyer made me feel like an outsider at LatCrit III. While some of that feeling may have been attributable to my being Cuban, I think most of it was attributable to my being a tax lawyer. When people asked me what I taught and I said tax, I felt them wrinkle their brows and silently wonder "so what are *you* doing here," as if I couldn't be both Latina and a tax lawyer. It is time for that to change.

V. CONCLUSION: TIME TO COME IN FROM THE COLD

The good news is that things are indeed changing. After all, I, a Cuban tax lawyer, was asked to be a discussant at LatCrit III. For that I am grateful. LatCrit scholars are nudging legal discourse to move beyond binary, bipolar paradigms, and the diversity of the participants in LatCrit III is a testament to the success of their efforts. As the theme of LatCrit III implies, it is now time to take the next step. For me, that next step is to make a concerted effort to find the places where I am inside, and to celebrate and revel in that insiderness, so that it is with me even when I am outside.

What I am suggesting does not require assimilation or denial of difference. On the contrary, claiming the inside requires that we acknowledge our differences. It requires that we see that many of the things that make us outsiders also make us insiders, so that we are insiders and outsiders, all at the same time.
n45

[809 I recognize that it may seem easy for me to urge this because I may be seen as privileged: my parents are both college graduates who spoke English even before becoming exiles, we did not emigrate for economic reasons, and we were not, in our home country, the victims of racial discrimination. I am now inside the community of tax professors and was once inside the community of practicing tax lawyers, and being inside those communities has been very nurturing. So, for others it might be more difficult to find and celebrate that inside than it has been for me. Nevertheless, difficulty does not mean impossibility, and deciding to look for that insider place is the first step. Some members of our diverse community will find it easier to do that than others, but all of us should try. By the very act of uniting to find that place of comfort and belonging, that insider's place, we can create it.

At LatCrit I Professor Jerome Culp exhorted us to "build a theory that recognizes our differences and builds coalitions for change," n46 but cautioned that "this new theory has to avoid falling prey to the temptation to become complicit in the description of the other. We will not build a theory for change if we replicate the structures of the other created by society." n47 The construction

of outside as a place that stands in opposition to inside is one such structure. That structure was necessary to break down the barriers that kept us on the outside looking in, but accepting and using that structure should not prevent us from also finding the places where we are inside. n48

A model in which we categorize ourselves as either insiders or outsiders replicates the structure of a society that treats us as being outside. But our world does not exist outside of some other, more important, world. Every day, we are insiders in some respects, even as we are outsiders in others.

To claim the inside, we need to value the diversity among us. The ways in which we are different from others are what make us the individual persons that each of us is. We should celebrate those differences. We are diverse in ethnicity, gender, sexual orientation, area of professional interest and a host of other things. These differences do not just make us outsiders, they also make us insiders to the communities whose members share them, even if they don't share other characteristics we possess.

[810 Writing about the gay and lesbian communities, my colleague, Professor Nancy Knauer, recently observed that:

The myth of a single community prompts arguments over the production of a single agenda. When much of the disagreement stems from fundamental questions of perspective and goal articulation, the challenge is not to determine whose goal prescription is right or more desirable, but rather, to try to respect the myriad of differing articulations emanating from our diverse communities. n49

LatCrit scholars have shattered the myth of a single minority community and have shown that there isn't even a single Latina/o community. They have been instrumental in beginning the process of allowing us to experience one another as multidimensional people who also have many things in common. We have started to move beyond the binary paradigm that essentializes one aspect of our identity, but we need to go further.

Latina/os are insiders and outsiders. It is time for us to claim all the places where we are inside, and to build others. We should nurture the communities to which we belong and build bridges to those we do not yet know well. We should bring our insights and our diversity to different areas of the law—including tax and business—areas where we continue to be seriously under-represented. By doing so we need not become either whitewashed or lost. Bridges need not fuse what they bridge.

NOTES:

1. See, e.g., Juan F. Perea, *The Black/White Paradigm of Race: The "Normal Science" of American Racial Thought*, 10 *La Raza L.J.* 127 (1998), 85 *Cal. L. Rev.* 1213 (1997) and the scholarship collected in 2 thereof.

2. See, e.g., Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 *Berkeley Women's L.J.* 16, 22 (1995); Trina Grillo & Stephanie M. Wildman,

Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (or Other Isms), in Richard Delgado & Jean Stefancic, *Critical White Studies* 619 (1997).

3. See, e.g., Elvia Arriola, Welcoming the Outsider to an Outsider Conference: Law and the Multiplicities of Self, 2 *Harv. Latino L. Rev.* 398 (1997).

4. The move that I am urging is not unlike that which has occurred over time in other areas of the law and in other progressive movements. Thus, the early common law saw the doctrine of consideration evolve from a binary concept that was, like a light switch, either on or off, through the development of the doctrine of promissory estoppel, which allowed recovery even when consideration might be lacking, and eventually to relational contract, which is a considerably more complicated, but arguably more apt, model for contractual relationships. See Robert S. Summers & Robert A. Hillman, *Contract and Related Obligation: Theory, Doctrine, and Practice* 42-43 (3rd ed. 1997); Grant Gilmore, *The death of Contract* (1974); Ian MacNeil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus"*, 75 *Nw. U. L. Rev.* 1018 (1981); Ian MacNeil, *The Many Futures of Contracts*, 47 *S. Cal. L. Rev.* 691 (1974). The evolution of feminism provides perhaps a richer and closer parallel, but I cannot explore it here.

5. See, e.g., Arriola, *supra* note 3, at 398.

6. See Alice G. Abreu, *The Difference Between Expatriates and Mrs. Gregory: Citizenship Can Matter*, 67 *Tax Notes* 692, 695 14 (1995) (disclosing that my status as a naturalized, rather than native born, citizen largely explains the value that I place on the status of U.S. citizenship); Alice G. Abreu, *Taxing Exits*, 29 *U.C. Davis L. Rev.* 1087 251 (1996) (again disclosing how a proposal would affect me, a naturalized citizen).

7. I owe the term to Professor Celina Romany, who has spoken eloquently of her move to the United States from Puerto Rico and poignantly described the experience of being "minoritized" for the first time in her life. The phenomenon that Professor Romany described as minoritization is not unlike the process that Zora Neale Hurston refers to as "becoming colored". See Zora Neale Hurston, *How It Feels to Be Colored Me*, in *I Love Myself When I am Laughing ... And Then Again When I Am Looking Mean and Impressive* 152 (A. Walker ed., 1979), quoted and cited in Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Sta L. Rev.* 581, 610 (1990). I adopt Professor Romany's term—minoritization—because it captures the essence of my own experience.

8. Esso was the trade name used by Standard Oil of New Jersey for many of its foreign, as well as some of its domestic, operations. Standard Oil used various trade names in the United States until 1972, when it decided to unify its domestic operations under the name Exxon. For a succinct history of the trade names used by Standard Oil as well as some of the legal issues that arose from its use of multiple names and its subsequent decision to use the name Exxon in the United States, see *Exxon Corporation v. Humble Exploration Company*, 695 F.2d 96, 98 (5th Cir. 1983), on remand, *Exxon Corporation v. Humble Exploration Company*, 592 F. Supp. 1226 (D. Tex. 1984).

9. *Exxon Corp. v. United States*, 7 Cl. Ct. 347 (1985). The case arose out of Exxon's deduction of a \$ 27.4 million debt owed to it by the subsidiary that owned the Cuban refinery which my father managed. The debt was not repaid following the nationalization and Exxon sought to deduct it as a bad debt. The tax litigation had a long and tumultuous history and was not resolved until 1991. Exxon won. See *Exxon Corp. v. United States*, 931 F.2d 874, 98 (Fed. Cir. 1991), *aff'd*, *Exxon Corp. v. United States*, 7 Cl. Ct. 347 (1985), *rev'd* 785 F.2d 277 (Fed. Cir. 1986), on remand, 12 Cl. Ct. 434 (1987), *vacated*, 840 F.2d 916 (Fed. Cir. 1988), on remand, 19 Cl. Ct. 755 (1990).

10. *Exxon Corp. v. United States*, 7 Cl. Ct. 347, 350 (1985).

11. I will refer to non-Cuban, non-Hispanic Anglos as Americans because that reflects the way I saw the differences between me and others whom I saw as belonging here. While I

recognize that awarding to residents of one country in the Americas an appellation that implies ownership of two continents is controversial, I nevertheless use it here because it illustrates who and what it was that I regarded as the other. It was not others of a different race, gender or sexual orientation. It was others who were native and therefore belonged in the United States.

12. The cognoscenti will recognize this as a part of Miami where a large concentration of Cubans now reside. It is referred to as “la sauguesera”, a term that connotes thorough Cubanization—a place where everyone is Cuban and Americans would feel like foreigners, down to having trouble understanding the spoken language and reading the signs on storefronts, only some of which proudly proclaim “We Speak English” in stark contrast to the early 1960’s when shops eager for Cuban business would advertise “Se Habla Espanol” (Spanish spoken here).

13. The term comes from regulations that interpret the Internal Revenue Code. Treas. Reg. 1.871-2(b). Until 1984, a non-resident alien who was a “mere transient or sojourner” was not treated as a U.S. resident for federal income tax purposes. Although section 138 of the Tax Reform Act of 1984, Pub. L. 98-369, 98 Stat. 672 (1984) changed the rules for determining residency status for tax purposes, the “transient or sojourner” classification remains significant for other purposes, such as determining whether an individual qualifies for the foreign income exclusion provided by I.R.C. 911. See Treas. Reg. 1.871-2(c).

14. Max J. Castro has written about what he has referred to as the Cuban “master narrative” that “explains [Cubans’ condition as immigrants not in terms of personal circumstances but of historical necessity. That perspective confers meaning and dignity to the exile’s condition regardless of external hardships and protects self-esteem against the stigma attached by some in this society to newcomers and to Latinos.” Max J. Castro, *Making Pan Latino: Latino Pan-Ethnicity and the Controversial Case of the Cubans*, 2 *Harv. Latino L. Rev.* 180 (1997). I find the “master narrative” label pejorative, for it implies an artificially imposed world view—something that has been “narrated” to us and thus imposed from outside—that is at odds with my experience. My aunt, now 71 and barely able to walk, refused to learn English because it would mean that she had accepted that she would have to make a life in the U.S.—that she would no longer be a transient or sojourner. That she has been in the U.S. for over 35 years, longer than she lived in Cuba, and that she has learned to understand English in spite of herself, has not altered the way she sees herself: She is Cuban, not Cuban American, and she still feels that she really belongs somewhere else. That is not a master-narrative, it is her reality.

15. Again, I use the term American because it is a translation of what they were to us: Americanas. We were, and are, Cubanás.

16. Professor Margaret Montoya has written about the effect of weaving English and Spanish and has cited evidence that it is a linguistically competent practice that serves a subtle signaling function. Margaret E. Montoya, *Mascaras, Trenzas y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 *Harv. Women’s L. J.* 185 6 (1994), 15 *Chicano-Latino L. Rev.* 1 (1994), citing Rodolfo Jacobson, *The Social Implications of Intra-Sentential Code-Switching*, in *New Directions in Chicano Scholarship* 227, 240-41 (1978). This weaving of two languages together, once confined to our personal lives, has itself become emblematic of Latina/o and LatCrit scholarship. See, e.g., Berta Esperanza Hernández-Truyol, *Borders (En)gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 *Y.U. L. Rev.* 882 (1997); Berta Esperanza Hernández-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 *Colum. Hum. Rts. L. Rev.* 369 (1994). Professor Yvonne Tamayo has written of the more recent reaction to the prevalence of Spanish speakers in Miami, where, she has observed, “Spanish is not the language spoken only by people who work in low-paying jobs and who occupy an inferior place in the professional, political and social strata: rather, in Miami Spanish is spoken as well by people who own thriving businesses, are elected to public office, and are active participants in the city’s social and cultural life.” Yvonne Tamayo, “Official Language” Legislation: Literal Silencing/Silenciando La Lengua, 13 *Harv. BlackLetter J.* 107, 120 (1997).

17. For some of the recent work discussing race as a social construct, see Kevin R. Johnson, “Melting Pot” or “Ring of Fire”? Assimilation and the Mexican-American Experience, *10 La Raza L. J.* 173 (1998), 85 *Cal. L. Rev.* 1259 (1997); Theresa Glennon, Race, Education, and the Construction of a Disabled Class, *1995 Wis. L. Rev.* 1237, 1290-1297, and sources cited therein

18. Apparently, many Cubans still do. See, e.g., Mary Coombs, LatCrit Theory and the Post-Identity Era: Transcending the Legacies of Color and Coalescing a Politics of Consciousness, 2 *Harv. Latino L. Rev.* 457 (1997). Coombs observed that “many of my Cuban students—who would be appalled (regardless of their skin tone) at being considered people of color—would self-identify as Cubano/Cubana or perhaps, as Hispanic.” *Id.* at 460.

19. The subject of race is, of course, complicated, as many scholars have shown. For now, I limit myself to describing how I felt, as a Cuban teenager in Miami in the late 60’s. As others have noted, many Cubans are biologically Caucasian, and tend, or tended, to self-identify that way, distinguishing race from ethnicity. See Johnson, *supra* note 17, at 1284-90 (describing Cubans who emigrated before 1980 as “mostly White,”), 134 (citing Earl Shorris, *Latinos* 64 (1992) for the proposition that “the first wave of Cubans were mostly White). Many Cubans are also Black, others are Asian, and still others are bi- or multi-racial. Given the racial diversity that existed in Cuba itself, for me the separation of race and ethnicity seemed both obvious and natural. *Id.* at 1293 (describing racial tensions between the pre-1980 Cuban émigrés and the refugees who emigrated as part of the Mariel boatlift of 1980, many of who were Black); see also Trina Grillo, Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House, 10 *Berkeley Women’s L. J.* 16, 22 (1995) (Professor Grillo, who generously shared many insights through her writing before dying of cancer way before her time, identified herself as Black, Cuban and Italian). The question whether race as a construct can or should be separated from ethnicity has recently occupied a number of scholars, including Professor Grillo, *id.* and Professors Espinoza, Harris, Lopez, and Perea. See Leslie Espinoza & Angela P. Harris, Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race, *10 La Raza L. J.* 499 (1998), 85 *Cal. L. Rev.* 1585 (1997); Ian Haney Lopez, Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory, *10 La Raza L. J.* 57 (1998), 85 *Cal. L. Rev.* 1143 (1997); Juan F. Perea, The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought, *10 La Raza L. J.* 127 (1998), 85 *Cal. L. Rev.* 1213 (1997). The contemporary debate promises to, and should, continue.

20. Eventually, I gave up on my first name, opting instead to use Alice because at least that is a name different from my real one and not a corruption of it, although I continue to insist on the correct pronunciation of my surname. I do of course, endure countless mispronunciations and misspellings. It will be interesting to see if that changes now, at least in Philadelphia, because the Philadelphia Phillies have a new player, Bobby Abreu, who insists on the correct Spanish pronunciation of his surname. Bobby Abreu is from Venezuela and is not a known relation, but I confess that I love hearing Bobby Abreu’s name pronounced correctly. The subject of names, and how they relate to our identities as Latina/os is an important and complicated one, which I will not elaborate on here. For thoughtful commentary, see Montoya, *supra* note 16, at 8, and Johnson, *supra* note 17, at 209-25.

21. On the excessive breadth of the term, see Berta Esperanza Hernández-Truyol, Building Bridges, *supra* note 16, at 404-06.

22. See Castro, *supra* note 14.

23. This theme appears again in more contemporary legal scholarship. See Berta Esperanza Hernández-Truyol, Building Bridges, *supra* note 16, at 411.

24. Cubans as a group are politically conservative. See Johnson, *supra* note 17, at 1293. As Max Castro and others have noted, Cubans tend to be politically conservative in part because they blame President Kennedy, and his party, for the Bay of Pigs debacle. See Castro, *supra* note 14, at 193. During the 60’s, I was much more conservative than the majority of my classmates at Cornell. The three-person organization that I helped to found was the Cuban Student Society (CSS). There were only three of us in the CSS because we were the only three Cubans we could

find, but we took on the then-powerful Students for a Democratic Society (SDS) to offer an alternative to the SDS version of the effects of the Cuban revolution. We not only organized a debate on the Cuban revolution that drew a capacity crowd to the student union, but obtained departmental sponsorship for a course on the Cuban revolution and arranged for a Cuban scholar, from Harvard, to visit Cornell and teach it. These activities hardly put me inside the Cornell mainstream in 1969. I was outside that, but I was inside another group, one that was valuable to me, so I did not consider myself a minority.

25. The lumping of very different groups under one homogenizing label is not restricted to Latina/os. For a good discussion of the phenomenon, and a description of the many ways in which it distorts public responses to problems, see Dvora Yanow, *American Ethnogenesis and Public Administration*, 27 *Admi & Soc'y* 483 (1996).

26. Unpublished manuscript on file with the author.

27. When working on transactions with Latin American lawyers and businessmen (and they were all men), I felt the full force of the gendered roles of women in Latin American societies. We may have a long way to go before achieving the kind of equality of opportunity we want in this country, but, in Latin America, women have an even longer road to travel. That, unfortunately, is another story.

28. Although power, like choice, can be both positive and negative, in this context I regard it as largely positive. For a somewhat more detailed discussion of the positive and negative aspects of choice and power, see Alice G. Abreu, *Taxes, Power, and Personal Autonomy*, 33 *San Diego L. Rev.* 1, 50-57 (1996).

29. For a thorough and contemporary treatment of some of the problems of identity politics and essentialism, see Martha Minow, *Not only for Myself: Identity, Politics and the Law* (1997).

30. See Berta Esperanza Hernández Truyol, *Out in Left Field: Cuba's Post-Cold War Strikeout*, 18 *Fordham Int'l L.J.* 15, 77-94 (1994).

31. Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 *U. Chi. L. Rev.* 417, 520 (1952).

32. See Martin J. McMahon, Jr. & Alice G. Abreu, *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 *Fla. Tax Rev.* 1 (1998).

33. Pamphlet, *The Mann Center for the Performing Arts, A Festival for the Senses* (1998) (on file with the author).

34. *Id.*

35. A number of the press accounts of Mr. Wilson's appearances remark on the scarcity of Black concert pianists and the impact that scarcity has on Mr. Wilson's career. See, e.g., Valerie Scher, *Terrence Wilson Doesn't Want to be Known as Just a Black Pianist*, *San Diego Union-Tribune*, Oct. 23, 1994, at E-6; Kenneth Young, *Wilson Plays With Consummate Brilliance*, *Buffalo News*, Oct. 16, 1995, at 6B; Jeff Bradley, *Young Pianist Struck Right Chord with Patrons*, *Denv. Post*, Oct. 7, 1996, at F-8; Marc Shulgold, "Addicted to the Stage", *Juilliard Talent* *Terrence Wilson Romances Grieg Piano Concerto with CSO*, *Rocky Mt News*, Oct. 10, 1996, at 8D.

36. See *id.* See also Karin Remesch & Lori Sears, *African and American: Remembrance: Black History Month is Celebrated in Historical and Art Exhibits, Contests, Dramatic and Musical Presentations, Storytelling and More*, *Baltimore Sun*, Jan 30, 1997, at 3; Marc Shulgold, *Internet Web Site Offers 'Virtual Tour' of Carnegie Hall*, *Rocky Mt News*, Oct. 6, 1996, at 9D; Derrick Henry, *The 1995-96 Master Season: ASO Schedules Crowd-Pleasing Lineup*, *Atlanta J. & Const.*, Mar. 1, 1995, at 1B; J. Wynn Rousuck, *Stephen Wigler, Robert Goulet is in Royal Form in Camelot at Lyric*, *Baltimore Sun*, May 29, 1994, at 2H.

37. See Karen Berger Morello, *The Invisible Bar: the Woman Lawyer in America, 1638 to the Present* 197, 250 (1986).

38. For a recent compilation of the body of empirical work that describes the ways in which the composition of the classroom affects student performance, and goes beyond it to provide

“comparative information about race dynamic in law school classrooms,” see Elizabeth Mertz, with Vamucii Njogu and Susan Gooding, *What Difference Does Difference Make? The Challenge for Legal Education*, 48 *J. Legal Educ.* 1, 2 (1998). Mertz et. al. found that “students of color participated more in the classrooms with teachers of color.” *Id.* at 3.

39. See Michael Sangiacomo, *Keys to His Dream Right on the Piano*: Terrence Wilson, 21, *Astounds Aspiring Students at Cleveland Orchestra Rehearsal*, *Plain Dealer*, Aug. 1, 1997, at B; Valerie Sher, *supra* note 35.

40. Although my physical appearance does not announce my ethnicity (because of stereotyped notions of what Latinas should look like), I nevertheless make it a point to let my students know I am Cuban. For example, in class I always pronounce student and case names like Hernández as a native would; when we discuss citizenship and jurisdiction to tax, I raise questions about the possible distinctions between citizens and non-citizen residents, openly drawing on my own experiences as both a citizen and a non-citizen. Although it has been suggested to me that I might be embarrassing some students by pronouncing their names in an obviously Spanish way, which I can do because I am a native Spanish speaker, I’ve never received anything but gratitude from students who appreciate not having their names mangled or mispronounced.

41. I have both identified myself as a Cuban and a naturalized citizen in print and explored the connection of that identity to my scholarly exploration of matters involving the tax consequences of the renunciation of US citizenship. See *supra* note 6. I have also brought my perspective as a Latina and my understanding of Latina/o culture to discussions of Internal Revenue Service’s treatment of immigrants who claim the Earned Income Tax Credit. As importantly, by simply being a tax lawyer I think I help to break down stereotypes and to make it easier for the many Latina/o tax lawyers who I hope will follow.

42. Marc Shulgold, *supra* note 36. Other interviewers have noted that “Wilson hopes he will not be pigeonholed as an African-American artist.” Jeff Bradley, *supra* note 35. “It really shouldn’t mean much at all, but in terms of marketability, it’s inevitable that because we are so rare, some orchestras feel it can help demographically. There’s a danger of being ghettoized, being featured only in events honoring Martin Luther King or only being invited to play in the month of February [Black history month.]” *Id.* Most poignantly, he has observed that “I always get people who come over to me and say, ‘You’ll be the next Andre Watts.’ They don’t tend to say I’ll be the next Krystian Zimerman or Martha Argerich.” *Id.* Both Zimerman and Argerich are young, but established, concert pianists whose playing has been widely celebrated.

43. See e.g. Derrick Henry, *Concert Review*, *Atlanta J. & Const.*, Jan 12, 1996, at B (noting that “Tchaikovsky’s First Piano Concerto was the vehicle 20-year-old pianist Terrence Wilson chose to play. While it’s appropriate to spotlight promising black talent in a King celebration—and Wilson played with impressive power and fluency if not much individuality—surely he could have learned something more relevant to the occasion, say the powerful concerto of black composer George Walker”). Amazingly, Mr. Henry laid none of the blame for Mr. Wilson’s selection of music at the feet of the Atlanta Symphony Orchestra’s Music Director Yoel Levi, whose program he described sympathetically in a piece that appeared the day before the concert, and whom he quoted as saying “I’m very happy that we’ve found pieces that are good music, stimulating music, and quite inspiring at the same time... music that comes from the soul.” Derrick Henry, *Conducting a Celebration: Yoel Levi’s Tribute to King Comes from Heart*, *Atlanta J. & Const.*, Jan 11, 1996, at 1F. Mr. Henry levied his criticism of Mr. Wilson’s choice of music, despite having noted that Spelman College President Johnnetta Cole, who hosted the program, had reminded the audience of “King’s exhortation to embrace both the white and black keys of ‘life’s piano,’ *id.*, and having commented, when previewing the performance the day before that “A promising new talent: Pianist Terrence Wilson, 20, will play the most famous of all piano concertos, Tchaikovsky’s First. Derrick Henry, *ASO Listener’s Guide: Glee Clubs to Have Part in King Tribute*, *Atlanta J. & Const.*, Jan 11, 1996, at 7F.

44. See *supra* note 43. Exploring why Terrence Wilson chose to play Tchaikovsky's Piano Concerto No. 1 is really beside the point. He might have chosen simply because it is a beautiful piece of music, or he might have chosen it because it is a piece he plays particularly well and he wanted to display his talents to maximum advantage. He could also have chosen it to celebrate the sexual orientation of the composer, who is now widely regarded as having been gay. The point is that if he wanted to play Tchaikovsky as a tribute to Dr. King, he should be able to. The fact that Terrence Wilson is a concert pianist whom thousands of people, of many races, pay to hear, should be the point.

45. In saying this I am reminded of and inspired by Professor Paulette Caldwell, who spoke movingly at LatCrit III of the way in which changing how we define ourselves can change our interactions with others as well as our view of the world. Professor Paulette Caldwell, *Critical Recollections: Reclaiming Latina/o Experiences*, Address Before the Legal Academy of the United States 38 (May 7, 1998) (transcript on file with U. Miami L. Rev. and U. Tex. Hispanic L.J.). See also, Jerome McCristal Culp, Jr., *Latinos, Blacks, Others, and the New Legal Narrative*, 2 *Harv. Latino L. Rev.* 480 (1997).

46. Culp, *supra* note 45, at 68.

47. *Id.*

48. See Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 *Women's Rts. L. Rep.* 297 (1992).

49. Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 *Temp. Pol. & Civ. Rts. L. Rev.* 337, 361 (1998).

3. Berta Esperanza Hernández-Truyol,* *Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex*, 53 MIAMI L. REV. 811 (1999)

This essay explores the multiple margins that Latinas n1 inhabit both within majority society and their *comunidad Latina* because of their [812 compounded outsider status in *all* their possible communities. Exploring the concept and theme of “Between/Beyond Colors: Outsiders Within Latina/o Communities” elucidates both the challenges and the possibilities the young LatCrit movement presents for Latinas. n2

From its inception, LatCrit has broadened and sought to reconstruct the race discourse beyond the normalized binary black/white paradigm n3 — an underinclusive model that effects the erasure of the Latina/o, Native, and Asian experiences as well as the realities of other racial and ethnic groups in this country. Primarily because of Latina/o panethnicity n4 and diversity, the LatCrit challenge should not, and can not, stop with the black/white racial binary. LatCrit’s interrogation of the black/white paradigm, dating to the movement’s beginnings, has invited us to contest other sites of normativity such as the socially constructed categories of foreignness, proper sex/gender roles, and sexuality—both within the majority culture and our *cultura Latina*. n5

This essay thus addresses those insights that LatCrit theorizing offers to the Latina experience looking through the lenses of *cultura*, (en)gendered *fronteras*, and sexuality. This *cuento* of the multifaceted ness and complexity of the Latina experience reveals how such site is an essential counter-narrative to the either/or formulae that colonize so much scholarly and jurisprudential discourses. The *cuento normativo* obscures and denies the multidimensional, intersectional, multiplicities and interconnectivities of Latinas/os’ real lives. n6

[813 LatCrit’s reinterpretation and repositioning of discourses, eschewing the atomizing either/or approach to embrace an inclusive and realistic both/and perspective, will not only reflect the multidimensionality and multicultural roots

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of Latinas/os and other diverse groups but will empower *all* marginalized communities. n7 This endeavor is complex and painful, even within the friendly intellectual communities of crits—race crits, fem crits, race/fem crits, and queer crits. n8 These communities, notwithstanding their useful, emancipatory, and beneficial foundations, proved to be “insufficiently attentive” to those, like Latinas/os, who exist at the margins of crit borderlands of race, sex, gender, sexuality, color, language, and culture. n9

Pursuant to rigorous interrogation of “the interplay of patriarchy and white supremacy in the shaping of race and racialized power relations” critical theorists have made some inroads into addressing issues of the intersection of race, sex, and class. n10 One example is the serious examination of the black/white paradigm. Yet, this questioning of race alone, or in isolation from other identity components, does not, and can not, explain or craft the setting for the inquiry into the interaction of sex and race to effect gendered inequalities. n11 Consequently, much work remains to be done in the areas of intersections of race, sex, and class with culture, language, and sexuality.

LatCrit itself, however much it has struggled for inclusiveness, and as diverse, inclusive, involved, and proactive as the coalition has been, has the potential for deep fault-lines based upon cultural clashes. One example of unexplored territory is the potential (and unavoidable) conflict that can confront a predominantly Catholic group in being asked to embrace sexual minorities or to accept certain population-control based solutions to hunger and poverty. n12 Undoubtedly, such explorations will [814 implicate the position of Latinas both within society at large and within the *comunidad Latina*.

Thus, in the course of writing about Latinas/os, I have discovered (and LatCrit discourse has unveiled and underscored) that critical theorizing is stressful, simultaneously liberating and restraining, confining, coercive. For me, there is one great irony in the endeavor to include Latinas/os in the discourses about law and justice, participation and cooperation, citizenship and foreignness. One of the major schisms I need to bridge in writing about multifaceted Latinas in a world that imprints homogeneity as normal, is the necessary use of an alien tongue—English—to communicate practice, theory, and insight based on the personal, real life journeys that I travel in Spanish. n13 This task forces me to translate untranslatables, like feelings.

I have unearthed in the course of all this critical intellectual inquiry that I feel in Spanish. My English expression is intellectual, cerebral, analytical, cold; my Spanish yarn is emotional, visceral, experiential, passionate. My own narratives often may have different meanings depending upon the voice. Foreign languaged stories may be incomplete and sometimes incoherent translations, at best silhouettes of my lived reality. Any necessary exportation of my personal knowledges to English bridles, constrains, and suppresses them; it distorts their reality, location, time and space. Spanish realities are performed as foreign fables.

Latinas are in a constant state of translations, existing in the interstices of languages, genders, races, cultures, and ethnicities.ⁿ¹⁴ For them, the distortions effected in engaging normative discourse are multifaceted. Their location as multiple aliens in majority communities is by virtue of many degrees of separation from the *normativo*: sex, ethnicity, culture, language. Within their own *cultura Latina*, Latinas are foreign simply because of their sex or, even more distancing, their sexuality. Such multiple barriers existing both within and outside group *fronteras* are definitional in the formation of, access to, and expression of Latinas' identities. The complicated amalgam of pressures that emanates from both outside and inside—the majority culture and la *cultura Latina*—result in Latina invisibility, marginalization and subordination in all their communities.ⁿ¹⁵ It is at this place of interconnectivity of outsidership that a liberation project must focus for it is only when those at [815 the margin of the margins are embraced that freedom is a true possibility.

This essay explores the potential of LatCrit for demarginalizing Latinas by exposing another *frontera*: sexuality. First, and briefly, the piece suggests various issues of culture that confront Latinas and next, it focuses on the gendered borderlands in which Latinas travel within their culture spaces. Third, this work presents sexuality as a location where Latinas experience multiple oppressions from both outside communities and the *comunidad Latina*. It then confronts the everyday complexities, tensions, and struggles faced by Latinas who are sexual minorities within their *comunidad Latina*. This analysis serves both to elucidate the very material problem of alienation and marginalization of Latina lesbians because of their multiple outsidership as well as to enliven and problematize the reality of multidimensionality.

Finally, I conclude by reiterating the need for a paradigm that recognizes, embraces, and articulates the multiplicity of all of our identities and rejects any possibility of atomization of our multilocal citizenships. In this regard, the international human rights model which integrates as foundational the concepts of interdependence and indivisibility of rights, is a valuable tool to enhance the possibilities of our critical, community-oriented work.

CULTURE

It is not an easy task to talk about culture when the group being scrutinized is one as diverse as Latinas/os.ⁿ¹⁶ This is a group with internally distinct and assorted languages, migrations, education, emancipation, and political histories. Roots within the territory now known as the United States are varied, the language of home is not easily predictable, racial composition is best described as *mestizaje*—and within the U.S. borderlands Latinas/os cannot be white *because* they are Latina/o.

Yet, while recognizing the diversities that exist between and among the panethnic groups collectively catalogued under the umbrella of the Latina/o label,

it is inescapable that the group indeed shares many cultural commonalities. Many of these converge around the importance of family and firm notions about appropriate sex and gender roles—two interconnected foundations of cultural oppression for Latinas. n17

[816 *La familia* is of sacrosanct importance in the *cultura Latina*. n18 It also is the site initially and continuously responsible for the creation, construction, and constitution of gendered identities. n19

Our families operate on the extended family model in which *abuelas* y *abuelos* are respected and revered, *tías* y *tíos* are effectively second sets of parents, and *primas/os* are like additional *hermanas/os*. This big tent is where we first learn about appropriate and proper conduct, including sex roles, from several generations. These generationally unchanging molds in turn become proof of the correctness of the point, about our proper and befitting places; what conduct is suitable and acceptable; and what comportments and performances constitute *cosas feas* (ugly things).

Inevitably bridging the diversities among Latinas/os, these learnings and knowledges about fitting demeanor are universally and uniformly gendered and sexualized. n20 *La cultura Latina* rigorously and authoritatively defines, delineates, and enforces gender identities. These *fronteras* are then used as a tool of oppression and pressure to marginalize those *mujeres* (and *hombres*) who do not conform to culturally accepted (and acceptable) designations of gender and sex roles and norms.

As I have confessed previously, I rebelled against some of the little messages imbued with meanings with respect to the definitions of the parameters for proper conduct for (proper) girls. n21 For example, I refused to make my bed; my *hermano* never had to. Yet, I guess it is generally appropriate for beds to be made and the simple solution to my rebellion itself also confirmed the proper gender roles regarding bedtiquette—*abuela* took on the task.

I also recall that while I was expected to excel at school —be a go-getter, the best, like *papi*— at home I was supposed not to argue, to be demure, and to defer. Some meanings of my parents' expressions did not escape me—"why couldn't I be more like *mami*?" was a phrase I frequently overheard *papi* utter, while shaking his head in what I interpreted as disappointment, my failure.

Yet while their intent in such messages may have been wholly clear to them, and while I understood the undercurrent of disappointment, the [817 gendered meaning to me was rather garbled, unintelligible. *Mami* was a practicing attorney, a diplomat in Cuba before our exile. I remember her all dressed up, briefcase in hand, being picked up by the State car every morning. Though I confess I never heard either of my parents argue, and remember them both always being courteous, I also never saw *mami* be submissive or deferential. I suppose my little-child eyes just did not see her as anything but strong and warm. I never as a child understood exactly how I needed to be more like *mami*. So much for messages about gender roles.

Some coded messages that I only understood much later also served to imprint the normativity, indeed the mandate, of heterosexuality in our *cultura Latina*. I remember one day, I must have been 12 or 13, maybe even 14 or 15, I was watching television at home in Puerto Rico. We—*mami y papi* and a friend from the neighborhood—were in the living room. I was lying down on the couch, my friend was sitting on the floor, the folks were on chairs or something. At one point, my friend leaned up against the couch and leaned her head back on my outstretched arm. Next thing I remember is my mom calling me into the kitchen “psst, *Bertica ven acá*,” (psst, Bertica come here) and telling me not to do that—not to let her lean on me. “*Eso es feo*,” (that is ugly) my mom said. Frankly, I was clueless then, I get it now, the words still resonate.

While a more exhaustive analysis of culture is impossible in this essay, these examples should provide ample flavor of the gendered and narrow-sex-role environment that constitutes normal in *comunidades Latinas*.ⁿ²² *It is pervasive and uniform. And for women, as the next section shows, there is little room for dissent.*

BORDERS ENGENDERED

In his work *El Laberinto de la Soledad*, Octavio Paz captured the Latinos’ image of woman:

An instrument, sometimes of masculine desires, sometimes of the ends assigned to her by morality, society and the law... In a world made in man’s image, woman is only a reflection of masculine will and desire. When passive, she becomes goddess, a beloved one, a being who embodies the ancient, stable elements of the universe: the earth, motherhood, virginity. When active, she is always function and means, a receptacle/a vessel, a channel. Womanhood, unlike [818] manhood, is never an end in itself.ⁿ²³

As the Paz passage depicts, the Latina is defined by the Latino from his dominant situation in family, church and state. The Latina did not participate in or consent to the definition that determines who she is or what she does. She is fabricated and sculpted in the image, desire, and fantasy of the Latino.

The cultural expectations/interpretations of Latinas, simply because of their sex, by the *cultura Latina* tracks the dominant paradigm’s construction of sex. Man is the norm, woman in his image, an afterthought—lesser in every sense: strength, stature, ability.ⁿ²⁴

The gendered imprinting occurs starting at birth. Baby girls are dressed in pink, treated demurely, and adorned with jewels —*dormilonas* (literally “sleepers”), small posts in gold that decorate their tiny ears— starting their designated route to femininity. Little girls continue to be socialized to be feminine, prepared to be mothers and wives. Their most important aspiration and achievement, is to get married, have children, and serve their families.ⁿ²⁵ Should the family needs demand the Latina to work outside of the home, employment is viewed as a means of continuing to serve the family. Since Latinas work for the

family rather than for personal satisfaction or gain, they pursue positions that replicate their “appropriate” conduct—those “feminine” low-respect, arduous, thankless occupations as caretakers: nannies, cooks, maids, jobs at the bottom of the pay scale (probably *because* they so well replicate their “natural” role as wife, mother, housewife). n26

The *cultura Latina*, reflecting and incorporating its predominantly Catholic religious foundation, fixates the idea of womanhood on the image of the Virgin Mary—the paradoxical virgin mother. n27 Latinas [819 are glorified by the *marianista* paradigm as “strong, long-suffering women who have endured and kept la *cultura Latina* and the family intact.” n28 This model requires that women dispense care and pleasure, but not receive the same; that they live in the shadows of and be deferential to all the men in their lives: father, brother, son, husband, boy friend. n29 Perfection for a Latina is submissio

Language and family are cultural constants throughout most of Latinas’ travels that unconsciously sometimes, subconsciously some times, and instinctively sometimes define navigations and destinations, transitions and translations. n30 For Latinas these clear and rigid delineations of the borderlands of proper conduct embed a male vision of culture, sex, and gender identity. n31 This epistemology privileges the Latino master narrative and predefines and preordains the content of and context for Latinas’ journeys. Thus family, society at large, community, church, and state collude to limit and frustrate the daily travels that *iden* [820 tify, define, and design the extent and parameters of the *viajera*’s tours. These cultural perspectives on proper sex/gender roles design Latinas’ lives and deeply affect their existence.

This constitutive power of accepted narratives makes me question why womanhood requires that I be submissive when I’m supposed to be revered (in the image of the Virgin Mary); why I should love boys and see all men as superior if they are not trustworthy; and why I should be deferential, servile, and subservient to men at home when I am supposed to be their equal or better at work. Those of us who question or challenge the norm risk alienation from and marginalization by our *comunidad Latina* rendering us outsiders even within the outsider *comunidad Latina*. As the last portion of this essay addresses in the following section, sexuality is central to the Latina subordinate position within family and community.

SEXUALITY—LA ÚLTIMA FRONTERA

Beyond sex, sexuality is another location where Latinas experience multiple oppressions from outside as well as from within la *cultura Latina*. Significantly, “sexuality and sex-roles within a culture tend to remain the last bastion of tradition” n32 thus making “sexual behavior (perhaps more than religion) ... the most highly symbolic activity of any society.” n33 The mores, rules and mandates on sexuality that fall on women, as aptly captured by Paz’s

definition of woman as repository of cultural values that are defined for her, are used as

“proof” of the moral fiber or decay of social groups or nations. In most societies, women’s sexual behavior and their conformity to traditional gender roles signifies the family’s value system. Thus in many societies a lesbian daughter, like a heterosexual daughter who does not conform to traditional morality, can be seen as proof of the lax morals of a family. n34

The honor of *la familia* is inextricably intertwined with the sexual purity of its wome n35

Beyond defining the parameters of “tradition,” women’s sex roles, as defined by men, serve to preserve men’s dominant status in all [821 spheres of life. n36 For Latinas, the expectations of and demands for appropriate women’s sexual roles and conduct, sourced in church, state, and family, are constant and consistent, repressive and oppressive. n37

For example, the teachings of the Catholic church, the predominant faith of Latinas/os, n38 while prohibiting any and all sexual contact that is not within holy matrimony and for the purpose of procreation, emphasize the importance of virginity *for all wome* n39 The church further insists that women remain virgins until marriage and “that all men be responsible to women whose honor they have ‘stained’.” n40 This apparently generous suggestion of responsibility only thinly veils differentiations concerning the distinct expectations regarding men’s and women’s adherence to the sexual norm. Plainly, religion is more freely accepting of men’s deviations from church teaching: there is no suggestion that men’s honor is “stained” by deviation from the purity norm. Moreover, by instructing male responsibility to the women they “stain” it colludes with and confirms societal gendered hierarchies. Thus even religion, while purporting to have a uniform sexual norm (virginity) for men and women alike, accepts gendered inequalities. n41

Originally, the religious tenet of sexual purity was church-inspired. The cultural norm that has emerged is fully embedded in the master narrative of the *comunidad Latina* and serves to dictate and ascertain the location of women in society.

Given these cultural sexual mores, there are three readily ascertainable tenets of Latina sexuality. The first is that sex is taboo *for wome* [822 For Latinas, virginity translates to and symbolizes purity, cleanliness, honorability, desirability, and propriety. This is the template for the *marianista buena mujer* (good woman), a standard to which women must adhere lest they lose status in the community, the family, and the church. The cultural script for *la buena mujer* dictates that she must always reject sexual advances which, incidentally, are mandatory for the men to make, if only to confirm the nature and character of the women in their company.

The worst thing, well, almost the worst thing as we will see shortly, that could happen to a woman is to receive the label of *puta*—whore—a *mujer mala*

(bad/evil woman). Should a woman consent to sex, every one, including the man with whom she had consensual adult even missionary sex will say she is a puta, she lacks virtue. n42 The man, of course, simply adds a notch to his belt.

To be sure the requirement of virginity for women but not for men and the language used to describe the loss of virginity for women but not for men, depict the strong cultural double sexual standard. Women's loss of virginity is a "deflowering" a "stain". On the other hand, culture supports, if not encourages and celebrates men's manly worth as grounded on sexual, really heterosexual conquests—pre-and extra-marital alike. n43

Aside from being taboo, contemporary studies confirm that the traditional mores also dictate that sex, for women, is something to be endured, never to be enjoyed. In the *cultura Latina* "to shun sexual pleasure and to regard sexual pleasure as an unwelcome obligation toward her husband and a necessary evil in order to have children may be seen as a manifestation of virtue. In fact, some women even express pride at their own lack of sexual pleasure or desire." n44

For Latinas the cultural significance of virginity as well as the man dated undesirability of sex, results in a third rule concerning sexual conduct: modesty. n45 Significantly, this modesty mandate does not end with marriage. As one fictional character puts it: "take me and Alberto. We [823 lived together for 18 years and never once did he see me naked." n46 So sexuality is a big deal for Latinas.

There are other aspects of sexuality that cast a long shadow on some Latinas' existence. A few paragraphs earlier I noted that being a puta was almost the worst thing that a Latina could be called. As the popular adage *mejor puta que pata*—better whore than dyke—reveals, there is a worse cultural/sexual outlaw in the *comunidad Latina* than the whore: the lesbia

The social and religious factors and influences that render sex taboo for *mujeres* in the *cultura Latina* are intensified, magnified, and sensationalized when imagining lesbian sexuality. In addition to the majority community's secular and religious reasons for othering and rejecting sexual minorities—immorality, sinfulness, perversion, unnaturalness—Latina lesbians are further *persona non grata* because they are imputed with rejection of and failure to conform to cultural (and religious) as well as sexuality norms. n47 After all, what could a culture that views sex as taboo, intercourse as a duty, modesty as mandatory, and women as objects and not subjects of pleasure do with two women enjoying sex with each other? n48

Latina lesbians have manifold "outsider" identities—cultural, racial, and religious—*vis à vis* the culture at large. They must grapple with and negotiate the consequences of their ethnicity *and* their lesbianism—conflated factors that magnify their marginalization and alienness within virtually every location occupied by the majority culture. Yet, for Latina lesbians their womanhood and their lesbianism are dual frontiers that invoke rejections and cause isolation within what other [824] wise could be considered the refuge of their *cultura Latina*. n49

Thus, Latina lesbians are foreign in all their spaces. n50 They are derided sexual minorities the heterosexual familia Latina; they are queer in the very heterosexual *comunidad Latina*. They are colored in the predominantly white gay/lesbian family; they are colored and lesbian in the white and heterosexual majority. They are nowhere in the heterosexual black/white paradigm that excludes their brownness and in the gay/straight binary that fails to accommodate their womanness. Latina lesbians, as Latinas, are ethnic outsiders who “must be bicultural in American society” and as lesbians are cultural outsiders who must “be polycultural among her own people.” n51

Latina lesbians enjoy (suffer) multi-layered deviations from the norm. Their subject position is one of alienness (alienation) everywhere. They embody the “fundamental interdependence of sexism, racism and homophobia in the construction and practice of social and legal subordination by, within and between various identity categories.” n52 Perhaps because of these multiple divergences from the normative, Latinas’ lesbianism is more difficult to accept than other “aberrations.” Within the *comunidad Latina* lesbianism triggers all ranges of cultural fears both in the cultural “traditionalists” and in the “cultural outlaws” themselves.

On the one hand, traditionalists fear the erosion of the culture and religious beliefs and mandates that could be effected by the sin of lesbianism. To be sure, lesbianism itself presents a challenge to and can constitute an outright rejection of patriarchal values and male superiority. n53

On the other hand, Latinas’ own lesbianism arouses in them a different set of cultural fears. One salient concern of Latina lesbians is the fear of loss of the all-important family n54—“the primary social unit and [825 source of support” within the culture because of rejection due to their sexuality. n55 These are genuine and weighty preoccupations.

As in any culture, reactions to a family member’s lesbianism vary. One familiar approach is for the family to offer to pay for the necessary therapy to “cure” the lesbia n56 Another popular response to a family member’s sexual “aberration,” one that fits well with the shame-based nature of the *cultura Latina*, is for the family to be embarrassed about the person’s lesbianism. n57 Families may address this discomfiture at the deviance of a family member in a number of ways, none particularly embracing of or healthy for the lesbia

In one model the family alternately denies and conceals her lesbian identity. This often translates to the banishing gay/lesbian friends from the family home. Such approach causes stresses to the individual who is torn between her *familiares* (family members) and her *otra familia* (other “family”) — the one being rejected by the relatives. n58 Loss of [826 family presents Latina lesbians with a difficult choice: loss of support from the one group where they were not “*en el otro lado*” (on the other side). n59

Beyond relatives, lesbianism threatens Latinas with loss of community and friends. Even in times of political struggles and ethnic aware ness, Latinas who

are sexual “others” have been marginalized and rejected. La *comunidad Latina* has derided Latina lesbians “as an agent of the Anglos” and “as an aberration, someone who has unfortunately caught *his* [Anglo disease.” n60

Lesbianism thus alienates Latinas from the heterosexual majority in the *comunidad Latina* which has difficulty with and even irrational revulsion for homosexuality. Lesbians are exiled from the culture and community by placing the group “in a context of Anglo construction, a supposed *vendida* to the race.” n61

While clearly unacceptable, the othering of Latina lesbians is the plainly explicable if one looks through the lens of those who are disturbed by differences. The challenge and tensions Latina Lesbians pose to culture is patent. In accepting and embracing their own outlaw sexuality, they effectively reclaim “what we’re told is bad, wrong, or taboo” n62 Acceptance of the multidimensional self implicitly, if not concretely, rejects the sexism and homophobia of the patriarchal culture.

[827 Finally, it would be irresponsible in studying the subordination of women in the *cultura Latina* because of their sex, sexuality, and lesbianism, if one did not consider the feminization of the gay male as part of the project of emancipation from sex-based oppression n63 Gay Latinos are feminized. The feminization of gay Latinos serves to show how femaleness, femininity, and womanhood are identity components that can be manipulated, distorted, and translated to reduce all women and gay men (who are viewed as women) to second-class citizenship status.

Literature is replete with examples of how gay Latinos are described with derision in precisely the same terms that are used to laud the “proper” women: docile, submissive, feminine. n64 Gay Latinos are called *pájaros* (birds), n65 *maricas* (faggots), n66 and *locas* (crazy females). n67 They are described with the same (mostly negative) words and behaviors used to portray or depict “normal” or sex/gender-appropriately behaving women: “hysterical, ludicrous, alternately sentimental and viper-tongued, coquettish with men she knows will likely end up beating her half to death when they are no longer satisfied with shouting insults at her at the same time that they are strangely attracted to the tattered eroticism that she can still manage to project.” n68

It is telling that characteristics not only valued in but demanded from “real” *mujeres* can so quickly be transmogrified into undesirable, immoral, sinister, corrupt traits when they appear in men who love me Gay Latinos are reduced to stereotypical caricatures of debased, degenerate, vile woman-like me The depravation of the revered attributes of femininity into derision if occurring in men reveals and underscores the tensions and stresses of world traveling by Latinas/os who are sexual others.

[828 Furthermore, it is noteworthy that *maricón* —faggot— the most common appellation for a homosexual male has multiple negative meanings. The word *maricón*, in common usage, is employed not only to refer to a gay man It also

is used to denote a wrongdoer, a reprobate, a weakling, a spineless actor. These multiple meanings elide and elude the translations of gender and sexual identity. The word for lesbian, *marimacha*, reveals similar discomfort with non-traditional and culture-affronting gender, sex, and sexual identity. The *marimacha*, a designation that plays with and preys on both the *marianista* and the *macho* proper roles, evokes wholly discordant cultural images.

CONCLUSION

Notwithstanding the powerful impact of sexuality on a Latina lesbian's location in all her societies, it is a theme at best sparsely considered, at worst, unabashedly ignored in the literature. Because of the multiple oppressions effected by sexuality on all Latinas, and the additional burdens of lesbianism, a confrontation of this *última frontera* has implications for all Latinas'/os' liberation.

One useful model is the indivisibility/interdependence framework of a critically adjusted international human rights model.ⁿ⁶⁹ International norms protect both equality and difference, autonomy and interdependence, privacy and family life. These principles recognize that human beings are the totality of their identities, not an essentializedⁿ⁷⁰ or segmented portion of our selves.

As was plainly presented with respect to Latina lesbians, fragmentation of identity perpetuates privilege and entrenches subordination. Latina lesbians are displaced and erased in all their communities by virtue of their multiple outsiderhood in all locations. An approach that partitions identity within any community will simply replicate and compound power relations be they based on sex, race, ethnicity, sexuality or a combination of any or all of such identity components. All these spaces must provide Latina lesbians refuge from subordination, dislocation, and disempowerment, not create them.

For LatCrit's success, it is imperative that it adopt and promote a [829 multidimensional model—"a principal epistemic site"ⁿ⁷¹ that embraces rather than atomizes our multiple co-existing, indivisible identities. This means that we must enfold all, particularly those who are different from the norm, those who we would rather ignore because we learned about them as *cosas feas*.

NOTES:

1. This work uses the term Latina to refer to the women citizens of the outsider community known or referred to as the Latina/o (or "Hispanic") community. See Berta Esperanza Hernández-Truyol, Building Bridges-Latinas and Latinos at the Crossroads: Realities, Rhetoric, and Replacement, 25 *Colum. Hum. Rts. L. Rev.* 369, n 1, 2 (1994) [hereinafter Hernández-Truyol, Building Bridges (explaining preference for use of term Latina/o)]. However, the boundaries, limits, and understandings of such a varied and diverse community are far from fixed or easily explained. See *id.* Rather, they are contested sites, subject to and deserving of necessary interrogation, particularly within the LatCrit movement and project. Far from being a classification easily identifiable, we can not simply know it when we see it. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (defining pornography by the "I know it when I see it"

standard). Luz Guerra has articulately posed the challenge to LatCrit to engage in the critical interrogation of our own namings and colonizations. She has directly confronted the erasures effected by placing indigenous peoples' issues on the agenda without first "critically examining the term Latino/a for its relationship to Native history." Luz Guerra, *LatCrit y la Descolonización Nuestra: Taking Colon Out*, 19 U.C.L.A. Chicano/a-Latino/a L. Rev. 351 (1998) (suggesting that LatCrit can not put indigenous peoples on the agenda without examining the term and its relationship to First Peoples' history; examining Spanish as the colonizing language of Native peoples and its effects on negating their languages, cultures, identities, and customs). To this challenge I add the need to interrogate our African roots and our simultaneous participations in and subjections to the practice of slavery outside the U.S. borders but within our places of origins such as the Caribbea See Hernández-Truyol, *Building Bridges*, supra, at 424, 283 (noting that slavery was abolished in Puerto Rico and Cuba later than it was in the U.S.). Recognizing the challenges posed by Latinas/os' *mestizaje*, this piece uses the term Latina/o to refer to a class of persons of diverse and mixed racial origins whose nationalities or ancestral background is in countries with Latin/Hispanic cultures and who within the U.S. borderlands are collapsed into one classification due to such roots. See Hernández-Truyol, *Building Bridges*, supra, at 429; Francisco Valdés, *Foreword—Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence, and Latina/o Self-Empowerment*, 2 *Harv. Latino L. Rev.* 1, 1 (1997) [hereinafter Valdés, *Foreword*; Max Castro, *Making "Pan Latino"*, 2 *Harv. Latino L. Rev.* 179 (1997).

2. See Berta Esperanza Hernández-Truyol, *Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks*, 2 *Harv. Latino L. Rev.* 199, 200-05 (1997) [hereinafter Hernández-Truyol, *Indivisible Identities*; Francisco Valdés, *Foreword-Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 *La Raza L. J.* 1, 7 & 28 (1996) [hereinafter Valdés, *Possibilities*].

3. See Juan Perea, *Five Axioms in Search of Equality*, 2 *Harv. Latino L. Rev.* 231 (1997); see also Leonard Baynes, *Who is Black Enough for You? An Analysis of Northwestern University Law School's Struggle Over Minority Faculty Hiring*, 2 *Mich. J. Race & L.* 205 (1997); Berta Esperanza Hernández-Truyol, *Las Olvidadas-Gendered in Justice/Gendered Injustice: Latinas Fronteras and the Law*, 2 *J. Gender, Race & Just.* 353 (1998) [hereinafter Hernández-Truyol, *Las Olvidadas*].

4. See Angelo Falcon, *Through the Latin Lens: Latinos Still Need the Voting Rights Act*, *Newsday*, Sept. 3, 1992, at 106 (noting that Latina/o panethnicity is sourced in "the pan Latino/a consciousness emerging in this country" while recognizing and accepting both Latina/o diversities and the reality that within the U.S., "more brings [the amalgam of persons referred to as Latinas/os together than separates them within the political process]"). See also Valdés, *Possibilities*, supra note 2, at 32, n 99-118.

5. See generally Berta Esperanza Hernández-Truyol, *Borders (En)gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 *Y.U. L. Rev.* 882 (1997) [hereinafter Hernández-Truyol, *Borders (En)gendered*].

6. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Sta L. Rev.* 1241 (1991) (intersectionality); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Sta L. Rev.* 581 (1990) (multiplicity); Francisco Valdés, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Interconnectivities*, 5 *S. Cal. Rev. L. & Women's Stud.* 25, 49 (1995) [hereinafter Valdés, *Sex and Race* (interconnectivity concept used as complement to multiplicity, multidimensionality and intersectionality)].

7. See, e.g., Francisco Valdés, *Foreword: Under Construction—LatCrit Consciousness, Community, and Theory*, 85 *Calif. L. Rev.* 1087 (1997) [hereinafter Valdés, *Under Constructio*].

8. See Francisco Valdés, *Theorizing About Theory: Comparative Notes and Post-Subordination Vision as Jurisprudential Method* [hereinafter Valdés, *Theorizing*, in *Critical Race*].

Theory: Histories, Crossroads, Directions (Jerome McCristal Culp, Jr. et al. eds.) (forthcoming 1998) (comparing the RaceCrit, LatCrit and QueerCrit experiences).

9. See Valdés, Possibilities, *supra* note 2, at 3-7.

10. See Valdés, Possibilities, *supra* note 2, at 5.

11. See Elvia R. Arriola, Gendered Inequality: Lesbians, Gay Men, and Feminist Legal Theory, 9 Berkeley Women's L.J. 103 (1994).

12. See Scott D. Weiner, Recent Publication: Created Equal: Why Gay Rights Matter to America. Michael Nava and Robert Dawidoff, 30 Harv. C.R.-C.L. L. Rev. 267 (1995) (discussing the influence of the Catholic church in the Latina/o community and the church's position on homosexuality).

13. See also Hernández-Truyol, Indivisible Identities, *supra* note 2, at 200-03.

14. See Hernández-Truyol, Building Bridges, *supra* note 1, at 376-96 (discussing the demographic multidimensionality of identity in Latina/o contexts).

15. See Hernández-Truyol, Borders (En)gendered, *supra* note 5 (addressing the subordination of Latinas).

16. See, e.g., Kevin R. Johnson, Race, Ethnicity & Nationhood: "Melting Pot" or "Ring of Fire"? Assimilation and the Mexican-American Experience, 85 Cal. L. Rev. 1259 (1997); Note, Into the Mouths of Babies: La Familia Latina & Federally Funded Child Welfare, 105 Harv. L. Rev. 1319 (1992) [hereinafter La Familia Latina].

17. See, e.g., Gloria Bonilla-Santiago, Breaking Ground & Barriers: Hispanic Women Developing Effective Leadership 11 (1992) (discussing traditional cultural expectations that Latinas be "sentimental, gentle, impulsive, docile, submissive, dependent, and timid."); Jenny Rivera, Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials, 14 B.C. Third World L.J. 231, 233 (1994).

18. See, e.g., Ian Lumsden, Machos, *Maricónes*, and Gays—Cuba & Homosexuality 55 (1996) ("The family was typically the most important institution in pre-revolutionary Cuba.").

19. See Hernández-Truyol, Borders (En)gendered, *supra* note 5; La Familia Latina, *supra* note 16, at 1324.

20. See Lumsden, *supra* note 18, at 55; La Familia Latina, *supra* note 16, at 1324.

21. See, e.g., Hernández-Truyol, Indivisible Identities, *supra* note 2.

22. See, e.g., Oliva M. Espin, Cultural and Historical Influences on Sexuality in Hispanic/Latin Women: Implications for Psychotherapy [hereinafter Espin, Sexuality, in Pleasure and Danger: Exploring Female Sexuality 149 (Carole S. Vance ed., 1984); Lumsden, *supra* note 18.

23. Octavio Paz, The Labyrinth of Solitude 35-36 (Lysander Kemp trans., Grove Press 1985).

24. See Ruth Burgos-Sasscer & Francis Hernández Giles, La Mujer Marginada: Por la Historia: Guia de Estudio 23 (1978). For a broader discussion of the cultural subordination of women, see, e.g., Sandra Lipszits-Bem, The Lenses of Gender (1993); Rhoda E. Howard, Dignity, Community, & Human Rights, in Human Rights in Cross-Cultural Perspectives 88 (Abdullahi Ahmed An-Na'Im ed. 1992).

25. See Burgos-Sasscer & Giles, *supra* note 24, at 55 (noting that a Latina's most important goal is to marry and serve her family).

26. See M. Patricia Fernandez Kelly, Delicate Transactions: Gender, Home, and Employment Among Hispanic Women, in Uncertain Terms: Negotiating Gender in American Culture 183, 194 (Faye Ginsburg & Anna L. Tsing eds., 1990) (finding that the "search for paid employment [by Latinas is most often the consequence of severe economic need; it expresses vulnerability not strength within their homes and in the marketplace."); Bonilla-Santiago, *supra* note 17, at 8 ("Many [Latinas still tend to pursue the more feminine occupations as a way to enter the work setting because they do not understand the organizational cultures.").

27. See Gloria Anzaldua, *Haciendo Caras, una entrada*, in *Making Soul/Haciendo Caras* xv-xxvi (Gloria Anzaldua ed., 1990). Anzaldua calls for the development of new theories which incorporate race, class, ethnicity, and sexual difference:

In our literature, social issues such as race, class and sexual difference are intertwined with the narrative and poetic elements of a text, elements in which theory is embedded. In our mestizaje theories we create new categories for those of us left out or pushed out of the existing ones.

Id.; see also Bonilla-Santiago, *supra* note 17, at 21, 24, 44 (noting shortcomings in current social science and feminist research with regard to race and class, and calling on Latina women to develop independent movement and critical theory).

In a study conducted from 1989–1991 with women from a barrio in New York City, the researchers found that class and gender position were the issues of greatest concern to women “with education as a potentially empowering strategy.” Rina Benmayor et al., *Centro de Estudios Puertorriqueños, Hunter College, Responses to Poverty Among Puerto Rican Women Identity, Community, and Cultural Citizenship* 10 (1992).

28. See Bonilla-Santiago, *supra* note 17, at 11 (noting ways in which Latinas are taught they are inferior to Latinos); Mary Becker, *Strength in Diversity: Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships*, 23 *Stetson L. Rev.* 701 (1994) (discussing “dominance feminism” and its assessment that women’s work in private sphere is systematically devalued); see also Catharine A. MacKinnon, *Feminism Unmodified* 55 (1987) (“We notice in language as well as in life that the male occupies both the neutral and the male position ... whereas women occupy the marked, the gendered, the different, the forever-female positio”); Lucinda M. Finley, *Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, in *Feminist Legal Theory* 571-79 (D. Kelly Weisberg ed., 1993) (arguing that legal language and reasoning reflect male-based perspective, and discussing limitations of this perspective in various areas of law).

29. See Anzaldua, *supra* note 27, at 19-20 (noting that lesbians of color make “ultimate rebellion” against native culture and often fear rejection by family and culture); Bonilla-Santiago, *supra* note 17, at 31-32 (citing Latino’s homophobia and unilateral focus on race as sole oppression facing Latinas).

30. For a more thorough discussion of the gendered nature of the Spanish language, see Hernández-Truyol, *Borders (En)gendered*, *supra* note 5, at 918-20; Hernández-Truyol, *Indivisible Identities*, *supra* note 2, at 211-12.

31. For an example of the continued perpetuation of this cultural vision, see Rosa Maria Gil & Carmen Inoa Vasquez, *The Maria Paradox* 5 (1996). But see Hernández-Truyol, *Las Olvidadas*, *supra* note 3, at 376-79 (criticizing *The Maria Paradox* as furthering stereotypes concerning the proper roles and behavior for Latinas).

32. Espin, *Sexuality*, *supra* note 22, at 160.

33. Oliva M. Espin, *Crossing Borders and Boundaries* [hereinafter *Espin, Boundaries*, in *Ethnic and Cultural Diversity Among Lesbians and Gay Men* 194 (Beverly Greene ed., 1997)].

34. Oliva M. Espin, *Leaving the Nation and Joining the Tribe: Lesbian Immigrants Crossing Geographical and Identity Borders*, 19(4) *Women & Therapy* 99, 103 (1996) [hereinafter *Espin, Borders* (noting that girls and women are forced to embody cultural continuity)].

35. Espin, *Sexuality*, *supra* note 22, at 154.

36. See, e.g., MacKinnon, *supra* note 28, at 36 (“Virtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men’s physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex.”).

37. See Hernández-Truyol, *Borders (En)gendered*, supra note 5, at 915.

38. Approximately 85% of Latinas identify themselves as Catholics and many hold socio-political views based on or strongly influenced by the church's teachings. See Bonilla-Santiago, supra note 17, at 15.

39. Cf. Antonia M. Villarruel, *Cultural Influences on the Sexual Attitudes, Beliefs, & Norms of Young Latina Adolescents*, *J. Soc'y Pediatric Nurses*, Apr. 15, 1998, at 69 (examining correlations between religious beliefs/church attendance and sexual attitudes in young Latinas).

40. Espin, *Sexuality*, supra note 22, at 151; see also See Ana Castillo, *La Macha: Toward a Beautiful Whole Self* [hereinafter *Macha*, in *Chicana Lesbians: The Girls our Mothers Warned us About* 32-22 (Carla Trujillo ed., 1991) (discussing one author's view of the impact of religion on women's sexuality).

41. See generally Elizabeth M. Igesias, *Rape, Race, & Representation: The Power of Discourse, Discourses of Power, & the Reconstruction of Heterosexuality*, 49 *Vand. L. Rev.* 868 (discussing the sexual power structure promulgated and enforced by Latinos against Latinas).

42. Espin, *Sexuality*, supra note 22, at 157.

43. For a discussion on the double standard see Claudia Colindres, *A Letter to My Mother*, in *The Sexuality of Latinas* 9 (Norma Alarcon et al. eds., 1993); Erlinda Gonzales-Berry, *Conversaciones con Sergio* (Excerpts from *Paletitas de guayaba*), in *The Sexuality of Latinas*, supra, at 80 (noting the notion of "cornudo" (having horns put on one) exists only with respect to unfaithful wives and that no female form of cornudo exists, but rather, to the contrary, men who have affairs are deemed manly).

44. Espin, *Sexuality*, supra note 22, at 156.

45. See Lumsden, supra note 18, at 31, 5 (defining pudor as an uniquely Spanish notion which is a combination of shame and modesty).

46. Elvia Alvarado, *Don't Be Afraid, Gringo*, in *The Sexuality of Latinas*, 9, 50 (Norma Alarcon et al. eds., 1993).

47. It is important to note that, as with other themes concerning Latinas there is a dearth of information concerning Latina lesbians. See Hernández-Truyol, *Las Olvidadas*, supra note 3 (discussing the dearth of information concerning Latinas). As Oliva M. Espin, a well know professor of psychology who has extensively written on Latinas, including Latina lesbians, has stated, "the literature on Latina lesbians is scarce." Oliva M. Espin, *Issues of Identity in the Psychology of Latina Lesbians* [hereinafter *Latina Psychology*, in *Lesbian Psychologies: Explorations & Challenges* 35, 39 8-11 (Boston Lesbian Psychologies Collective eds., 1987) (citing to only studies to the author's knowledge that "focus particularly on Latina lesbians or on the specific aspect of their identity development").

48. This is not to say that Anglo/a culture is embracing of lesbianism. See, e.g., *Macha*, supra note 40, at 37 (describing lesbianism as "a state of being for which there is no social validation nor legal protection in the United States (nor in Mexico)"). Moreover, it is important not to essentialize Latina lesbians. Latina lesbians, indeed all lesbians, are diverse, multidimensional beings with differences in race, class, ethnicity, culture, religion, education, and gender identity to name a few. See, e.g., Migdalia Reyes, *Nosotras Que Nos Queremos Tanto*, in *Compañeras: Latina Lesbians* 248 (Juanita Ramos ed., 1994) (noting diversity within lesbian community, including Latina lesbian community).

49. See, e.g., Tiana Arruda, *How Can I Live a Life of Lies? (Oral History)*, in *Compañeras*, supra note 48, at 184.

50. See Hernández-Truyol, *Las Olvidadas*, supra note 3; Hernández-Truyol, *Borders (En)gendered*, supra note 5; Kevin Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 *Harv. Latino L. Rev.* 101, 117-21 (1997).

51. *Macha*, supra note 40, at 35.

52. See Valdés, *Foreword*, supra note 1, at 5.

53. See Kenneth L. Schneyer, *Avoiding the Personal Pronoun: The Rhetoric of Display & Camouflage in the Law of Sexual Orientation*, 46 *Rutgers L. Rev.* 1313, 1322 (1994) (discussing the theory that lesbianism inherently undermines and rejects patriarchy).

54. Macha, *supra* note 40, at 37-38 (noting regarding latina lesbians that “above all, I believe, they do not want to lose the love and sense of place they feel within their families and immediate communities”). The fiction writing also reflects this fear. For example, the lesbian daughter in *Marimacho* whose father questions what two women can do, when her lover asks her to run away with her responds: “Tu sabes bien que te quiero, esa no es la cuestio Que vamos a hacer dos mujeres, sin dinero, sin amigos, sin tierra? Nadie nos va a recoger, somos una cochizada.” (author’s translation: You know that I love you, that is not the issue. What are we going to do as two women, without money, without friends, without land? Nobody will take us in, we are filthy/swine). Gloria Anzaldua, *La Historia de una marimacho* [hereinafter *Marimacho*, in *The Sexuality of Latinas*, *supra* note 43, at 65. Author’s note: “Cochizada” does not translate easily. The word cochino as an adjective, means very dirty, it also means, as a noun, a hog, a pig. Thus cochizada blends, exacerbates, and transcends both meanings.

It is interesting to observe that one Chicana author openly noted that while Chicanos “took issue with society as brown men, Catholic men, and poor working class men [they entered into a confrontation with society from the privileged view of a dialogue amongst me” Marta A. Navarro, Interview with Ana Castillo, in *Chicana Lesbians*, *supra* note 40, at 115, 124. On the other hand, Castillo observes that contrary to the men who were “not willing to look at themselves and say, ‘I am a horrible cabron’ ... [and romanticize themselves, or ... glorify themselves, or ... objectify themselves, and their courage and their history, but none of them is ever willing to look into each other as an individual” the Chicana writers are “openly self-critical and abnegating at the same time. Id. at 116. Finally, the writer observes that she is beginning to see a “glimpse” of men writing about themselves as individuals from the gay male Chicano writers. Id.

55. Beverly Greene, *Ethnic Minority Lesbians & Gay Men*, in *Ethnic & Cultural Diversity Among Lesbians & Gay Men* 219 (Beverly Greene ed., 1997).

56. Arruda, *supra* note 49, at 183 (“My mother’s reaction was to tell me that she was willing to pay for me to go to therapy and straighten myself out. That was the same thing my aunt and uncle in Brazil told my cousin when they found out he was gay.”).

57. See Carla Trujillo, *Chicana Lesbians: Fear and Loathing in the Chicano Community*, in *Chicana Critical Issues* 117 (Norma Alarcon et al. eds., 1993).

As lesbians, our sexuality becomes the focal issue of dissent. The majority of Chicanas, both lesbian and heterosexual, are taught that our sexuality must conform to certain modes of behavior. Our culture voices shame upon us if we go beyond the criteria of passivity and repression, or doubts in our virtue if we refuse. We, as women, are taught to suppress our sexual desires and needs by conceding all pleasure to the male. As Chicanas, we are commonly led to believe that even talking about our participation and satisfaction in sex is taboo.

Id. (citations omitted).

58. See Althea Smith, *Cultural Diversity and the Coming-Out Process* (hereinafter *Coming Out*), in *Ethnic and Cultural Diversity Among Lesbians & Gay Men*, *supra* note 55, at 294 (noting that “members of the gay, lesbian, and bisexual community are often referred to, colloquially, as members of the family”).

59. See Gloria Evangelina Anzaldua, *The Other Side/Del Otro Lado* [hereinafter *Otro Lado*, in *Compañeras*, *supra* note 48, at 2-3.

60. Carla Trujillo, Introduction, in *Chicana Lesbians*, *supra* note 40, at ix (emphasis in original) (quoting Saporta Sternbach, *A Deep Memory of Love: The Chicana Feminism of Cherrie Moraga*, in *Breaking Boundaries* 48-61 (A. Horno-Delgado, et al. eds., 1989)); Espin, *Sexuality*, *supra* note 22, at 158-59 (telling of Latinas who view “lesbianism [as a sickness we get from American women and American culture]”); Espin, *Latina Psychology*, *supra* note 47, at 40

(quoting a participant at a meeting of Hispanic women in a major city in the U.S. in the early 80's as saying that "lesbianism is a sickness we get from American women and American culture").

61. Trujillo, Introduction, *supra* note 60, at ix (citation omitted). Trujillo posits that the cultural rejection "more realistically is due to the fact that we do not align ourselves with the controlling forces of compulsory heterosexuality. Further, as Chicanas we grow up defined, and subsequently confined, in a male condaddy's girl, some guy's sister, girlfriend, wife, or mother. By being lesbians, we refuse to need a man to form our won identities as wome This constitutes a 'rebellion' many Chicanas/os cannot handle." *Id.* (emphasis in original); see also Macha, *supra* note 40, at 24 ("As a political activist from El Movimiento Chicano/Latino, I had come away from it with a great sense of despair as a woma Inherent to my despair, I felt was my physiology that was demeaned, misunderstood, objectified, and excluded by the politic of those men with whom I had aligned myself on the basis of our mutual subjugation as Latinos[/as in the United States."); Trujillo, Fear and Loathing, *supra* note 57, at 187 ("Too often we internalize the homophobia and sexism of the larger society, as well as that of our own culture, which attempts to keep us from loving ourselves.... The effort to consciously reclaim our sexual selves forces Chicanas to either confront their own sexuality or, in refusing, castigate lesbians as vendidas to the race, blasphemers to the church, atrocities against nature, or some combinatio").

62. Trujillo, Introduction, *supra* note 60, at x (emphasis in original); Macha, *supra* note 41, at 44 ("We [Latinas had been taught not to give those [sexual feelings and fantasies names, much less to affirm their meanings.").

63. See Lumsden, *supra* note 18, at 27, 51 ("Discrimination against homosexuals has also been bolstered by the machista devaluation of women"). Significantly, this power dynamic is sometimes replicated within some gay communities. See *id.* at 28-9 ("The right of masculine males to enjoy their sexuality as they see fit matches the power they have in society as a whole.... [In Cuba before 1959 masculine ostensibly heterosexual males were able to satisfy some of their sexual needs with 'nonmasculine' males while simultaneously oppressing them in other ways. In this respect there was not much difference between how they treated homosexuals and how they treated women").

64. David William Foster, *Gay & Lesbian Themes in Latin American Writing* 28 (1991) (quoting *Los Invertidos*).

65. *Id.* at 51 (writing about a book entitled *Pajaro de Mar por Tierra*).

66. *Id.* at 83 (referring to the maricas as the lowest class, the most grotesque, within homosexuality).

67. *Id.* at 91; see also Lumsden, *supra* note 18, at 56 (explaining the imagery of the loca as "parodying stereotypical female mannerisms").

68. Compare Foster, *supra* note 64, with Lumsden, *supra* note 18, at 6 (referring to Cuba), and Lumsden, *supra* note 18, at 28 (noting that "there is a correlation between the oppression of women and the oppression of homosexuals").

69. See Hernández-Truyol, *Borders (En)gendered*, *supra* note 5; Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform,"* 71 *S. Cal. L. Rev.* 547 (1998) (explaining how the human rights framework can be used to challenge recent immigration and welfare reform laws that have a negative impact on Latinas/os).

70. See Harris, *supra* note 6; Hernández-Truyol, *Building Bridges*, *supra* note 1; Valdés, *Sex and Race*, *supra* note 6, at 49.

71. See Margaret E. Montoya, *Academic Mestizaje: Re/Producing Clinical Teaching and Re/Framing Wills as Latina Praxis*, 2 *Harv. Latino L. Rev.* 349, 370 (1997).

4. Dorothy E. Roberts, * *BlackCrit Theory and the Problem of Essentialism*, 53 *MIAMI L. REV.* 855 (1999)

Some critical scholars might object to a **BlackCrit** theory, which is focused on the identities, experiences, and aspirations of Black people, on the grounds that it is essentialist. **BlackCrit** theory, it could be argued, poses the danger of three forms of false universalism that are characteristic of essentialism. [n.1](#) It could erroneously imply that Blacks share a common, essential identity; it could erroneously attribute to all people of color the experiences of Black people; and it could reinforce the white-black paradigm as the only lens through which to view racial oppression. In this essay, I will use reproduction as a concrete substantive point of reference to explore the concern that a **BlackCrit** theory would be essentialist.

I entitled my first major law review article, which discussed a reproductive rights issue, "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy." [n.2](#) In the years after publishing that article, I have asked myself why I used the words "women of color" in the title. The article concerns Black women in particular, not women of color in general. It focuses on the prosecutions of poor Black women who smoked crack during pregnancy. I think I put "women of color" in the title because I thought it would be essentialist to confine my attention to Black women. I was probably reacting to a criticism that I sometimes heard when I presented the paper before it was published: "You didn't talk about Latinas," "You didn't talk about Asian women," or "You didn't talk about Native American women." I often found these comments distracting because I had not come to talk about those groups of women although I hoped my presentation was *856 relevant to them. But the criticisms from and about other women made me feel self-conscious about focusing on Black women.

Such comments were not distracting when they helped to further a discussion about the commonalities and differences among the reproductive experiences of women of color. I appreciated, for example, the Puerto-Riquena who asked, "Do you know about 'la operacion,' the government-supported campaign in Puerto Rico that resulted in the sterilization of one-third of the women of childbearing age?" [n.3](#) In addition, the Korean graduate students, who remarked, "What you are saying about genetic relatedness and race in the United States reminds me of the way Koreans define national identity," helped me understand how the genetic tie "links individuals together while it preserves social

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boundaries." [n.4](#) Also, I learned more about the use of birth control to regulate women's bodies from a Native American woman who told me about the coercive distribution of the long-acting contraceptive Norplant on her reservation.

These women of color were trying to connect their experiences of repressive reproductive health policies to what I was saying about poor Black women's experiences. This sharing of distinct experiences, that had common features, helped all of us to better understand the extent and nature of reproductive regulation, to form coalitions, and to formulate strategies to oppose these policies.

Sometimes, however, the question, "What about other women of color?," came from people who were bothered because I was focusing exclusively on Black women. I viewed these comments as a diversion, sometimes even a deliberate one. The question often stemmed from a misunderstanding of the critique of essentialism in feminist scholarship. Minority scholars have noted that white feminists' efforts to find commonalities among women often ended up erasing the identity and experiences of women of color. [n.5](#) Searching for a common oppression implied not only a universal, essential gender identity common to all women, but also that white, middle-class women have no racial and class identity. As Elizabeth Spelman explained, this type of feminist thinking 'invites me to take what I understand to be true of me 'as a woman' for some golden nugget of womanness all women have as women. How lovely: the many turn out to be one, and the one that they are is me.' [n.6](#)

Some feminists mistake this criticism of the exclusive focus on ***857** white women's experiences as a prohibition against ever paying exclusive attention to the experiences of one group of women. But the problem of essentialism did not derive from studying the lives of particular women; it derived from claiming that the lives of a particular group of women represented all women.

Other commentators at my talks seemed to be implying that the issue of poor Black women's autonomy by itself is not important enough to be the center of discussion. I recognize a similar viewpoint in discussions about the most effective strategy to challenge the prosecutions of women for drug use during pregnancy. [n.7](#) Most of the women prosecuted for these crimes are poor Black women who smoked crack. [n.8](#) These women, however, make especially unsympathetic complainants because of disparaging stereotypes about pregnant crack addicts and the historical devaluation of Black motherhood. [n.9](#)

Therefore, some attorneys and scholars have suggested ways of diverting attention away from these women and the devaluing racial images that degrade them by focusing instead on the dangers that punitive policies pose for middle-class white women. [n.10](#) Although this approach has certain strategic advantages, it implies that the repression of poor Black women alone is not a persuasive enough basis for advocating policy change.

Moreover, as I thought about the title of my article, I realized that it made me more of an essentialist than if I had just been honest and stated what the article

was really about. The title suggests that the article explores the reproductive rights of all women of color when it does not. It might imply the erroneous claim that what I wrote about Black women represents the experiences of other women of color as well. Writing about Black people is not essentialist in and of itself. It only becomes essentialist when the experiences discussed are taken to portray a uniform Black experience or a universal experience that applies to every other group.

When I decided upon the title of my book about Black women's reproductive liberty, I chose *Killing the Black Body*. [n.11](#) I think that is a more honest title. The book is about the Black body--the unique way in which repressive reproductive policies have interpreted and attempted to regulate Black bodies. I could not have adequately described these policies without focusing on black-white relationships and on the particular*⁸⁵⁸ meaning of blackness--what it means for bodies, as Anthony Farley [n.12](#) put it, to be marked as black.

These repressive reproductive policies arose out of the history of the enslavement of Africans in America. The institution of slavery gave whites a unique economic and political interest in controlling Black women's reproductive capacity. [n.13](#) This form of subjugation made Black women's wombs and the fetuses they carried chattel property. The process of making a human being's very reproductive capacity the property of someone else is not replicated in other relationships of power in the United States. While slavery serves as a very powerful metaphor for other reproductive practices, such as contract pregnancy or surrogacy, Black women really were slaves. [n.14](#) There is a distinction between a metaphor and the actual experience.

Further, the maternal images that justify these reproductive policies are images that are uniquely Black: Jezebel, Mammy, matriarch, welfare queen, and pregnant crack-addict. When I say these labels, a Black woman almost certainly comes to mind. They do not apply to women of any other race. Other groups of women have their own set of degrading stereotypes that have helped to legitimize the regulation of their bodies and reproductive decisions. The myths about Black motherhood support particular reproductive policies--policies that cannot be explained without investigating the implications of these images and the significance of their blackness.

Does insisting on this focus on Black mothers reinforce the black-white paradigm and its negative features? The answer depends on what we mean by the black-white paradigm and what we see as its impact. I do not believe that this focus necessarily reflects the essentialist aspects of the black-white paradigm. The prominence of this paradigm in Critical Race Theory was criticized for excluding the experiences of people who are neither Black nor white. Critical Race Theory must continue to develop a more accurate and inclusive definition of race, racial identity, and racial issues. But scholarship exploring Black women's reproductive experiences need not suggest that this is the exclusive word on

reproductive health policy.

My work in this area, however, has also made it very clear to me that there continues to operate a hierarchy in the United States that is based on white- black relationships with whites on top and Blacks on the bottom. This hierarchy does not operate in every context; there are ***859** some contexts, such as debates on immigration policy in some regions, where native-born Blacks hold a privileged position relative to certain immigrants of color. All Blacks and whites, moreover, are not similarly situated within the white-black hierarchy. This hierarchy is complicated by differences of class and gender. Nevertheless, the white-black hierarchy frequently governs discourse in the reproductive policy context.

This hierarchy is especially prominent in rhetoric and practice concerning reproduction-assisting technologies--technologies such as in-vitro fertilization ("IVF"), egg-donation, and artificial insemination. These technologies are genetic marketing techniques; they allow parents to purchase the genetic material of their children. They reveal that on the American genetic market the genes of Black people are the least valuable while the genes of whites are the most valuable. I believe that the fertility business is so popular in the United States because it almost exclusively produces white children. [n.15](#)

This valuation of children is replicated in the adoption market where children are literally valued in dollars according to their racial features. The vast majority of white adoptive parents are only willing to take a white child. When they do adopt outside their race, whites generally prefer non- Black children with Asian or Latin American heritage and are willing to pay more to adopt them. [n.16](#) Latino children, for example, are judged by some adoptive parents according to how "Black" or "white" they look; the closer a child's features are to those associated with white people, the more desirable the child is, while the closer a child's features are to those associated with Black people, the less desirable the child is. [n.17](#) Therefore, the lighter the skin, the blonder the hair, the bluer the eyes, and the narrower the nose, the more valuable the child is. The black-white paradigm in the adoption market for Latino children operates alongside an European-Indian paradigm that values children more highly the more European and the less Indian they look. [n.18](#)

The black-white paradigm also helps to explain cases in which race adds a disturbing dimension to the use of reproduction-assisting technologies. One case involved a white woman who brought a lawsuit against a fertility clinic she claimed had mistakenly inseminated her with a ***860** Black man's sperm instead of her husband's. [n.19](#) The mother demanded monetary damages for her injury, which she explained was caused by the unbearable racial taunting her daughter suffered. Although receiving the wrong sperm was an injury in itself, the damage of bearing a Black child was linked to the opposition of Black and white genetic features.

This opposition was even more graphic in a bizarre fertility clinic mix-up in the Netherlands. A woman who gave birth to twin boys as a result of IVF

realized when the babies were **two** months old that one was white and one was Black. [n.20](#) The Dutch clinic mistakenly fertilized her eggs with sperm from both her husband and a Black man. [n.21](#) A Newsweek article subtitled "A Fertility Clinic's Startling Error" reported that "while one boy was as blond as his parents, the other's skin was darkening and his brown hair was fuzzy." [n.22](#) The reporters' wording evokes the ominous sense that as the skin of the wrongfully conceived child turned darker and darker and as his hair turned fuzzier and fuzzier, the horror of the mistake increased.

The black-white paradigm is so powerful in the arena of reproduction that it sometimes erases other identities. In *Johnson v. Calvert*, [n.23](#) Anna Johnson entered into a gestational surrogacy agreement with Crispina and Mark Calvert, an infertile couple who wanted to have a genetically-related child. [n.24](#) An embryo formed through IVF using Crispina Calvert's eggs and Mark Calvert's sperm was implanted in Johnson, who became pregnant and gave birth to a child. [n.25](#) The lawsuit arose when Johnson notified the Calverts that she would refuse to relinquish her parental rights to the child. [n.26](#) The case was complicated by the fact that all of the parties were of different races: Anna Johnson is Black, Crispina Calvert is Filipina, and Mark Calvert is white. [n.27](#) The media, however, paid far more attention to Johnson's race than to that of Crispina Calvert. [n.28](#) As Lisa Ikemoto observed, "the media stories focused on Anna Johnson's blackness and Mark Calvert's whiteness." [n.29](#) It also portrayed ***861** the baby as white. [n.30](#) Thus, the case was publicized as a dispute over whether a Black surrogate mother had any legal claim to a white child. (The California Supreme Court held that Johnson was not the legal mother of the child.) [n.31](#)

Examining the white-black paradigm in the context of reproductive technologies also illuminates the project of defining racial identity in non-biological terms. I have argued that race influences the importance that many whites place on new reproductive technology's central aim--the reproduction of genetically related children. [n.32](#) The critical importance of racial purity to white domination helped to create the conception of identity rooted in genetic heritage. This claim forced me to ask the question, how important is genetic relatedness to Black people's self-definition? Do Blacks not place equal weight on genetics in their own identity and the meaning of blackness?

Of course, it is important to most Black people to have genetically-related children. We, too, determine whether someone is Black, at least as an initial matter, by their physical features. But I think that Black identity is tied less to biology than we typically acknowledge. Black people have also resisted identifying themselves strictly in biological terms. Instead, Blacks have re-defined themselves as a political group. It is not true that Blacks are born with an essential racial identity based entirely on their physical attributes or genetic make-up. Identifying as Black does not mean simply assuming an oppressive straight jacket constructed by whites.

Black people have more options for self-identification than one might

think. For example, you might look at me and say, "Of course, she has no choice in her identity: she is a Black or African American woman." What alternatives do I have for fluidity, for shifting identities, or for choice? But the truth is that I am the first Black person in my family born in the United States. I see it as a political decision that I made in my teens to identify with Black people whose ancestors were enslaved in the southern United States. As far as I know, I have no ancestors who were slaves in the South. Yet that is how I usually think about myself and present myself to others. I also deliberately decided at an early age not to identify as biracial or multi-racial although I am biologically qualified to do so. That, too, is a political judgment.

Sometimes I identify as the daughter of a Jamaican immigrant to the United States. In fact, I identified myself as a Jamaican at the LatCrit II conference when several participants discovered that most of the *862 Black people there were of West Indian descent. At one point, we gathered to share stories about our common backgrounds. When I debated Peter Brimelow, the author of *Alien Nation*, at a conference on immigration, I asserted my identity as the daughter of a dark-skinned immigrant--someone Brimelow argued should have no right to automatic United States citizenship. [n.33](#) I passed as a Latina when I lived for a year in Bogota with a Colombian family and wanted to immerse myself in the culture there as well as to escape the prevalent anti-American sentiment. Again, all of these shifts in self-definition were political moves.

As these examples show, Blacks are not consigned to a super-imposed, pre-ordained, uniform, universal, biological identity. We have fluid identities that shift according to the context and that are, at least in part, political and deliberately chosen. We should think more about a **BlackCrit** Theory that develops a notion of a Black identity that is not rooted in biology or genetics. We know that a theory that posits an essential Black identity and that excludes the experiences of other people of color is false and dangerous. But we must also be careful not to advocate the kind of anti-essentialism that is a way of disassociating with blackness. We should be concerned about avoiding blackness when so many people still feel uneasy about "loving blackness." [n.34](#)

NOTES:

- [1.](#) On the meaning of essentialism, see Katharine T. Bartlett & Angela Harris, *Gender and Law: Theory, Doctrine, Commentary* 1007-1009 (2d ed. 1998); *Critical Race Theory: The Cutting Edge* 281-343 (Richard Delgado, ed.1995); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, [42 Stan. L. Rev. 581 \(1990\)](#).
- [2.](#) Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, [104 Harv. L. Rev. 1419 \(1991\)](#).
- [3.](#) See Betsy Hartmann, *Reproductive Rights and Wrongs: The Global Politics of*

- Population Control 247-48 (1995).
- [4.](#) See [Dorothy E. Roberts, The Genetic Tie, 62 U. Chi. L. Rev. 209, 211 & n. 7 \(1995\).](#)
 - [5.](#) See, e.g., Harris, *supra* note 1.
 - [6.](#) Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* 159 (1988).
 - [7.](#) See [Dorothy E. Roberts, Unshackling Black Motherhood, 95 Mich. L. Rev. 938, 954-59 \(1997\).](#)
 - [8.](#) *Id.* at 938.
 - [9.](#) *Id.* at 954.
 - [10.](#) *Id.*
 - [11.](#) Dorothy Roberts, *Killing the Black Body* (1997).
 - [12.](#) See, Anthony Farley's piece in the Final Plenary of LatCrit III Conference.
 - [13.](#) See Roberts, *supra* note 11, at 22.
 - [14.](#) See Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 *Harv. J. L. & Pub. Pol'y* 139 (1990).
 - [15.](#) See Roberts, *supra* note 4, at 269-72.
 - [16.](#) See Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 [Harv. BlackLetter J. 39, 51-54 \(1993\).](#)
 - [17.](#) See Mary Jo McConahay, *The Baby Trade: Where There Is Poverty in the Third World and a Baby Shortage in the First, Children Become a Commodity*, *L. A. Times*, Dec. 16, 1990, at 12; Janice G. Raymond, *Women as Wombs: Reproductive Technologies and the Battle over Women's Freedom* 144-54 (1993).
 - [18.](#) I am grateful to Richard Delgado for his observation about the European-Indian paradigm within the adoption market for Latino children.
 - [19.](#) See Robin Schatz, *Sperm Bank Mix-up Claim; Woman Sues Doctor, Bank; Says Wrong Deposit Used*, *Newsday*, March 9, 1990, at 5; Ronald Sullivan, *Mother Accuses Sperm Bank of a Mix-up*, *N. Y. Times*, March 9, 1990, at B1.
 - [20.](#) See Dorinda Elliot & Friso Endt, *Twins--with **Two** Fathers: The Netherlands: A Fertility Clinic's Startling Error*, *Newsweek*, July 3, 1995, at 38.
 - [21.](#) *Id.*
 - [22.](#) *Id.*
 - [23.](#) [851 P.2d 776 \(Cal. 1993\).](#)
 - [24.](#) *Id.* at 778.
 - [25.](#) *Id.*
 - [26.](#) *Id.*
 - [27.](#) See [Lisa C. Ikemoto, The In/Fertile, the Too Fertile, and the Dysfertile, 47 Hastings L.J. 1007, 1023 \(1996\).](#)
 - [28.](#) *Id.*
 - [29.](#) *Id.* at 1023-24.
 - [30.](#) *Id.*
 - [31.](#) [Johnson v. Calvert, 851 P.2d 776, 778 & 787 \(Cal. 1993\).](#)
 - [32.](#) See Roberts, *supra* note 4, at 223-30.
 - [33.](#) See Peter Brimelow, *Alien Nation* (1995). I argued that the campaign to deny

immigrants of color the right to give birth to citizens perpetuates the racist ideal of a white American identity in Dorothy E. Roberts, Who May Give Birth to Citizens?: Reproduction, Eugenics, and Immigration, in *Immigrants Out!: The New Nativism and the Anti-Immigrant Impulse in the United States* 205 (Juan F. Perea ed., 1997).

[34.](#) Bell Hooks, *Black Looks: Race and Representation* 9 (1992).

5. Catharine Peirce Wells,* *Speaking in Tongues: Some Comments on Multilingualism*, 53 *MIAMI L. REV.* 983 (1999)

INTRODUCTION

983 I am honored to be here and especially grateful to all of you for the special sense of collegiality and friendship that I experience whenever I come to these meetings.

The topic is language, and I would like to begin my comments on this morning's papers by pulling together some of the threads of yesterday's discussion. Two themes in particular seem relevant.

The first, is the power of language not only to communicate, but also to exclude. Yesterday morning, we held a panel and discussion in which the participants spoke about their first experiences with enforced bilingualism. Olga Moya, for example, spoke movingly of her first day in school when she and several of her classmates were punished for lapsing into Spanish in a moment of crisis. She also observed that many of these same students did not remain in school for very long.

The second is the power of language to shape identity and self expression. Yesterday morning, Yvonne Tamayo spoke about the many things she could say in Spanish but was unable to express in English. Berta Hernández-Truyol made a similar point at the first plenary when she talked about how she often thinks in English but experiences her emotions in Spanish. And Madeleine Plasencia elaborated on the subject when she spoke about how languages are an integral element of who we are; how they shape not only our personal sense of self, but also our identity in the outside world.

PERSONAL DIALECTS

I will begin, as the panelists did yesterday, with a few remarks about my own linguistic background. I share this as a way of acknowledging my own limited perspective on these matters. I was raised in an English speaking home. The language of my childhood had a lot of depth and subtlety when it came to abstract discussion, but it was also very limited. Most of my family expressed personal preferences in the abstract language of moral theory. Thus, if my mother wanted me to stop drumming on the table, she might say, "good girls don't do that kind of thing," or "you ought to refrain from that type of behavior." Requests were often met in terms of entitlements or fairness. One's parent might say, "it would not be fair to buy you an ice cream cone when I can't very well buy one for

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your sister.” Even sibling rivalry had a firm and decisive answer. “Comparisons are odious!”, was my father’s frequent refrain. Statements of feeling: “I feel angry, upset, sad or tired,” or requests, “I want to go home”, or “I want to go out and play” were treated as inconsequential and annoying interruptions to real conversation. In this way, you might say, I learned to speak like a lawyer at my mother’s knee.

By contrast, I was married for a long time to a man whose first language was not English but Greek. As a result, I learned Greek playfully as a language of love and affection.

When I was in graduate school, philosophy was primarily a study of language. I learned that every so-called natural language (such as English, Spanish or Greek as opposed to artificial languages like Cobol, Logic or Mathematics) consists of a number of different dialects. This helped me to understand that the dialects of a language are not confined to regional variations in accent and vocabulary. They also represent ways of speaking the same language in the context of different values and ways of life. And so, as an adult, I’ve come to understand that the lawyer-like language that I learned from my family is merely one dialect of what we call the English language. As such, it is both a very powerful tool and the source of many of my personal limitations. It was as if my Anglo ancestors had given me a magic wand that I could use to ace my way through a lifetime of standardized tests and academic rituals.

In non-academic areas, however, the limitations of my language are palpable. Language is not only a means of communication; it is also an incredibly powerful form of social control. The words of one’s language draw a decisive boundary between what one can and cannot say. And I cannot say many things—things I would like to say; things that many of you take for granted. It is clear that my particular English dialect [1985] was a firm expression—*for better and for worse*—of the kind of person my Anglo ancestors had hoped I would become.

SCHOLARLY DIALECTS

Each of the papers this morning has used a different scholarly dialect to examine the problem with English-only legislation. The result has been an interesting and informative discussion. For my own part, I would like to reflect a little on the choice of scholarly dialect and on how we both lose and gain when we choose to speak within the confines of an academic discourse. Before starting, I should say that, as a pragmatist, I am a pluralist about scholarly dialects. Life is multifaceted and complex. Genuine insight is hard to obtain—hard enough so that we should not handicap ourselves by deciding, in advance, that all knowledge must conform to the relatively rigid requirements of a single academic discourse. But, while it is good to have a choice of many tools, it is important to use them with awareness. When we talk in a particular scholarly dialect, we may gain insight and understanding, but we may also lose our ability to talk about other

aspects of a problem—aspects that in other circumstances we might consider to be the crux of the matter. This is particularly true when we talk about language itself.

Language, by its very nature, is a distillate of human culture. Hidden within it are many of the values that animate those who speak it. We should be careful therefore, when we subject language to the rigors of an academic analysis. n4 Whether the discourse analyzes language as an economic commodity, a badge of personhood, or a matter of practical politics, we should keep in mind that language is not an abstract object that can be readily disconnected from its cultural and spiritual dimensions.

LAW AND ECONOMICS

In this spirit, let's think about the law and economics discourse that Bill Bratton so skillfully wove into this morning's discussion. He made an important point: we should not be so quick to concede the efficiency rationales for English-only legislation. Whether English-only legislation is a matter of genuine efficiency or whether it is, as Bill suggests, simply a question of Anglo special-interest legislation makes a real difference to our understanding of the issue. Even so, we must remember that law [1986] and economics is a particular dialect and thus can only represent a partial perspective. Like every academic dialect, it will highlight certain aspects of the problem, but this will occur at the expense of doing a poor job of illuminating the rest. Thus, even under the best of circumstances, we should be careful not to place too much emphasis on questions of efficiency. We should remember the reasons for skepticism.

One reason to be skeptical is that economic analysis tends to assume that anything worth counting can be fully understood as an item of commerce. Thus, if we are talking about widgets, one assumes that every widget is a fungible commodity and that there is no serious obstacle to understanding the value of the widget solely in terms of its monetary value. n5 This assumption may work well for widgets, it might even work well for artificial languages such as those that are used in computer programming. However, it is less likely to work well as a way of analyzing the use of natural languages. Since natural languages construct identity and value, they are unlikely to be well understood by a discourse that limits the concept of value to fully formed and numerically quantifiable preferences.

A second reason for skepticism is that law and economics has traditionally offered very little insight into the real world disparities of power and wealth. One problem is that it tends to convert every question of distributive justice into a question of redistributive justice. Because the touchstone of economic analysis is the concept of efficiency, an economist is likely to begin her analysis of distributive questions by considering the relative efficiency of various systems of property rights. Thus, if fairness is to enter into the analysis, it must do so at a later stage when, for example, we consider whether the taxing system should play

a significant role in redistributing income or capital. Yet since claims for redistribution inevitably raise objections about entitlements and expectations (not to mention the costs of redistribution), this move tends to undermine claims that are based upon notions of justice and fairness.

A third reason to be skeptical about the economics of linguistic regulation is the failure of economic thought to provide a framework for making meaningful distinctions between systematic forms of discrimination and the aggregation of individual preferences. For example, when women employees sued Sears alleging gender disparities in wages paid to sales personnel, it was possible for economists to argue on both sides of the issue. Some argued that wage discrepancies stemmed from discrimination, while others economists suggested that they could be “explained” in terms of the preference of female workers for selling lower priced, non-commissionable items. A similar ambiguity exists [987 with respect to English-only legislatio Bill Bratton spoke about how discrimination against Latina/os has limited the incentives for Spanish speaking Latina/os to become bilingual. This might be true, but, from an economic perspective it is not obvious. As an alternative, an economist might argue that the choice to live in “enclave communities” and take lower paying, Spanish-speaking jobs reflects the cultural preferences of individual and autonomous players.

DEONTIC THEORIES OF PERSONHOOD

In her presentation, Dru Cornell offered an analysis of English-only that is based upon Kantian conceptions of personhood. This sort of deontic theory is frequently understood as a more humanistic alternative to economic analysis. Thus, while the economist thinks of human beings as aggregations of preferences backed by dollars, the Kantian conceives of them as non-negotiable subjects of respect and value. It is this conception of personhood that permits Dru to make a case for respecting each person in their choice of linguistic expressio

The advantages of such an approach are obvious. In a Kantian world, the value to a person of speaking one’s own language cannot be sacrificed to the overall efficiency of human communicatio While this seems promising, it is important to note that, for Kant, respect for others is derived from the sense that they share what is most essential about ourselves. When Kantians respect the personhood of others, they are being fundamentally reverential to human sameness rather than human difference. What we can’t get from Kant is the notion that what is sacred in you is fundamentally different from what is sacred in me; that someone who differs is—for that very reason—especially worthy of respect. On Kantian grounds, for example, I can see that it is wrong to promote English speaking at the expense of Spanish speakers. I can understand that it deprives them of something that, were I in their position, I too would value. But it takes something more than Kant to help me understand the poverty of my own English-only perspective. When I begin to understand that what is “other” is sacred, then I

know that English-only legislation is not just unfair to Spanish speakers, but that it also deprives me, as an English speaker, of something valuable that I can get in no other way.

CONCLUSION

As part of her presentation this morning, Sharon Hom told a wonderful story about her son's attempt to author Penelope's diary and his ability to express what he imagined as her needs across great barriers of [1988 gender, race, culture, time, and history. Her story conveys a lot of what I find valuable in the concept of multilingualism.

Multilingualism offers an alternative to cultural imperialism. It seeks genuine communication rather than an understanding of others as partial replications of ourselves. Genuine communication is hard. It happens only when we commit ourselves to real flights of imagination and expression. And, to be successful, we must surround these efforts with an atmosphere of love and respect for one another. Because I believe this is possible, I think we should not get too caught up in what the economists call the cost of multi-linguism. Instead, we might explore the possibility that by paying close attention to what is said in other languages, we can heal the pains of our own limitation and partiality. In short, what we need to focus on is the gift of otherness, the opportunities of multi-linguism and the possibility that through difference we can find wholeness.

NOTES:

1. The Structures of Latina/o Subordination: Intersections in Law and Life, Moderator: Olga Moya; Presenters: Laura Padilla, Yvonne Tamayo, and Rey Valencia; and Commentator: Donna Young.

2. Between/Beyond Colors: Outsiders Within Latina/o Communities, Moderator: Pedro Malavet; Panelists: Roberto Corrada, Berta Hernández-Truyol, and Rudy Busto; Commentators: David Cruz and Jenny Rivera.

3. A friend of mine reading this comment said: "You must be exaggerating. People don't talk like that to their children" However, I am not exaggerating. In my community of origin, this way of putting things was not necessarily perceived as cold or insensitive. It was simply the way people talked—not just my family but most of the people I knew in the rural area near Boston where I grew up.

4. For example, in the past hundred years, Anglo-American philosophy has devoted much effort to relatively straightforward attempts at describing and analyzing natural languages. The difficulties of analyzing language are amply demonstrated by the puzzles and paradoxes that are offered by Wittgenstein as a commentary on this approach. See, e.g., his *Philosophical Investigations*.

5. See, e.g., Margaret Jane Radin, Market-Inalienability, *100 Harv. L. Rev.* 1849 (1987).

6. Sharon K. Hom,* *Lexicon Dreams and Chinese Rock and Roll: Thoughts on Culture, Language, and Translation as Strategies of Resistance and Reconstruction*, 53 MIAMI L. REV. 1003 (1999)

Good morning. I want to first thank the wonderful conference organizers, especially Frank Valdés and Lisa Iglesias, for their hard work. This is my first LatCrit conference and it has been a very special experience. Because of LatCrit's broad theoretical concerns and inclusive political project to expand coalition strategies, n1 I trust my remarks today on culture and language across a transnational frame will not sound too "foreign" I'd like to take advantage of these supportive, critical and challenging conversations, to think out loud about a couple of ideas that might not fit neatly within traditional legal discourses. Although Mother's Day (tomorrow) is a Hallmark-created holiday, it seemed appropriate to insert a mother-child story as narrative preface. When my son, James, recently pointed out that I might be violating his copyrights in telling stories about him as I often do, I promptly invoked the privileges of the powers of creatio So I begin with a story about my teen age son that suggests I think the complex dialectic between cultural inscription and cultural transformatio

After assigning the Odyssey last year, my son's English teacher asked the students to edit and produce a newspaper of the times. The collaborative project that James' small group produced was creative and [1004 very funny, and included a number of his contributions—real estate ads for Mt. Olympus (no vacancies), obituaries on Ajax, Paris, and Achilles, an editorial on fate (can't be avoided), and an opinion poll among "readers" about whether Odysseus should have killed the suitors. There was an "exclusive"—"What Penelope was Really Thinking while Odysseus was Away"—a set of Penelope's "diary entries" re-imagined by my so The entries are set in the eighth, twelfth, and nineteenth year of the Odyssey, and convey Penelope's loneliness, anger and helplessness in the face of the suitors who have taken over her home, and fear and hope for

* Professor of Law, CUNY School of Law. This essay moves along several levels of "translatio" The first is the inevitably distorted translation of my LatCrit remarks, a presentation that incorporated performative elements—visual, music, and story-telling—onto the pages of a written text, especially a law review text. In the absence of a multi-media CD law review format, I have given up the attempt to "translate" my part of the presentation on Chinese Rock and Roll. My presentation also implicated linguistic, cultural and translation issues, the languages of Chinese and English, international/domestic feminist and human rights discourses, and implicit cross-discipline "translations" as I borrow from other literatures and methodologies outside of law. I thank all the participants at the LatCrit III workshop for their generous feedback and encouragement, and the opportunity to learn from the rich LatCrit jurisprudence "under constructio" I especially thank Frank Valdés and Lisa Iglesias and the student editors for this space to tease an essay out of part of my conference remarks, and to Juemin Chu for her Chinese calligraphy

Odysseus' safe return I was shocked to read in the entry of the nineteenth year this line—after expressing hope that Odysseus will come home soon, the entry asserts “a woman has needs.” My sixteen year old teenaged son writing “a woman has needs”??? Okay, it was clearly time to have a talk.

As I reflect on what was actually embedded in my copyright exchange with my son on his rights to his own life's stories, I am struck by how deeply we both have absorbed the stories of possessive individualism that underlie the dominant western copyright and intellectual property regime. Yet, it is his attempt to (re)imagine Penelope's reality that gives me hope for the possibilities of transcending existing paradigms. Whether the diary entries were an appropriation of Penelope's story by my son, reaching back thousands of years, across gender differences, and through language and cultural frames, there is something provocative about a Chinese-American, teenage man-child imagining the diary entries of a Greek woman after the fall of Troy. So I begin to rethink cultural appropriation as a possible strategy of resistance and re-vision that may not operate across the neat polar logic of oppressors and victims, or dominant and marginal sites of struggle.

Against neo-post-colonialist and imperial histories, the foreign-born, multi-lingual, and cross-cultural common grounds shared by many Latinos and Chinese (and other Asians) in the United States, suggest discursive and transformative resources and insights that Asian and Latino/a critical theorizing makes visible in ways that dominant United States race paradigms often elide. In this limited space, I would like to draw upon my human rights scholarship and exchange work in China and focus on two related categories of analysis and performance—culture and language—to explore the opportunities and dangers presented by cultural and linguistic appropriation for anti-subordination strategies. As an example of a cross-cultural feminist intervention in the international human rights arena, or in Berta Hernández' phrase, an attempt at translating the untranslatable, I will talk about a Chinese-English project on women and law that I co-edited for distribution at the Fourth World [1005 Conference on Women in 1995. n2 As a specific example of the complexities of mass culture as a site of global capitalist commodification, cultural appropriation, and resistance, I'd like to invoke the music of the “founder” of Chinese Rock n' Roll, Cui Jian, to invite the listener to imagine as it were, the sound of resistance across time, space, and cultures. I was also originally on the democracy anti-subordination and globalization intersection panel for this LatCrit workshop, so I think that you will probably hear some continuing resonances of that train of thought. Finally, drawing upon cultural studies frameworks, n3 and focusing on multiple social spheres of meaning production and struggle, I am implicitly suggesting that the roles of law, progressive lawyers and critical legal theory need to be situated within a complex matrix of social transformation processes that include multiple sites of contestation and mediatio

First, to invoke culture is to deploy “one of the two or three most complicated words in the English language.”ⁿ⁴ As I use the term culture in this essay, I am suggesting several interrelated concepts and processes reflective of shifting negotiations of meaning and power. Culture can refer to a set of values and institutions, constructed by social forms, practices, and ideological beliefs that are constantly in negotiatio In this sense, language and rock and roll both reflect and constitute con tested social forms, practices and ideological beliefs. Culture is also a problematic construct deeply implicated in the history of colonialism. As Nicholas Dirks has argued, culture is a colonial formation and colonial ism was itself a cultural project of control.ⁿ⁵ At the same time, it is perhaps more accurate to refer to cultures by the way different cultures are interrelated, interdependent, and also often in tension and conflict with each other. The plurality of cultures or reference to “a” culture also signals resistance to an assumed Eurocentric norm as in western “civilizatio” Beyond simply acknowledging the discursive complexity of the concept, we need to mine our relationships to these multiple cultures for theoretical and political resources. For example, despite being caught between the cross-fire of international human rights debates about universalism and cultural relativism,ⁿ⁶ culture as a category of analysis, and [1006 cultures as materially situated sites of struggle, culture(s) can be sources of transformative insight and power. Cultures are not static. Cultures make us even as we resist and create different, more just social forms, practices and beliefs. We therefore need to interrogate our different invocations of “culture” in different settings and pay critical attention to methodological and substantive questions. In part, what we “need to understand is not what culture is, but how people *use the term* in contemporary discourses.”ⁿ⁷ Who gets to define culture(s)? Who uses (misuses) specific assertions of what is culture (or coded for tradition)? What purposes do various deployments of culture serve? Who benefits? Who is harmed? How do we surface harms and injuries—these questions implicate the responsibility of progressive scholars for knowledge production, legitimization of different forms of knowledge, and responding to the implications of our theoretical work for social transformation strategies.

LANGUAGE AND TRANSLATION

“We are the ink that gives the page a meaning.” ⁿ⁸

I once wandered into a powerful dream about finding a set of lost dictionaries carefully nestled in silk lined bamboo baskets in an old magical bookstore. For a very long time afterwards, I carried that dream and a sense of loss that I could not and did not buy them while in that dream store. But, when I was working on my English-Chinese Lexicon on Women and Law project, I realized I couldn’t buy those dictionaries—we needed to write them ourselves, to

reinvent ourselves linguistically and culturally. n9 But we do not write on a blank page.

In locating myself in relationship to language and culture, I am speaking as a Hong-Kong born Chinese who immigrated to the United States as a child. The dialect of my father is *Toisan*, the rather guttural southern dialect of peasants. My mother speaks Hong Kong Chinese, the Cantonese of Hong Kong princesses. I did not receive formal Chinese language training until graduate study in East Asian Languages and Cultures at Columbia. But then it was not in the familiar languages of home, but in Mandarin, *putonghua*, n10 the national dialect of The Peo [1007 ple's Republic of China and a nationalist tool of linguistic and cultural unification and standardizatio As a Cantonese speaking person, my *putonghua* will forever be accented by my southern origins. Reflecting years of traveling and working in China, and speaking *putonghua*, my Cantonese has acquired a northern accent. To most Chinese speaking audiences, my Chinese is probably "accented" and marked as "outsider." When I listened to the conversations yesterday about people seeing, or thinking in Spanish, I realized that thinking or speaking in Chinese does not translate for me into "an/other" language, but rather invokes the many languages that flow from my cultural inheritance.

As I awkwardly juggle languages—never with 'native' fluency, I hear Margaret Montoya's calls to reclaim our native heritages, to deploy bi-lingualism and mixing of languages and disciplines as strategies of empowerment and to subvert dominant monolingual discourses, and to linguistically reterritorialize public legal discourse. n11 Articulated in a Chinese register, perhaps one small contribution of these remarks to the LatCrit/Asian critical jurisprudence project is to problematize the linguistic territorialities of our native heritages and tongues. For me to linguistically claim my Hong Kong heritage is not to claim some native authenticity, but to confront a former English-speaking British colony. "Returned" to Chinese sovereignty in 1997, in what Rey Chow has named a recolonization, n12 the "hand-over" was marked by public theater of a grand scale and colonial exits with a stiff upper lip, all carried along by mediatized narratives of nativist pride that played well domestically and abroad. The 'return' was referred to as *wuiguie* (return) in Cantonese, and in English, the hand-over. Whatever the locution, Hong Kong was the object being returned or handed over, while the people of Hong Kong were conspicuously absent except as industrious little inhabitants of an essentialized object of praise, the beloved poster child of capital ism. The official hand-over speeches, the swearing in of the new chief executive, Tung Chee Hwa, the provisional legislative council members, and the judges were in *putonghua*, and for the non-ethnic Chinese judges who did not speak Chinese at all, in English. Cantonese, the language of the Hong Kong Chinese was not spoken at all. In this staged performance, what would it mean as Rey Chow asks, for Hong Kong to write in its own language, that is, not English or standard *putonghua*, but the vulgar language of the people—the combination of Cantonese, broken [1008 English, and written Chinese? What can it mean to

maintain Hong Kong's society and way of life, to envision a democratic Hong Kong if its language is not even its own?

On hand-over night, one of my uncles recounted a story about a Hong Kong restaurant that offered a special of a complimentary bottle of English wine. In Cantonese, *soong yingkok jiaow*, a language play on "to send off (kick out?) the English." We all laughed at this typical Cantonese humor and double entendre. Although the language play echoed the official Chinese nationalistic sentiment, at least I think it suggested that language still retains its potential as a tool for resistance. Indeed, multiple meanings that undermine the assertion of monolithic and imposed interpretations, and gestures towards the possibilities of language as a site for the appropriation of new values and meanings. n13

*And in my dreams,
I can never quite see clearly enough
I pop my contact lens out of my eyes,
and put them in my mouth,
conscious of their fragility, their inherent danger
They always splinter—glass slivers of vision, and I freeze
Or in dreams, my mouth is full of a sticky dark paste
which gets thicker and thicker
hopelessly cementing my teeth together
burying and trapping my voice
I wake—and dream
of spitting the glass slivers out
Transformed into crystalline words
reflecting the clarity of sunlight through ice
Transparent bridges out into the world
spitting the silencing cement-mud out
spitting out my bloody teeth
Exhaling one long easy breath through
the open wind cave
of my finally freed mouth*

The genesis of the *English-Chinese Lexicon on Women and Law* (Lexicon) can be traced back to a specific moment during a particular conference, "Engendering China: Women, Culture, and the State," held at Harvard University and Wellesley College in 1992. I was sitting in the audience, sans translation headphones, when I began to wonder what were the translations traveling through those headphones to my Chinese colleagues. What *were* the translations for contingency, subjectivity, [1009 counter-hegemonic reification, gender, feminism and so forth—the numerous terms used, assumed as translatable and as translated, in this "cross-cultural" exchange? In the years that followed, I became more and more interested in the pragmatic level of working across differences and increasingly aware of the English-centric context of "international" settings. I

wanted to pay attention to the foundational bridges for our interactions, to language itself. Otherwise it seemed to me that as the Chinese expression goes, we were sleeping in the same bed dreaming different dreams. Interestingly, through the years, in discussions with translators and women activists working in Spanish, Russian, French, Arabic, and others languages, I discovered that they also struggled with similar linguistic, cultural, and political translation issues. n14

Through a process that included workshops, and discussions with Chinese women's studies researchers and activists, my co-editor, Xin Chunying and I began the collection of terms that Chinese women identified as confusing, unclear, or simply incoherent in Chinese translation—a kind of foreign-sounding Chinglish. We coordinated a team of United States-based and China-based volunteers from a wide range of disciplines including law, women's studies, anthropology, history, literature, and psychology. In the end, due to limited resources and time, and a decision that it was more important to have something useful for distribution for the Conference rather than nothing at all, we completed a manuscript of only 175 English terms (out of the over three-hundred terms that were suggested) on women's health, human rights, development, and feminist theories and practices. As an effort to introduce Chinese expressions to non-Chinese speaking readers, we also decided to include 30 Chinese expressions that were in common usage that we felt reflected prevalent Chinese social attitudes about women. I want to briefly talk about a few of these terms to illustrate some of the difficulties we faced in this task of 'translating the untranslatable' and to reflect on what these difficulties suggest about the complexity of multi-cultural interventions.

"Affirmative action" is a good example of the political incoherency of literal translation. I had seen "affirmative action" once literally translated into Chinese as affirmative action, *jiji* (as in affirmatively to act). But without any social or historical context to support this phrase in translation, this term was meaningless and conveyed to me a bizarre image of hyperactive people. Another more common translation is *chabie duidai yuanze* "the principle of dealing with [1010 difference." Both translations needed the invocation of a situated civil rights struggle, culturally specific notions of rights, equality and equity, private and public spheres of action, and assumptions regarding the role of government and law. In the end, instead of the more common translation, we adopted a fairly long winded phrase, *weile shixian pingdeng er shixing de chabie duidai yuanze* clearly not a Chinese "translation," but Chinglish. However, supported by a general descriptive entry, n15 as the term made its awkward appearance in Chinese, our provisional translation choice retained the situated cultural, political, and legal resonances of its English genealogy.

"Empowerment," *shi*, was another term that presented similar political issues. In our translation discussions, the questions that we struggled with included: What was the source of the power? What verb does one use given different Chinese verbs for power relative to power as from above or from below?

Where do we insert and invent the verb for “the power” from within each of us and collectively from groups? In the entry discussion, we adopted several unsatisfactory verb choices, such as, “to get” power and “to receive” power, but settled on the phrase that literally suggested, that empowerment is “to make all with power.” n16

[1011 Like “empowerment,” “engendering” was another term that required linguistic contortions and we discovered that even in English, the term was difficult to define. The final entry reads:

“In common English usage, engender as a verb means to produce, to cause, or to give rise to. Feminists have expanded its usage and meaning to refer to the process of drawing attention to the ways in which existing social concepts and structures have embodied and perpetuated gendered notions of men and women and their proper roles in society. As a feminist theoretical method, engendering refers to the integration of gender as an analytical category into diverse disciplines and issues. For example, engendering law refers both to the deconstruction and exposure of the gendered dimensions of legal rules, process, and legal analysis and to the process of introducing a gender perspective to transform the content and methodology of law.” n17

Feminism is often translated as *nuquan zhuyi*, but many of the Chinese women on the project had a distaste for the negative political resonances in Chinese of the *chuan* (power) and suggested *nuxing zhuyi* ([Editor’s note: Chinese characters could not be reproduced], literally the ‘ism of the female-sex.’ We settled on including both translations to acknowledge the ongoing discursive and political negotiations and to signal the non-authoritative intentions of the lexicon and our goals of surfacing different intentions, and translation difficulties. In the entry, we referenced the multiple Western and Third World feminisms and included a discussion of the history of the Chinese translation of Western feminist texts in the early twentieth century and the debate about the two competing translations for feminism. n18

Because time is short, I can only quickly discuss two other terms—gender and sex. In Chinese, sex has been translated as *xing /xingbie* ([Editor’s note: Chinese characters could not be reproduced]). Gender has also been often translated as *xing*, sometimes *xingbie*, sex-difference. But some of us on the project team wanted to make a clearer distinction between the social constructedness of gender versus the biological connotations of sex so we suggested *shehui xingbie* -- ‘social-sex.’ Others in the group pointed to how “weird” this sounded and yes, I had to agree that socially constructed sex *is* weird. Our entry notes this discussion:

“There is no exact term for gender in Chinese that adequately conveys the social constructed aspect of the concept. In recent years, the term gender has been translated into Chinese as *xingbie*, or *shehui xingbie*. *Xingbie*, which also is used to mean sex, does not convey [1012 the contingency implied in the English term and retains the biological connotations of *xing*. *Shehui xingbie*, meaning literally “social sex,” still has a close affinity to biological sex. The concept of gender as developed by Western feminists is viewed as culturally

specific and Western by many Chinese women activists and scholars in women's studies. Nevertheless, a familiarity with Marxist materialism enables many educated Chinese to also perceive human beings as socially constructed and environmentally determined." n19

Take the difficulties briefly introduced by the discussion of these few terms and multiply them a hundredfold, and you will get some sense of the translation, political, and ideological complexities of the project. In addition to the substantive work, the administration, funding, and organization of the project presented enormous challenges. Initially without any funding support, the publication of the finished volume was later generously supported by United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Development Programme (UNDP), and the Ford Foundation. Thousands of free copies were distributed at the Fourth World Conference on Women held in Beijing in 1995.

In some ways, the translation negotiations we engaged in for the Lexicon project were also about cultural appropriations. In a definition that "bristles with uncertainty," cultural appropriation may be defined as "the taking—from a culture that is not one's own—of intellectual property, cultural expressions or artifacts, history and ways of knowledge." n20 However, the reference points to the "appropriations" of international feminist human rights discourses and their deployment in "domestic" Chinese context, were destabilized by the diasporic positionings of the women in the project. n21 Mostly Chinese-born, but educated both in China and in the United States, the Chinese women working on the translation work of the project were simultaneously engaged in cultural importation, exportation, translation, and critical assessments of the "transplants." Questions of who is appropriating what, for whom, and why become a more complex process and negotiation not neatly enclosed within "domestic" frames. The discourses of authenticity and nativism are simply not adequate to address the political and theoretical challenges and opportunities presented by these necessary negotiations.

[1013 The nightmarish struggles with the Chinese printers for the control of the Lexicon during the final production stage is too long a story to tell. What I also took away from this project was a sense of the pervasive ways political control can be asserted over language, and therefore, over what can be said and thought. n22 Suffice it to say that the frustrations of negotiating through the stifling Beijing heat to resist assertions of "acceptable" formulations, seem in retrospect, almost worth it. In a 1995 reader survey, *Zhongguo Dushu Bao*, a national Chinese paper (and I should note not a feminist paper by any definition), the Lexicon was named as one of the most important books published in China. An International Ladies Garment Workers (ILGW) union language study group of Chinese immigrant women in New York City also ordered copies of the Lexicon as English-language study material. Beyond its limited print run, I hope that the reprinting and circulation of the book inside China continues, undermining current copyright regimes, even one that purports to protect my intellectual property rights.

CODA: A LITTLE ROCK AND ROLL ANYWAY

At the end of my LatCrit presentation, despite our moderator displaying not only the hangman's noose, but the executioner's ax as a sign of my time being up, I managed to squeeze in a few minutes of the music of one of China's most famous rock and roll stars, Cui Jia Cui Jian's song, *Yiwu souyou* (I Have Nothing) from 1986, was an anthem for a whole generation of young Chinese, and the Chinese Democracy Movement. In 1989, Cui Jian performed for the thousands of student protesters and hunger strikers in Tiananmen Square. Dressed in battered People's Liberation Army (PLA) fatigues and a Mao jacket, performing [1014 with his signature gesture of metaphoric defiance, Cui Jian sings while blindfolded with a red piece of cloth. In invoking a powerful subversive critique of Communist Party imposed regimes of meaning, his performance and the song is subversive because in socialist China where every thing is supposed to be better, you cannot claim you have nothing. Under the surface of a love song, in his husky raw voice so unlike the pretty voices of pop Chinese male singers, he pleads: "It's ages now I've been asking you: When will you come away with me? But all you ever do is laugh at me, 'cause I've got nothing to my name When will you come away with me?"

China Journal, October 1989

Beijing slowly appears in the gray morning mist—the buses, bicycles, an occasional army truck passes by along on the wet streets. Sometime in the night as we slept, it must have rained. On the corner, in the slight drizzle that is still coming down, an old woman is doing her morning exercises. I watch her rhythmic waving of her arms, back and forth, as if aim lessly directing invisible traffic. Walking in the brisk, cold October morning, I pass two women busy frying fresh fragrant you-tiaos (crullers) for the line of Chinese getting breakfast on their way to work. I am in China again, but the images of our airport arrival, the PLA soldiers waiting at the bottom of the airplane steps and the armed soldiers at key intersections, are chilling reminders this is not the China I left a year ago.

Xidan market in Beijing at night—cooking smells of roasted chestnuts and skewers of meat filled the crowded streets. People were everywhere, shopping, eating, as if life goes on, as if nothing happened. On ChangAn Street, there are no signs or vestiges of the violence and bloodshed just a few months ago. Yet the next day, as I make my way through the crowded rush hour, the loudspeakers blare over and over a message of stability, order, and warning: "Welcome to Xidan ... Keep care of your belongings ... While in a crowd, be more polite to others. When accidents happens, do not crowd or push around. Observe safety and hygiene rules ... Be on your guard against bad elements who make trouble. If you observe bad elements report immediately to 666-6549 ... Bei jing is our great capitol." It is afterwards that I then noticed the public

information “arrests” boards on the street, displaying pictures of those who have been captured, together with the weapons confiscated.

[1015 As Chinese leaders continue to insist, no major changes have been or will be made, only tiao zeng (adjustments). As the facts and the correct position are set forth in official speeches reprinted in newspapers, and studied in political study, the leadership is clearly retrenching into their either-or worldview in which the maintenance of order is paramount. The “no fire hoses and rubber bullets” or “no one died in the Square truth” is offered to justify the necessity of using tanks and guns to end the threat to Party power posed by the chaos and disorder. The official “truth”—a small group of counterrevolutionaries were responsible for the chaos and bloodshed. Each citizen must continue to engage in self-examination, analysis and criticism.

A Chinese musician friend of mine encourages me not to feel such despair for China. He tells me to not only look at the surface of things as described and reinvented by leaders and officials. The reality is underneath, in the spirit of the people. You have to listen very closely, sometimes without appearing to listen, to hear the messages of the spirit, sometimes released silently like anonymous air balloons carrying messages of defiance floating above the city. I ask a Chinese legal scholar how he could still be so clearly committed to continuing his research and theoretical work on political reform and protection of democratic rights through law. He answers: “At present in China, it is hard to do this work. But the starting point is the future.”

As an underground phenomenon that emerged in contrast to state sponsored and controlled *tongsu* music (officially sanctioned popular music), ⁿ²³ Chinese Rock and Roll, is one of the key arenas of cultural resistance before and after the 1989 democracy movement. China in the post-Cultural Revolution, post-Mao, open reform period, is a country that one might say has swallowed hope, line, and sinker some of the dominant economic stories of Western industrialized market systems despite resulting inequities and unsustainability of these market “reforms.” Yet, within China and in the global Chinese diaspora, Chinese democracy activists, scholars and artists struggle for a more just social order in the face of enormous material and ideological obstacles. These domestic Chinese and global human rights struggles are connected through the interconnected global flows of people, capital, and technology. I think it is deeply ironic that Rock an infiltration of the West, closely tied to the huge multinational record industries, ⁿ²⁴ has been now played back, used, reinvented and appropriated by Cui Jian and other Chinese rock musicians like him.

Cui Jian has said that Rock and Roll is an ideology, not a set musical form. He understood this notion of culture as an arena of struggle. Cui Jian’s music is a powerful reminder of the subversive capacity of mass cultural forms to undermine, and evade state mechanisms and regimes of political control over thought, language, and the imagination. Trained as a classical musician, a wonderful trumpet player in fact, Cui Jian played with the classical Beijing music conservatory until his Rock and Roll life force him to leave. By reinventing Chinese folk songs, even sacred Army songs, inserting traditional Chinese

instruments, and the distinctive singing styles of barren desolate or vast mountainous landscapes into his music, Cui Jian geographically displaces the West in his appropriations of Western Rock. At the beginning of one his concerts in 1989, he tells the audience: “If Western Rock is like a flood, then Chinese Rock is like a knife. We dedicate this knife to you.” n25

Under the full perfect moon in the endless Beijing sky

Young people sitting on the wooden railings lining the covered walks of Ertan Park,

Perched on the gray shadows of rocky islands

in the middle of the lily ponds black waters,

thin students in white short sleeve summer shirts,

young women in spandex leggings,

teenagers with frizzed out shoulder-length hair,

metallic and leather collars and wristbands,

They defy the night, screaming, dancing to

the electronic blasts of banned Rock and Roll

Beer bottles thrown

Landing in splinters of glass and beer showers

Xiao He, in a tight red tanktop, muscled arms gripping the guitar

His hoarse “blow it up!” crashing

through the huge speakers on both sides of the stage,

And the response of the crowd

Fists up, lit matches and cigarette lighters

hundreds of flickering firelights

[1017 fill the darkness of the gardens

New offerings to The Temple of the Sun n26

In the human connections engendered by the LatCrit conference that made it so powerful and empowering, I also hear music. On a moonlit Miami night, at

the edge of the ocean, a group of us laugh, talk, and sing a Hawaiian children's song endlessly until we're hoarse. Weaving through our theoretical work, music is a way to share and reclaim our spirit resources. In the Asian American movement of the sixties, community artists like Chris Ijima (now a law professor), Joanne Nobuko Miyamoto, and "Charlie" Chin performed songs that brought people together, that expressed outrage against the exploitation and suffering of our peoples, and that celebrated our strengths.²⁷ In building a multi-coalition progressive movement, we still need songs of outrage and celebratio I suggest the formation of a "Chorus for Justice," a chorus in which anyone can sing, in which we teach and learn each other's songs, a chorus in which we sing in multiple languages, invoking the power of diverse and rich cultural ground, reappropriating mass cul ture as a site of struggle and reconstruction—a chorus that will teach us to listen for, and to nurture the music of transformative resistance and celebratio

NOTES:

1. See Francisco Valdés, *Under Construction: LatCrit Consciousness, Community and Theory*, 85 *Cal. L. Rev.* 1087 (October 1997), 10 *La Raza L.J.* 1 (1998); Francisco Valdés, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 *Harv. Latino L. Rev.* 1 (Fall 1997).

2. Sharon K. Hom and Xin Chunying, *English-Chinese Lexicon of Women and Law* (Yinghan Funnu Yu Falu Cehuishi) (1995) [hereinafter Hom and Chunying, *Lexico*]

3. See Bruce Ziff and Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (1997).

4. Raymond Williams, *Keywords: A Vocabulary of Culture and Society*, Revised Edition 87 (1983).

5. Nicholas B. Dirks, ed., *Colonialism and Culture* (1992).

6. In the context of debates about "Asian" perspectives on human rights, I have argued that the polar logic and state-centric paradigm that dominates these debates needs to be critically examined and opened up to include powerful transnational actors, international, regional, and domestic NGOs, and grassroots activists. See Sharon K. Hom, *Commentary: Re-positioning Human Rights Discourse on "Asian" Perspectives*, 3 *Buff. J. of Int'l L.* 251 (1996).

7. John Tomlinson, *Cultural Imperialism* 5 (1991).

8. From a detail of artist Glenn Ligon's piece, "Prisoner of Light No.1," shown at the Max Protech Gallery.

9. Whenever I invoke dreams upon academic ground and begin to feel nervous about legitimacy, I remind myself of the words on a wonderful T-shirt that Dean Rennard Strickland sent out one holiday seaso It said "Dreams have power."

10. I use the pinyin phonetic system to indicate the putonghua pronunciatio This system was developed in the mid-1950's by the Chinese Communists and has been adopted as the standard romanization system on the mainland.

11. See Margaret E. Montoya, *Academic Mestizaje: Re/Producing Clinical Teaching and Re/Framing Wills as Latina Praxis*, 2 *Harv. Latino L. Rev.* 349 (1997).

12. Rey Chow, *Between Colonizers: Hong Kong's Post Colonial Self-Writing in the 1990's*, *Diaspora* 2:2 (1992), 151-170, at 153.

13. I reflect on the return in a piece constructed out of a series of journal entries that travel from the Chinese Consulate in New York City, to Beijing, to Hong Kong and back to New York, a

kind of 'homing towards disappearing origins.' See Sharon K. Hom, *Return(ing) Hong Kong: Journal Notes and Reflections*, 23 *Amerasia J.* 55 (1997).

14. For a discussion of the issues presented for women human rights activists working in Spanish, see Claudia Hinojosa, *Translating Our Vision: Organizing Across Languages and Cultures*, *Global Center News*, No. 4, 8-9 (Summer 1997).

15. The entry reads: "Affirmative Action originally referred to the policy adopted by the United States. Federal government requiring all companies, universities, and other institutions that do business with the government, or receive Federal funding, to 'take affirmative action to ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, color, religion, sex, or national origin.'" The term has since come to refer to programs designed to remedy effects of past and continuing discriminatory practices in the recruiting, selecting, developing, and promoting of minority group members. It seeks to create systems and procedures to prevent future discrimination and is commonly based on population percentages of minority groups in a particular area (i.e. quotas). Factors considered are race, color, sex, creed, and age. Affirmative action often involves timetables and numerical goals, which has aroused some of the fiercest public policy debates. Opponents of affirmative action have charged that these policies can only be achieved by "reverse discrimination" against white males. International women's rights NGOs have also advocated the adoption of quota percentages, timetables, and affirmative action training programs as tools to address the existing gender imbalance in the decision-making levels of United Nations and governmental bodies." Hom and Chunying, *Lexicon*, *supra* note 2, at 12-14.

16. The entry reads: "Empowerment refers to a process by which people reclaim power over their own lives and communities. It refers to both an individual and collective process. The term empowerment was first systematically used by the Black Power Movement in the United States. This movement emerged in the 1960's as a militant response to perceived failures of the Civil Rights Movement to make real improvements in the lives of black people. Militant black power leaders advocated the removal of power from the white-dominated power structure to improve the condition of black people, with some groups advocating the use of violence. These radical groups were crushed by the authorities, and many blacks turned to electoral politics as an empowerment strategy. The empowerment concept was adopted by other social movement groups in the 1960's, including the Asian American Movement, and the women's movement. In the national and international arenas, the specific strategies for individual and collective empowerment include consciousness-raising and education about the causes of inequality and oppression and grassroots organizing to address particular issues such as nuclear disarmament, violence against women, or environmental protection" Hom and Chunying, *Lexicon*, *supra* note 2, at 100.

17. *Id.* at 102.

18. *Id.* at 128-132.

19. *Id.* at 146.

20. Bruce Ziff and Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* 1 (1997).

21. See Sharon K. Hom, *Chinese Women Traversing Diaspora: Essays, Memoirs, and Poetry* (1999) for an edited collection of cross-discipline narratives that explore this diasporic terrain, and reimagine diaspora as beyond spatial location, claiming multiple loyalties to our communities of origin and choice.

22. In 1963, Mao had asserted, "one single [correct formulation, and the whole nation will flourish; one single [incorrect formulation, and the whole nation will decline." Michael Schoenhals, *Doing Things With Words in Chinese Politics* 2, 3 (1992). Under the Chinese Communist Party, control over political expression by the state is accomplished through a politicized criminal enforcement system, regulation of the mass media, attempted restrictions on use of technology, and direct control over language through tifa (formalized approved language formulations proscribing and prescribing appropriate terminology). For example, in 1965, the

formulation, class society (jieji shehui), was inappropriate for use in a socialist society, because socialist society was and must be distinguished from the class societies of the past. Therefore, only the formulation, you jieji de shehui (a society that contains classes) was correct. Schoenhals, *supra* at 2-7. However, the power and relationship of language to material and political order goes back to imperial China when official lists of taboo terms (bihui) were compiled and enforced. “In the *Analects*, Confucius argued that when names are not correct and what is said is therefore not reasonable—the affairs of the state will not culminate in success, and the common people will not know how to do what is right. Consequently, the Prince is never casual in his choice of words.” Schoenhals, *supra* at 2. In contrast to the legal struggles in the United States against English only laws for example, as China attempts to build a “rule of law,” law is not the means of control over language, but the possible tool by which political power can be controlled and made democratically accountable.

23. The production, distribution, performance, and content of Tongsu music were circumscribed by the ideological imperatives of the CCP. Tongsu music served two functions: propaganda and a complex and integral role in the debates in China about cultural “self-reflection” (wenhua fansi) and “roots seeking” (xungen). Andrew F. Jones, *Like a Knife: Ideology and Genre in Contemporary Chinese Popular Music* 4 (1992).

24. In 1978, five transnational music corporations controlled through ownership, licensing, and distribution, more than 70 percent on an international music market of more 10 billion dollars. By 1987, this market had grown to more than 17 billion dollars. See Reebee Garofalo, *Understanding Mega-Events: If We Are the World, Then How Do Change It?*, In *Technoculture* 253 (Constance Penley and Andrew Ross, eds (1991).

25. Jones, *supra* note 23, at 1.

26. The old city of Beijing was marked by temples where the imperial offerings and sacrifices were made, for example The Temple of the Sun (Ertan), The Temple of the Moon, (Yuetan), and The Temple of Heaven (Tian Tan). These Temples still stand: public spaces, tourist sites, and as I suggest in this poem, sites for potentially subversive new “offerings.”

27. *A Grain Of Sand: Music For The Struggle By Asians In America* (Paredon Records 1973).

7. Mary Romero,* *Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: "Where Can You Find Good Help These Days!"*, 53 MIAMI L. REV. 1045 (1999)

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I. INTRODUCTION

Before beginning my first college teaching post in 1980, I stayed at the home of a colleague who employed a live-in domestic worker. Until then, I had been unaware of the practice of hiring teenage, undocumented Mexican women as live-in household help, nor had I had access to the social or "private" space of an employer. I was struck by the ease in which this middle-class family violated the law, participated in the underground economy, and most of all, disregarded their employee's rights.

I was shocked at the way my colleague and his family treated their sixteen-year-old domestic, who I will call Juanita. Only recently hired, Juanita was still adjusting to her new environment; her shyness was reinforced by my colleague's constant flirting. I observed many encounters that served to remind Juanita of her subservient role. For example, one evening I walked into the kitchen as my colleague's young sons were pointing to dirty dishes on the table and in the sink and yelling at Juanita, "Wash! Clean!" Angry and humiliated, she glanced at me from her frozen position at the kitchen door. Aware of the risks of my reprimanding the boys, I chose to suggest instead that Juanita and I would wash and dry the dishes, while the boys cleared the table. When my host returned from his meeting and found us cleaning the last pan, his expression told me how shocked he was to find his houseguest and future colleague washing dishes with the maid. His obvious embarrassment confirmed my suspicion that I had violated the normative expectations of class-based behavior within the home.¹ After excusing my behavior as one of those Chicano radicals who identify with *los de abajo* (the downtrodden), he began to relate a litany of problems he experienced when hiring Mexican immigrant women. He recalled his efforts in assisting their illegal crossing from Ciudad Juarez to El Paso and in, introducing

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them to the modern conveniences used to clean his house in the Country Club area. He did not feel his generosity and goodwill had been repaid because their loyalty failed to extend beyond a few months. He assured me that their failure to return to work after a weekend off was due to their interest in finding a husband.

Not long after my encounter with Juanita, I began systematic research on private household workers. n2 While I made a conscious effort to study domestic service from the standpoint of the workers, I found myself reflecting on the conversation with my colleague—my first encounter with the “servant problem.” n3 The servant problem in the U.S. has always involved the shortage of workers who are willing to accept the substandard wages and working conditions frequently found in the positions they occupy. Like my colleague in El Paso, employers rarely accept their position as “employers,” but rather characterize the employment of undocumented women as a domestic or nanny as “help [1047 ing those poor Mexican wome” n4 In addition, the employer-employee relationship is further denied by employers’ claims that their maid is “just like one of the family.” n5 However, interviews with private house hold workers expose a wide range of emotional, physical, and economic exploitation experienced by women of color. Frequently these forms of exploitation occur under the guise that the employee is engaging in a labor of love as a family member, rather than engage in paid labor as an employee. n6 Disguising the employee-employer relationship provides the foundation for the “servant problem” and the search for the “faithful servant.”

At first, I was caught off guard when colleagues responded to my research as employers rather than as scholars, researchers, or feminists. n7 Even after I presented a detailed analysis of the personalism and asymmetrical nature of the employer-employee relationship and the relation ship between the underground economy of domestic labor, legislation protecting household workers, and the substandard working conditions facing women of color, there always was one colleague who continued [1048 to insist that her maid/nanny/cleaning woman/girl (or some version of this) was indeed “like one of the family.” In response to data showing the lack of mobility for domestic workers and the classical reference to domestic service as a “bridging occupation,” I always could expect at least one colleague to argue that the work experience in their home would result in social mobility for the domestic worker. This was particularly the case for employers who wanted recognition for arranging work hours that permitted their Guatemalan worker to attend classes to learn English or to drive. n8 Question-and-answer sessions turned into a defense of practices such as hiring undocumented workers for less pay than college students, not filing income taxes, paying social security, sixty hour work weeks for live-in employees, or gift-giving in lieu of raises and benefits. The recurring responses made me realize that my feminist colleagues had never considered their relationship with “cleaning women” on the same plane as those with secretaries, waitresses, or janitors; that is, they thought of the former in terms of the mistress-maid relationship. When I pointed out the contradiction,

many still had difficulty thinking of their homes —the haven from the cruel academic world— as someone’s workplace. While they were aware of their responsibility for paying income taxes and social security, they openly accepted the lawbreaking activity of not filing either on the basis that no one else does. Their overwhelming feelings of discomfort, guilt, and resentment, which sometimes came out as hostility, alerted me to the resistance these employers exhibit to any challenge to their “privilege” to hire household workers for such little money or benefits as the under ground market will allow.

As I reflect back on these colleagues/employers’ comments, I recall questions posed by anthropologist Leo Chavez in the introduction of his book, *SHADOWED LIVES, UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY*. Drawing from Benedict Anderson’s notion of “imagined communities,”ⁿ⁹ Chavez asked whether there lives an image of community in the minds of American citizens that includes undocumented immigrants as part of the larger society. Many of the workers employed in domestic [1049] service have been left outside the other communities, including “feminism,” “workers,” “working mothers,” and “family.”ⁿ¹⁰ The discourse on the “servant problem” discloses ways that communities are constructed to exclude workers on the basis of race, class, gender, and immigrant status. Furthermore, intersectionality excludes and marginalizes the majority of domestics in immigration and employment legal discourse.

This article discusses the exclusion and marginalization of women of color, namely immigrant women, from public debates surrounding household labor and childcare. Part II, offers an overview of the domestic labor debate that occurred in the 1960s and 1970s, highlighting the themes that shaped future feminist analysis on work and family. Ignoring the class difference among women, namely resources available for escaping the drudgery of household labor and aid for child care, reproductive labor was theorized as only unpaid work. Assumptions were made about the worth of monetary value in determining the status of reproductive labor rather than the intersection of gender, race, class, and citizenship. Part III, offers a brief historical account of employer dependence upon migration as the solution to the “servant problem.” Building on Kitty Calavita’s analysis of the relationship between the processes of lawmaking and lawbreaking, I will argue that domestic service is an occupation that borders on white-collar crime. I will also reveal how the “servant problem” represents the tension between these two processes. Part IV, is an overview of the controversy that arose over the hiring practices of Clinton’s nominations for Attorney General, known as “Nannygate.” The debates surrounding Nannygate highlight the consistency in the treatment of white collar crime and the relationship between lawmaking and lawbreaking. Part V, concludes with some thoughts about the intersectionality of women immigrant workers in fulfilling the needs for reproductive labor in the U.S.

II. THE DOMESTIC LABOR DEBATE

Concern over the role of women in reproductive labor in the home and nation immediately appeared at the forefront of the feminist agenda in the 1960s. Theorizing about women's experiences, particularly the structure of gender inequality, feminists began by challenging the separate spheres of the private and the public realms that ignored the complicated relationship between family and work. Both European and U.S. feminists writings in the 1960s and 1970s addressed the politics of housework, focusing on the position of women in the family as the central point for analyzing gender inequality.¹¹ Housework was identified as an important issue that affected women and that was crucial to understanding gender stratification. Analysis of the distribution of household labor and the value of the work performed by domestic laborers convinced many feminists that the oppression experienced by women was best symbolized in housework issues.¹² Housework determined not only women's lives in the home, but more importantly, also determined the social ideology and role expectations of women and reproduced the structure in a gendered work force.

Attention on the devaluation of women's unpaid labor in the home turned to discussions over wages for housework and the analysis of women as an economic class. These discussions were central components of what has come to be termed the "domestic-labor debate."¹³ Exploring the conversion of housework into wage labor was an attempt to unmask the relationship between women's labor and the economic system. Although the debate was engaged more fully in Italy and England, the demand of "wages for housework" influenced feminist thinking about housework in the United States. Concepts like "wageless house wives" or "unpaid household laborers" were developed to draw an analogy between women and racial minorities. Although popular¹⁴ comparisons between gender and racial oppression were intended to highlight the seriousness of sexist acts and comments in everyday interactions between men and women, the analogy also devalued the experiences of women of color who suffered from both racism and sexism and relegated them to complete invisibility.¹⁴ Analogies did not take into account the fusion of racial and sexual hierarchies. This point becomes particularly important in the discussion of women of color employed in domestic service.

Feminists who advocated in favor of wages for housework perceived wages as a solution to the low status and lack of regard for women's unpaid labor at home,¹⁵ which has all too often been treated as an expression of women's subservient nature.¹⁶ In an attempt to place value on reproductive labor, comparisons were made between the unpaid tasks women do in their homes with the wages workers receive when doing similar tasks in the labor market. Comparisons with workers in the labor force engaged in similar activities—cook, teacher, nurse, chauffeur, and the like—have been used to calculate the exchange value of housework.¹⁷ Computing the monetary value of housework was an

attempt to give marketplace value to homemaking activity. Economists based calculations on the accumulated market values of each household task. They concluded that housework was far from valueless but may actually be priceless. These studies impacted feminist theories about gender inequality by providing evidence (regardless of how incorrect the methods were) to support the assumption that domestic labor becomes valued when it is paid labor, and that as waged labor it also is treated as “real” work/employment. The exercise of computing the monetary value in the service sector completely erased the real experiences of women employed as private household workers. Domestic [1052] engage in a wide range of reproductive labor, which include child care, cooking, and the completion of household errands; yet, the “market value” calculated by economists and other social scientists did not reflect the wage earned by these women workers nor the lack of benefits and job security. Furthermore, the domestic labor debate positioned woman as housewives; that is as heterosexual females with children, unemployed, and married to a white middle class male. Data supporting “wages for housework” were collected using research methods that completely ignored conditions in the underground economy or in the lawbreaking activities of middle-and upper-class families.

Research based on actual employment experiences of domestic workers does not support the thesis that “wages” increase the monetary or social value placed on reproductive labor, or does it elevate the status of the woman receiving the wage.¹⁸ In the following sections, I will argue that the value and status of labor is tied to the social relations surrounding the work; that lawmaking is constructed to ignore the intersectionality of immigrant women of color who experience their race, class, gender, and citizenship differently than other workers, placing a low market value on their work and relegating them to the underground economy; and that the low risk involved in hiring undocumented women and not filing income tax or social security supports the lawbreaking activity of white collar crime committed by many employers in domestic service. An overview of the transition from servants to maids to house keepers and nannies points to a clear pattern of immigrant and women of color being employed in the most exploitative working conditions of the occupation

III. HISTORICAL OVERVIEW OF THE SERVANT PROBLEM

Public debates over the shortage and quality of private household workers has a long history as “the servant problem.”¹⁹ The first labor shortage occurred when men moved out of domestic service and into the factory. Operating within a seller’s market, those men who remained in domestic service were criticized for their air of “independence and [1053] insubordination”²⁰ As a result, employers immediately stratified workers in domestic service. They relegated immigrants and women of color to poorer working conditions, pay, benefits, and demeaning forms of social interaction The experience of native born white women in domestic

service was so distinct that Faye Dudden has argued that two different forms of nineteenth-century household service existed: help and domestics. n21 Young American born white women commonly were hired during busy times, especially harvest season, and during events that increased homemaking activity, such as illness or the birth of a child. n22 Dudden distinguished “help” on the basis that the “work was organized more around task than time,” n23 and “domestic” were employed to assist the homemaker who usually worked alongside her employee. The classification of domestic was reserved for immigrant, Black, Mexican, American Indian, and Asian men and women

The industrial expansion of the late nineteenth century increased employment options for women. Just as male servants turned to new occupations, women also left domestic service as soon as the job market expanded. With other options available, young women were unwilling to submit to the long hours, lack of privacy, drudgery, and lack of mobility that characterized domestic work. n24 On average, domestics worked two or more hours longer than other working women and many worked seven days a week. David Katzman estimated that “nearly all domestics in the nineteenth century worked at least ten hours a day, with a full working day averaging eleven to twelve hours.” n25 Live-in domestics found it especially difficult to place limits on the length of the work day. Industrialization brought on a shortage of household workers and began a general decline in domestic service in the United States. In 1870, fifty percent of women employed were servants and washerwomen

By 1900, domestic service only accounted for one-third of all [1054] employed women n26 The major feature of domestic service in the twentieth century has been a continuing labor shortage. Julie Matthaei noted that in 1900, there were 95.6 female servants per one thousand families; by 1960 the number had dropped to 33.3. n27 The structure of work itself underwent changes as the middle class joined in the ranks of those “keeping servants.” Unlike the aristocracy, the middle class could not afford to employ large staffs. Instead, middle-class homes were staffed with fewer servants or, more commonly, one “maid-of-all work.” n28 Increased work loads placed upon fewer servants living in smaller quarters intensified master-servant relations. Household servants differed from their predecessors because they “were hired to supplement or take over what were considered the wives’ responsibilities and during this period middle-class wives came to have primary responsibility for the hiring, deportment, and work assignments of servants.” n29 Domestics were reduced to unskilled labor, and they were subjected to constant supervision. They became increasingly replaceable because all they brought to the relationship was their ability to perform general work and not particular skills.

World War I and its aftermath brought a general prosperity, thereby improving working conditions and opening employment opportunities for women. The war also slowed immigration, thus reducing the pool of women available for domestic service. Between the turn of the century and 1920, the percentage of

employed women who worked as domestics had been cut in half to sixteen percent. Perhaps the Depression caused the figure to increase slightly to twenty percent over the next decade. ⁿ³⁰ As always, domestic work attracted women with few employment options. For those women, the shortage of household workers provided an opportunity to regain a measure of autonomy. A seller's market [1055 offered some leverage for changing the most oppressive aspects of the occupation. Furthermore, the rights gained by workers in the manufacturing and service economy established expectations that benefited domestic workers in their negotiations. The most significant change resulting from the burgeoning labor market was the reduction of work hours and the shift to day work. This shift was eased by increased urbanization which permitted domestics to travel daily to and from work.

The labor shortage created a less docile work force, which led homemakers to complain about the laborer's attitude or quality of work as the "problem." A good domestic worker was expected to be the faithful servant, sacrificing her own family and personal life for her employers. Homemakers lamented the passing of the days when they had more control over the domestics in their employ. Commenting on the ambiguous meaning of the "servant problem," George Stigler wrote, "Does it mean—as one often suspects—that a good servant cannot be hired at the wage rate one's parents paid? ... Or does it mean that the market mechanism does not work—that the offer of the going rate of wages does not secure a servant because servants do not move to the highest bidder?" ⁿ³¹

Two of the most commonly supported solutions to the "servant problem" have been immigration and training. ⁿ³² Middle-class women stepped up efforts to professionalize homemaking and industrialization created a shortage of household workers. Training and certification were offered as a solution to the "servant problem;" this approach was believed to upgrade housework to skilled labor, elevate the status of household workers, increase wages, and improve opportunities for social mobility. However, training did not change the occupation or assist in moving women into better paying jobs. As one 1940s report found, "domestic workers with special training for their jobs received no higher wages than those without it.... It may therefore be concluded that the wages of household workers are determined by forces largely beyond the control of the workers themselves." ⁿ³³ Schools established in response to unemployment during the Depression and later in the 1960s as part of the job training offered to the poor did not succeed in professionalizing domestic service. While immigration provided immediate relief to shortages of workers, employers complained about the quality of foreign workers unfamiliar with American culture. In addition, immigration did not provide a steady flow and reliable source of cheap labor.

[1056 Neither immigration nor training are solutions that address the reasons for workers opting to leave the occupation or avoid it at all costs. Immigration and upgrading worker skills does not improve pay, decrease hours,

address issues of loneliness and the lack of privacy on the job, reduce supervision, loosen tightened job descriptions, or eliminate the demeaning mistress-servant relationship. Because workers' concerns are disregarded or omitted during public debates over labor shortages, improving the working conditions has not surfaced as a component of the "servant problem."

The legal system has been extremely slow to respond to the needs of domestics by consistently excluding them from labor legislation. Domestics were not covered by federal minimum laws until 1974. The new coverage also included time and a half overtime pay after forty hours.ⁿ³⁴ However, not all household workers were included under the protection of the minimum wage and overtime provisions. Exceptions were made for under employed workers (less than eight hours a week and earning less than \$ 50 per calendar quarter), live-in maids, and home care workers.ⁿ³⁵ Five years later, the Department of Labor reported high rates of noncompliance and summarized the reasons as ignorance of the law, employee willingness to work for less, and workers' understating earnings and over reporting actual hours worked.ⁿ³⁶ Because the Department of Labor did not engage in an information campaign to inform employees of the law, the processes of lawmaking and lawbreaking were established as low risk white collar crime.

The next section presents the most recent public debate on the "servant problem," commonly referred to as "Nannygate". Placing the controversy within the historical context of the "servant problem" highlights the continued practices of structuring immigration law and labor law to benefit employers rather than employees. When President Clinton's first two women nominees for Attorney General were questioned about their childcare arrangements, their advocates argued from a feminist position that male nominees were not questioned regarding the issue. Outrage against the nominees' hiring of undocumented women became characterized as a class distinction of lawbreaking and the leniency of the government towards white collar crime. In addition, the inadequate child care services became blurred with issues surrounding class privilege of the upper-middle class hiring live-in undocumented women to resolve [1057 their child care needs. As in past debates over the servant problem, the discourse was dominated by employers who requested that solutions be sought through changes in immigration legislation and professional training. Again, proposed solutions offered little in the way of improving actual working conditions for women employed in domestic service.

IV. NANNYGATE: A CONTINUATION OF THE SERVANT PROBLEM

Nannygate involved two issues: 1) the hiring of an undocumented worker during a period when it was illegal for an employer to do so; and 2) the failure to pay taxes.ⁿ³⁷ However, as in the case of Kimba Wood and other potential nominees, "the Zoe Baird problem" became known as the hiring of undocumented household workers or not filing income taxes and social security on behalf of the

workers. The public debate that ensued not only revealed a great deal about social norms and values relating to gender and work, but it also brought to light the disregard for these same issues when race, ethnicity, and citizenship was submerged under the topic of immigration. Public opinion clustered around two sentiments, one emphasizing gender and the other emphasizing class. Gender politics were advocated by Baird supporters who cited a double standard. For instance, Kathleen Brown, the Treasurer of the State of California, remarked that, "For every man who has ever been confirmed to a Cabinet position, there has never been the notion of disclosure of his housekeeping arrangement, much less how much time he spent with his child." n38 Class politics characterized Nannygate as a "Yuppie" crime and resented attempts to sweep it under the rug. For instance, a forty-five-year old assistant manager at a pet store in Washington was quoted as the typical attitude of the average American: "She (Baird) thought she could do something illegal and get away with it.... I don't think it's fair. I raised my kids while I was working, I worked days. My husband worked nights at the post office. Our in-laws filled in when they had to. This makes me mad." n39 Gender politics constructed its response to the issue of white collar crime by arguing that [1058 the law was frequently violated and rarely enforced. n40 It was enforced in this case to discriminate against women, namely working mothers. Furthermore, they argued that Baird really did not do anything wrong because the law was out of step with the needs of the nation

Interests expressed in the Nannygate scandal mirrored previous publicity over "the servant problem." Proposed solutions focused on increasing the number of eligible workers. In an effort to attract American workers, an attempt to professionalize domestic service by upgrading training and advocating certification was introduced as a means to improve the status, pay, and working conditions to make child care and domestic service more attractive and competitive with other occupations. n41 Embedded in the professionalization solution was an attack on immigrant workers as the source of the poor working conditions and low wages in domestic service. For instance, one commentator claimed that "without the wide use of illegal immigrants, the salaries of domestic workers would have risen over recent years. Domestic work might have become increasingly professionalized, with special schools for it, as has been the case in Britain and elsewhere." n42 He concluded with the claim that "what has happened is that illegal immigrants, for whom substandard American wages are vastly higher than what they could earn in their own countries, have flooded the market, kept wage levels low and enabled employers to avoid the cost of employee benefits." n43 However this claim easily is rebutted simply by considering the experiences of women of color, particularly African-Americans, Latinas, Asians, and Native Americans. n44 As U.S. citizens, they experience the lowest salaries in their occupations and the worst working conditions. Rather than hold employers responsible for maintaining poor working conditions and pitting workers against each other, the blame was shifted to the [1059 workers. In

addition, training and certification as a solution to Nanny gate ignored the realities of the market—even the agencies that trained and certified nannies were involved in hiring undocumented women

The major avenue to increasing workers was through immigration. Several proposals emerged that outlined changes needed to shape immigration law around the needs of employers. Proposed changes included revisions of the unskilled worker visas, the H-2B non-immigrant visa, and the J-1 exchange visitor visa. Modifications were proposed for increasing the number of immigrants eligible for work visas, changing the temporary classification, and reducing the lengthy labor certification process.ⁿ⁴⁵ Although many of the proposals argued that immigration changes and training programs benefited nannies and domestics, worker concerns were not central to the discussion. In the debates, workers were identified only in terms of their citizenship and legal status. As Kevin Johnson and Stephanie Wildman have noted, legal terminology and language was frequently used to create nonpersons and invisibility.ⁿ⁴⁶

Public debates never included nannies and domestics class and gender identity politics. The press did not inquire about the type of employer Zoe Baird was. Lillian Cordero, the nanny, was deported immediately. Outrage over failure to pay social security existed because Zoe Baird broke the law, *not* because she violated workers' rights. The class and gender dynamics of Nannygate were carefully constructed to exclude the workers involved. This was done by exclusively defining class and gender as a white issue and limiting discussions of race and ethnicity to immigration.ⁿ⁴⁷ Nor did immigration proposals address workers' grievances; they were shaped with employers in mind.ⁿ⁴⁸ Advocates for Zoe Baird and Kimba Wood denounced the unequal treatment of working mothers in the confirmation hearings by pointing to the unrealistic employer sanctions, but few acknowledged that differential enforcement of immigration policy as political.ⁿ⁴⁹ Undocumented private [1060 household workers always have been used as pawns in employers' personal fights, whether they be feuding neighbors or rival politicians.ⁿ⁵⁰ Gender politics did not inquire into why women immigrant workers were targeted.ⁿ⁵¹ Nominees could easily have been asked about the hiring practices of gardeners.

The proposed remedies appear quite different if looked at from the perspective of the employee. If one examined the situation from the "bottom up," workers' issues would be addressed rather than seen as simply an immigration problem. A workers' perspective would not suggest training, certification, and more supervision. Rather, it would suggest higher wages for workersⁿ⁵² and enforcement of federal employment law. Employers will continue to hire undocumented workers as long as they remain cheap labor and the enforcement of sanctions remains lenient.ⁿ⁵³ Workers' complaints about conditions shed light on the attractive nature of hiring undocumented labor, particularly as live-in help.ⁿ⁵⁴ For instance, embedded in the proposals is the assumption that employers hire a live-in nanny or *au pair* only to provide child care. Mike Bailey, owner of

the Child Care Connection in Northridge, California, described the typical request: “‘I want a nanny who’s energetic, clean and neat, can cook and clean, speaks English, is available before I go to work and after I get back home’. That means arriving at 6 a.m. and staying till 10, and they’re expected to be on call the rest of the evening. ‘And oh, by the way, we want to pay her \$ 100 a week.’” n55 In another case, Nancy [1061 Cervantes, a volunteer employment-rights attorney working with CHIRLA (Coalition for Humane Immigration Rights of Los Angeles) described the working conditions of one client who was treated like chattel. “Concepcion” worked eighteen months in a household of five adults and three children. She was responsible for all their cooking, cleaning, washing, and child care. Her day began at 6:00 a.m. and ended well past midnight, six days a week, for \$ 100 a week. n56 Concepcion’s situation is more typical than unique and highlights important issues that make the work unappealing to workers with other options. n57

Workers’ complaints challenge the assumption that employers are actively seeking workers who are citizens. The nature of these complaints demonstrates that employers instead are seeking workers who are non-citizens and have an undocumented status. Behind Zoe Baird’s use of the Peruvian couple and the case of Concepcion lies the reason that day care centers are not as good a solution to upper-middle-class parents who can afford to hire “help.” Employers prefer workers who are available all the time, can accommodate the employer’s schedule, and are willing to undertake the wide variety of tasks connected to childcare and maintaining a household. Because day care centers are not open twenty-four-hours-a-day, they force parents to maintain regular hours. As in the case of Zoe Baird, Aetna offered employees a variety of options to assist in child care, including a day care center, but none of these options provided the privileges found in home child care. n58 As one immigration advocate has stated, employers are “turning to illegal exploitation because it’s too inconvenient to let wages go up. People think they are entitled to quality in-home care for dirt-ball wages... That’s got to stop.” n59 Changes in immigration legislation will not reduce the attractiveness of undocumented workers. Only when undocumented workers are first treated on the basis of their status as employees, rather than their [1062 immigration status, can the servant problem be addressed in a way that respects human rights before the rights of employers.

Much of the opposition to Zoe Baird was clearly a form of class conflict. It was an expression of working-class and lower-middle-class anger toward what was perceived as a “Yuppie”-class privilege. Rather than identifying with the larger issue impacting working mothers, child care was defined as an elite-class issue involving live-in nannies. The controversy completely ignored the realities of the working poor, working class and lower-middle class. Although child care options for these classes are limited by finances, they too face overtime and long commutes to and from work, making day care center options less than adequate. However, in the Zoe Baird dispute, child care was defined as an isolated issue that

affected wealthy lawyers and politicians: The universal issue of child care was ignored. Affordable child care remains a private and family problem rather than a public issue requiring a public solution. Upper-middle-class families can afford the personalized service to work around the limited child care options in this country. Opposition to Baird and Wood appeared to be class based. It looked like working and lower-middle-class workers resented the leniency towards “Yuppie” crime. However, class interests were defined on racial grounds, thereby excluding the violation of the rights of working-class immigrants and women of color who were denied social security and other benefits. Instead, the workers’ issues were treated as simply an issue of immigration status.

V. CONCLUSION

The role of employers continues to be a major component in upgrading the domestic service occupation because household labor negotiations frequently occur within the underground economy and involve few government regulations. Consequently, employers have enormous leeway in determining working conditions, setting wages, establishing job descriptions, and determining the work structure. Recent studies reveal that household workers report a wide variation in wages and working conditions. Employers decide whether to give raises, and they usually decide if social security or benefits are obtained. Domestic workers have little influence over their working conditions other than the choice to accept the job or quit. Given the power that employers exert over working conditions domestic workers feel dependent on and at the mercy of their employers more than other workers. For most domestic workers, the occupation continues to be regulated by community norms and values that determine informal labor arrangements made between a private [1063 household worker and her employer. n60 Pierrette Hondagneu-Sotelo argues that upgrading working conditions in the occupation weighs heavily on educating employers and state support. n61

Latina domestic workers propose an interesting case for several areas of critical race theory, particularly the intersection of race, class, gender, immigration, and citizenship status. As an occupation that always has been dominated by the most vulnerable worker in an area, one is not surprised to find that the image of the Black woman toiling in the kitchen, cleaning the house, and caring for her employer’s children has now been replaced largely by an image of Spanish speaking immigrant woman. Like the case of Juanita in El Paso, poor and working-class (and sometimes middle-class) Latina immigrant women find an open market for their services as maids and nannies in homes throughout the country. However, marked by their class, race, ethnicity, gender, and immigrant status, these women are employed in a segment of the occupation that has low wages, long hours, and additional work that includes both housework and childcare. Additionally, many face isolated live-in conditions in this facet of the underground economy. The intersection of statuses make Latina immigrant

women ideal candidates for fulfilling the needs of American families; not only are they less expensive than employees hired by agencies, but they are more easily exploited for additional work, and need not be provided any benefits. They also provide the social markers that distinguish the worker from other household members. Focusing on the intersection of statuses is crucial because many social scientists, politicians, and members of the general public have argued that the poor working conditions of the occupation can be attributed to the workers themselves. Throughout the history of domestic service in this country, this attitude has dominated and has resulted in attempts to professionalize the occupation rather than improve the working conditions for domestics. This history also includes systematic exclusion from employment legislation, as well as attempts to gain special provisions for bringing a specific class of immigrants to work as domestics and nannies. Concern about improving the working conditions of domestics and nannies has been abated by [1064 social scientists who have characterized the occupation as a vestigial from feudalism and predict its disappearance in modern society. However, signs to the contrary are visible throughout the United States: the riders of color on public transportation in affluent white neighborhoods, women of color (frequently in white uniforms) in parks caring for white children, and the portrayal of women in the media as domestics (usually in the form of walk-on scenes in film or in the case of the Salvadoran maid in the O.J. Simpson trial). Proposals to address the “servant problem” that focus on immigration law maintain exploitative working conditions. Unless proposals include both safeguards for both undocumented and documented immigrant workers and mobility to better positions in, as well as outside, domestic service, the “servant problem” will continue to reflect the worker’s struggle for a better life.

NOTES:

1. Advice given to masters at the rise of industrialization could certainly have applied to the live-in conditions I confronted in El Paso and in many contemporary situations:

To be on familiar terms with one’s servants shows the cloven foot of vulgarity Encourage your servants now and then by a kind word, and see that they have good and wholesome food, clean and comfortable quarters. Once in awhile give them a holiday, or an evening off, a cash remembrance at Christmas, and from time to time some part of your wardrobe or cast-off clothing. They are just like children, and must be treated with the rigor and mild discipline which a schoolmaster uses toward his pupils.

Russell Lynes, How America “Solved” The Servant Problem, *Harpers Magazine* at 50 (1963). For other examples of publications aimed at Latina domestics, see Gladys Hawkins, *Your Maid from Mexico*; Linda Wolf, *Tell-A-Maid*; Apron Pocket Press; *Home Maid Spanish*. Currently we do not find books on folkways, mores, norms, values and racial etiquette governing domestic service in the United States; however, occasionally, editorials and magazine articles offer do’s and don’t’s and other helpful hints to working women seeking household workers, including nannies. See Danielle Crittenden, *The Servant Problem, No Longer Just the Lament of the Rich, Now It’s Every working Mother’s Nightmare*, *The Women’s Q.* (1997).

2. See Mary Romero, *Maid in the U.S.A.* (1992). See also *Not Just Like One of the Family: Chicana Domestic Establishing Professional Relationships With Employers*, in *Feminist Issues* 10 (1990); *Chicanas Modernize Domestic Service*, 11 *Qualitative Soc.* (1988). "I'm Not Your Maid! I am the Housekeeper.": The Restructuring of Housework and Work Relationships in Domestic Service, in *Experiences of Gender: Color, Class and Country* (Gay Young & Bette Dickerson eds., 1994); *Chicanas and the Changing Work Experience in Domestic Service*, in *Maid in the Market: An International Perspective* (Sedef Arat-Koc & Wenona Giles eds., 1994).

3. See Linda Martin & Kerry Segrave, *The Servant Problem: Domestic Workers in North America* (1985).

4. The cult of domesticity offered middle-class women opportunities to practice "good works" without leaving their own homes by engaging in "home missionary work" with their servants. Helen Munson Williams' papers stated that one objective of the project was "to restore the right relationship between classes, and to bring them nearer to each other in the ways appointed by God and nature." Faye Dudden, *Serving Women: Household Service in Nineteenth-Century America* (1983). Application of the cult of domesticity in the lives of Chicana and Mexican immigrant women can be found in the programs developed under the WPA. See Sarah Deutsch, *No Separate Refuge Culture, Class and Gender on an Anglo-Hispanic Frontier in the American Southwest, 1880-1940*, 182 (1987).

5. One of the earliest critiques of the employer's claim was written by Alice Childress in her depiction of an African-American day worker named Mildred. The conversations were first published in Paul Robeson's newspaper *Freedom* under the title "Conversations from Life" and later in the *Baltimore Afro-American* as "Here's Mildred." A collection of her writings were later published in *Like One of the Family: Conversations from a Domestic's Life* (1986). For a brilliant analysis of Childress's character, Mildred, see Trudier Harris, *From Mammies to Militants* 111-34 (1982).

6. See Romero, *supra* note 2, at 123-133 (discussing emotional labor); see also Julia Wrigley, *Other People's Children* (1995); Judith Rollins, *Between Women: Domesticity and their Employers* (1985); Evelyn Nakano Glenn, *Issei, Nissei, War Bride: Three Generations of Japanese American Women in Domestic Service* (1986); Bonnie Thornton Dill, *Making Your Job Good Yourself*, in *Women and the Politics of Empowerment* (Anne Bookman & Sandra Morgen eds., 1988); Shelle Colen, "Just a Little Respect": West Indian Domestic Workers in New York City, in *Muchachas No More: Household Workers in Latin America and the Caribbean* (Elsa M. Chaney and Mary Garcia Castro, eds., 1989).

7. At the time, I thought employers emerged in the oddest places as journal reviewers for papers I submitted to women's studies and sociology journals and at professional conferences. Academicians reviewing my submissions wrote their comments from the perspective of an employer rather than engaging in the issues of gender, race, and class analysis of work and family. I observed similar responses to other scholars of color analyzing employee and employer relations. Researchers focusing solely on domestic associations or domestic service in the immigrant experience were less likely to be confronted by academicians speaking from the position of an employer.

8. English speaking abilities open up possibilities for domestics who can frequently negotiate higher pay than monolingual Spanish speakers or other non-English speakers. Driving, and having a driver's license also increase the wage scale for workers because they can do errands for their employer, along with the cleaning and child care. However, these skills by themselves do not necessarily assure the worker's mobility outside domestic service or the underground economy. But, both skills do expand the range of domestic tasks the worker can do for the employer's family.

9. "In the minds of each lives the image of their communio... It is imagined as a community, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is

always conceived as a deep, horizontal comradeship.” Benedict Anderson, *Imagined Communities* 15-16 (1983).

10. See Gerald P. Lopez, *The Work We Know So Little About*, 42 *Sta L. Rev.* 1, 1 (1989) (noting how the plight of immigrant women employed as domestics reflects the larger society).

11. See Juliet Mitchell, *Women’s Estate* 14 (1971). In her classic essay, Della Costa, summarized the position commonly held by feminists: “all women are housewives, and even those who work outside the home continue to be housewives [It is precisely what is particular to domestic work ... as quality of life and quality of relationships which it generates, that determines a woman’s place wherever she is and to which ever class she belongs.” Della Costa, *Women and the Subversion of Community*, in *Radical America* 6 (1972).

Similarly, Nona Glazer argued that domestic labor is “central to understanding women’s continued subordination in both advanced capitalist and socialist societies, and that women’s assignment to housework and child care (whether or not given women ever actually do the work involved) structures women’s lives outside the household.” Nona Glazer, *Everyone Needs Three Hands: Doing Unpaid and Paid Work*, in *Women and Household Labor* (Sarah Fenstermaker Berk ed., 1980).

12. As Ann Oakley professed, “a study of housework is consequently a study of women’s situatio” Ann Oakley, *Women’s Work* 9 (1974).

13. See Paul Smith, *Domestic Labour and Marx’s Theory of Value*, in *Feminism and Materialism: Women and Modes of Production* (Annette Kuhn and Ann Marie Wolpe eds.); John Harrison, *The Political Economy of Housework*, 4 *Bull. of the Conf. of Soc. Economists* 35-51 (1973); Wally Secomb, *The Housewife and Her Labour Under Capitalism*, 83 *New Left Rev.* 3-24 (1974); Lise Vogel, *The Earthly Family*, 7 *Radical Am.* (4-5) 19-50 (1973); Ira Gerstein, *Domestic Work and Capitalism*, 7 *Radical Am.* (4-5) 101-28 (1973); Jean Gardinar, *Women’s Domestic Labour*, 89 *New Left Rv.* 47-57 (1975); Jean Gardinar, et al, *Women’s Domestic Labour*, 4 *Bull. of the Conf. of Soc. Economists* (2) 1-11 (1975); S. Hiimmmmelweit & S. Mohun, *Domestic Labor and Capital*, 1 *Cambridge J. of Eco* 1, 15-31 (1977); M. Coulson, et al., *The Housewife and her Labour Under Capitalism: A Critique*, 89 *New Left Rev.* 559, 559-71 (1975); I. Gought and J. Harrison, *Unproductive Labour and Housework Again*, 3 *Bull. of the Conf. of Soc. Economists* (1) 1-7 (1975); Terry Fee, *Domestic Labor: An Analysis of Housework and Its Relation to the Production Process*, 8 *Rev. of Radical Pol. Eco* 1-17 (1976).

14. Feminist legal scholars writing Critical Race Theory have written extensively on the exclusions and marginalization of women of color. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. Chi. Legal. F.* 139; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Sta L. Rev.* 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Sta L. Rev.* 581 (1990); Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers’ Rights and Remedies Under Title VII*, 20 *Y.U. Rev. L. & Soc. Change* 607 (1993-94).

15. See Mariarosa Dalla Costa, *Women and the Subversion of Community*, 6 *Radical America* (1) 67-102 (1972).

16. See Silvia Federic, *Wages Against Housework*, in Ellen Malos, *The Politics of Housework* 221 (1980). “In a society in which money determines value, women are a group who work outside the money economy. Their work is not worth money, is therefore valueless, is therefore not work, can hardly be expected to be worth as much as men, who work for money.” Margaret Benson; *The Political Economy of Women’s Liberation*, in Malos, *supra*, at 121.

17. This economic perspective suggested a strategy for reducing the stigma of housework that transcended semantic changes, such as referring to housewives as domestic engineers.

18. Reported wages are below estimates suggested in studies generated by calculating market value in the service sector by specific tasks. Research findings indicate variation by region and

appear to reflect a number of influences in the market that increase or decrease the pool of undocumented workers employed in the underground economy. See Pierrette Hondagneu-Sotelo, *Regulating the Unregulated?: Domestic Workers' Social Networks*, 41 *Soc. Problems* 58-59 (1994). See also Romero, *supra* note 2, at 170.

19. See Martin & Segrave, *supra* note 3; see also George Stigler, *Domestic Servants in the United States: 1900-1940*, in *Occasional Paper No. 24*, at 36 (New York, National Bureau of Economic Research 66).

20. See Pamela Horn, *The Rise and Fall of the Victorian Servant* 7-9 (1975) (noting that the choice to leave domestic service was not always voluntary and pointing out that Lord North levied a tax against "keeping male servants" in 1777 in order to force more men into the factories).

21. See Dudden, *supra* note 4, at 44.

22. See Samuel McKee, *Labor in Colonial New York, 1664-1776* (1935). Glenna Matthews described housewives in colonial America homes as being "in charge of a team that kept the household supplied and functioning. Many housewives had help from a 'hired' girl even if they had no full-time servants, and they could count on regular assistance from their own family." Glenna Matthews, *Just a Housewife: The Rise and Fall of Domesticity in America* 3 (1987).

23. Dudden, *supra* note 4, at 39.

24. See David Katzman, *Seven Days a Week: Women and Domestic Service in Industrializing America* (1981).

25. *Id.* at 111.

26. See *id.* at 271.

27. See Julie Matthaei, *An Economic History of Women in America: Women's Work, the Sexual Division of Labor and the Development of Capitalism* 282 (1982). Regardless of the introduction of modern conveniences, the shift from live-in to day work, or the eight hour day, domestic service remains undesirable work and only women without other options enter the occupation. George Stigler commented on the degree of concern the shortage caused: "Indeed one can hardly escape one or both of two references from the perennial complaints about the servant problem: either domestic service is a disappearing occupation or rivals the weather as a major conversational subject." Stigler, *supra* note 19, at 1.

28. Maids-of-all-work translated into working alone on the job. Their isolation was worsened by being treated invisible. Domestic workers complained of loneliness even when they were surrounded by people in their employer's home.

29. See Rollins, *supra* note 6, at 35. See also Theresa McBride, *The Domestic Revolution: The Modernization of Household Service in England and France, 1820-1920* (1976) (analyzing the middle-class acquisition of household servants as a significant factor in establishing the housewife as "the mistress of servants ... because it represented a clear concession of sphere of power which was specifically female").

30. See Katzman, *supra* note 24, at 271.

31. Stigler, *supra* note 19, at 36.

32. See Martin & Segrave, *supra* note 3, at vii.

33. G. Fox, *Women Domestic Workers in Washington, D.C.*, 349 *Monthly Rev.* 54 (1942).

34. See Martin & Segrave, *supra* note 3, at 131.

35. See *id.* at 135.

36. See *id.* at 148. Martin and Segrave note that domestics, like most workers, are highly unlikely to choose to work for less pay. Rather, they are forced to accept lower wages. The third factor noted is that the Department of Labor basically accuses domestics of lying about their working conditions.

37. See Cecilia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 *Geo. Immig. L.J.* 343 (1994); Kathleen A. DeLaney, *A Response to "Nannygate": Untangling U.S. Immigration Law to Enable American Parents to Hire Foreign Child Care Providers*, 70 *Ind. L.J.* 306; M. Isabel Medina, *In Search of Quality Childcare: Closing*

the Immigration Gate to Childcare Workers, 8 *Geo. Immig. L.J.* 161 (1994); Suzanne Goldberg, In Pursuit of Workplace Rights: Household Workers and a Conflict of Laws, 3 *Yale J.L. & Feminism* 100 (1990).

38. Some Perceive a Double Standard for Male, Female Nominees, *Star Tribune*, Feb. 7, 1993.

39. See Felicity Barringer, What Many Say About Baird: What She Did Wasn't Right, *Y. Times*, Ja 22, 1993, at A10 (arguing that Baird only acted like a mother: "I think she probably put the priority of her child first. I can't condemn her for that").

40. See Clifford Krauss, Nominee Pays Fine for Hiring of Illegal Aliens, *Y. Times*, Ja 7, 1993, at 15.

41. See, e.g., Theresa Monsour, Minnesota, the Land of 10,000 Nannies, Where Women Sought for Work Ethic, *St. Paul Pioneer Press*, Feb. 1, 1993, at 1B, 4B (describing the students of Red Wing/Winona Technical College, highlighting wonderful working conditions, including traveling all over the country and the world and gym equipment in their apartment-sized private living area). See also Anna Quindlen, Justice is Blind: Kimba Wood and the Sins of Zoe Baird, *Y. Times*, Feb. 7, 1993 ("One reason the employment pool may include so many foreign workers is that in many other countries the care of children is an honorable profession. In America, it is treated like scut work.").

42. Lawrence E. Harrison, If Domestic Work Paid Well, *Y. Times*, Ja 31, 1993, at F11. Similar arguments are also made by other lawyers. See Jerome B. Ingber, Create a 'Nanny Visa' to Help Meet U.S. Child Care Needs, *St. Paul Pioneer*, Feb. 16, 1993.

43. Harrison, *supra* note 42, at F11.

44. See Rollins, *supra* note 6; Glenn, *supra* note 6; Romero, *supra* note 2; Hondagneu-Sotelo, *supra* note 18; Leslie Salzinger, A Maid by Any Other Name: The Transformation of "Dirty work" by Central American Immigrants, in *Ethnography Unbound: Power and Resistance in the Modern Metropolis* 139-60 (Michael Buraway et al., eds., 1991).

45. See DeLaney, *supra* note 37, at 306.

46. See Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of NonPersons, 28 *U. Miami Inter-Amer L. Rev.* 264 (1996); Stephanie M. Wildman, Privilege Revealed: How Invisible Preference Undermines America 9 (1996).

47. See Ontiveros, *supra* note 14, at 618.

48. Analysis of the IRCA application to conditions of undocumented workers employed in domestic service clearly demonstrates the lack of benefits these workers will receive and does not serve as an incentive for employers to increase wages or provide benefits. See Goldberg, *supra* note 37, at 79; Diana Vellos, Immigrant Latina Domestic Workers and Sexual Harassment, 5 *Am. U. J. Gender & Law* 407, 427 (1990); Nancy Ann Root & Sharyn A. Tejani, Undocumented: The Roles of Women in Immigration Law, 83 *Geo. L.J.* 605, 615 (1994).

49. However, unlike workers, the employer does not face deportation or suffer the crisis of unemployment.

50. See Kevin R. Johnson, Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement, 1993 *B.Y.U. L. Rev.* 1139, 1218-41 (discussing the use of immigrants in political debates).

51. Although all undocumented workers are vulnerable to discrimination because of their limited employment options, fear of deportation, limited English skills, and ignorance of legal rights, the burdens of discrimination fall hardest upon wome Immigrant women, many of whom are undocumented, often work in conditions that are far worse than, and for wages that are below, those offered to immigrant men or nonimmigrants.

Ontiveros, *supra* note 14, at 618.

52. See *id.*

53. See Peter Margulies, Stranger and Afraid, Undocumented Workers and Federal Employment Law, 38 *DePaul L. Rev.* 553, 554 (1989).

54. See U.S. Agencies Look Other Way on Domestic Help, *Wash. Post*, Feb. 14, 1993; Mary Poppins Speaks Out, *Newsweek*, Feb. 22, 1993, at 66-68. Five problems identified were: (1) employers' low regard for domestic labor and childcare; (2) employers' refusal to pay a decent wage and over time; (3) long hours; (4) hard work; and (5) no benefits. See David Rosenbaum, No Pensions, No Unemployment, No Compliance: Usually the Illegality in Domestic Work is Benefits Denied, *N.Y. Times*, Jan. 1, 1993.

55. See *The Parent Rap: It's Hard to Follow the Law and Easy to Get Good, Illegal Child Care*, *Newsweek*, Feb. 1, 1993, at 34-37. See also Carla Marinucci, *Domestics Tell of Virtual Slavery: 7-day Weeks and Demand for Sexual Favors by Bosses*, *S.F. Examiner*, Jan. 11, 1993, at A1; Carla Marinucci, *Immigrant Abuse: "Slavery—Pure and Simple"*, *S.F. Examiner*, Jan. 10, 1993, at A1.

56. See Mary Poppins Speaks Out, *Newsweek*, Feb. 1, 1993, at 66-68.

57. For further discussion on immigration law and the impact on undocumented women, see Root & Tejani, *supra* note 48. For specific impact of IRCA, see Grace Chang, *Undocumented Latinas: The New Employable Mothers in Mothering Ideology, Experience, and Agency*, 259-85 (Evelyn Nakano Glenn, Grace Chang, et al. eds, 1993) The case of household workers sponsored by an employer for an immigrant visa is a long process and one that lends itself to ample opportunities for exploitation. See Vellos, *supra* note 48; Medina, *supra* note 37.

58. "Some employees do not want to bundle up their children on cold winter mornings before sunrise for a long commute to a center. Others have work schedules that make it impossible for them to pick up their children when required by the centers. And then there is the simple fact that many higher-paid employees with demanding schedules will often choose in-home care, because it means they don't just get their children diapered, but their houses tidied as well." Cindy Skrzycki, *Baird's Firm Offered Better Child-Care Deal than Most*, *Star Tribune*, Feb. 7, 1993, at 29A.

59. *Id.*

60. For the definition of the informal sector, see Alejandro Portes, *The Informal Sector VII Review* 157 (1983), which applies to the current condition in domestic service. "It is work that is unstandardized, and unorganized, requires no formal training and from which employees may be fired for lack of cause. Its workers are not included in the protective legislation covering wages, illness, accidents or retirement. And its labor is far more 'elastic'; hired in good times and discharged during bad; hired for unspecified periods and fired without notice." *Id.*

61. See Pierrette Hondagneu-Sotelo, *Affluent Players in the Informal Economy: Employers of Paid Domestic Workers*, 17 *Int'l J. Soc. & Soc. Pol'y* 130.

62. For instance, one such denied was proposed with the Bracero Program in El Paso. See *El Paso Wives Appeal Ruling Barring Maids*, *El Paso Herald Post*, Nov. 18, 1953, at 13.

8. Roberto L. Corrada,* *Familiar Connections: A Personal Re/View of Latino/a Identity, Gender, and Class Issues in the Context of the Labor Dispute Between Sprint and La Conexión Familiar*, 53 MIAMI L. REV. 1065 (1999)

Sometimes the governing paradigms which have structured all of our lives are so powerful that we can think we are doing progressive work, dismantling the structures of racism and other oppressions, when in fact we are reinforcing the paradigms. These paradigms are so powerful that sometimes we find ourselves unable to talk at all, even or especially about those things closest to our hearts. When I am faced with such uncertainty and find myself unable to speak, anti-essentialism and intersectionality are to me like life preservers. They give me a chance to catch my breath as the waves come crashing over me and they help me sort through my own confusion about what work I should be doing and how I should be doing it.¹

Tina Romero struggled to relax her face so as not to draw attention to herself. Although she had been in the employment law class for only a short time, she already knew that any unusual reaction would attract the harsh and questioning gaze of the professor. She always arrived prepared, but, like most law students, Tina tended to avoid professor/student dialogue in the large classroom setting. The dialogues were so short and impersonal and often seemed to be orchestrated by the professor to elicit a narrow, technical, fill-in-the-blank response. She tried again to relax, look attentive, and hope for the best.

As the professor droned and her mind wandered, a sense of displacement crept over Tina. How strange for her to be in this classroom in Denver, Colorado. In distance it seemed just up the road from home, [1066 but was in fact quite far, both in time and culture, from her native Las Vegas, New Mexico. She had completed her undergraduate and post graduate education at the University of New Mexico, and she deeply missed her old community. Still, Tina knew that to grow she ultimately would have to leave New Mexico (if only for a brief while), because this opportunity to attend the University of Denver Law School would

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¹ Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16 (1995).

allow her to stretch her legs without wandering too far from her beloved state. It didn't hurt, of course, that she could continue her postgraduate degree in Labor Studies here by concentrating on labor and employment law.

She had noticed, even before deciding to attend Denver Law, that her labor law professor, Roberto Corrada, was Latino. His name had initially sounded familiar, but she gave up trying to place it. She remembered calling him once to inquire about labor law at DU, and had been pleased with the answers she received: both labor professors at DU had an interest in NAFTA, and the school offered opportunities for directed research and internships—possibly even a field placement in Mexico.

But for Tina, the big surprise at law school was not the labor curriculum; she was, after all, already familiar with many of those topics. The surprise was how little the Latino students there had in common. Tina had dropped out of the Hispanic Law Students' Association simply because of the dearth of Chicanas involved in the organization. And the Law School itself was largely populated with white students from the upper middle class and higher.

Tina had not expected this. She knew it would not be the University of New Mexico, but wasn't Colorado's Hispanic population around 20%? She realized early on she would simply have to stick it out and get her degree, then wait to see what would happen.

"Ms. Romero, how does the systemic discrimination case differ from the ordinary indirect evidence case set out in *McDonnell Douglas*?" asked Professor Corrada suddenly. Jarred violently back to reality, Tina realized she had let herself drift, and the professor had seen his opportunity. "The systemic case is premised on a statistical showing of discrimination," she blurted out.

There was a tense, momentary silence. Then the professor said, "That's exactly right." There was no indication of approval except for this flat, direct statement, and he returned to his lecture.

Tina returned to her thoughts. She had completed the first year of Law School satisfactorily though not without the standard anguish. She could not understand why the process of learning the law had to be so competitive and hostile, almost more like a war than an educational experience.

1067 During her second year, Tina dutifully signed up to take employment law with Professor Corrada. After about two weeks of class, she had suddenly recalled why the name seemed so familiar. She had encountered his name in some testimony about NAFTA that she had read in a postgraduate class. She vaguely recalled that Professor Corrada had testified as an expert in a NAFTA case stemming from the labor side accord between the United States and Mexico. While attending law school, Tina had discovered that the proceedings of that hearing (including the testimony) had been reproduced in a book entitled *THE EFFECTS OF SUDDEN PLANT CLOSINGS ON FREEDOM OF ASSOCIATION AND THE RIGHT TO ORGANIZE IN CANADA, MEXICO, AND THE UNITED STATES* (1997),

released by the Commission for Labor Cooperation. Two weeks before her employment law class began, she sat down and read the testimony again.

The NAFTA case concerned a dispute between Sprint Corporation and La Conexión Familiar (LCF), a small Hispanic telephone company that Sprint had acquired and converted into a subsidiary. LCF was a niche company designed to market long distance telephone service to Spanish speaking people. Accordingly, most of the company's workers were Latinas who were fluent in Spanish and English. The complaint (the first of its kind under NAFTA) was filed by a Mexican labor union alleging that the United States was not enforcing its own labor laws. The complaint followed determinations by both an administrative law judge and a federal district court judge that Sprint did not violate labor laws when it sold its LCF subsidiary and terminated its employees just before a union election among LCF's workers.

Tina was surprised at Professor Corrada's testimony. Apparently he had testified at a hearing in San Francisco held by the United States Department of Labor as an expert for Sprint, and had maintained that US labor laws had been properly enforced. Tina found it hard to understand how this professor could have testified for Sprint. She tried to think about why she felt this way. After all, she didn't really know the professor very well.

The reasons pored forth easily. Not only did this type of corporate testimony seem at odds with his character generally, Tina had noted several times his decidedly progressive stand on race and employment. On one occasion he had even indicated that he was co-counsel in an ACLU case, and Tina had learned that he was currently Chair of the Board of the ACLU of Colorado. In her conversation with him prior to attending law school, she found out that he was intimately involved with the Colorado Hispanic Bar Association, and had been chair of its public policy committee. In this role, he had become a staunch defender of affirmative action and bilingual education. Tina wondered how someone who was so devoted to the Latino community could testify for a large U.S. corporation against the better interests of Latina blue-collar workers.

Maybe, she thought, his background was elite, upper class Hispanic. And wasn't he Puerto Rican? Tina noted that Professor Corrada was fairly light-skinned. She entertained the thought that he was perhaps one of those paternalistic old-party Democrat Hispanics who thrived on the subordination of other Latinos because it served to lift them to positions of leadership within the community and allowed them to feel they truly knew what was best for the greater Latino population.

As the class wound to an end, Tina realized she could not stand to merely speculate about these issues. After all, if she was going to work closely with this professor on a directed research project she should learn about his perspective and his thoughts on Latino subordination in this country in advance. She would not compromise herself for academic opportunity.

As Tina watched the last of the students file out of the classroom, she resolved to ask the professor about his testimony in the LCF matter; after all it was a matter of public record. He was almost to the door when she gained his attention: "Professor Corrada, may I ask you a question that's not really related to the class?"

"Sure, go ahead," he said.

"Well, I don't know if you recall my background, but I have a Master's Degree in Labor Studies with an emphasis on NAFTA."

"Sure I remember," he said, nodding assuredly. "We get so few students with an actual academic grounding in labor policy. Say, this isn't about a possible directed research project is it?"

"Not exactly," Tina replied. "In my studies I came across some testimony you apparently gave on behalf of Sprint Corporation in a labor dispute involving La Conexion Familiar."

Professor Corrada suddenly looked annoyed. "Yes ...what about it?"

"Well," Tina continued, trying to keep a nervous flutter from her voice. "I wanted to know whether it was really you who had testified."

"Well," he said, "Roberto Corrada is not a very common name. In fact, my father says all Corradas in the world are related. Yes, it was me." He paused for a moment and set his books on a desk. The scowl disappeared from his face. "Do you find that surprising?"

"I do find it somewhat surprising given that everything I know about you suggests that it should have been more likely that you would have," she got courageous, "that you *should* have testified on the other [1069 side, and not for Sprint." She folded her arms in an act of unintended defiance.

Corrada put his hand on his chin and stared at her. Tina couldn't tell if his look was approving or disdainful.

"It's true," he said. "My general predilections are in favor of workers and certainly the Latino community, but it's not as easy as that."

"What do you mean?" Tina asked.

"It's kind of a complicated story," he replied, the scowl returning to his face. "But look, I'm not doing anything for the next hour and a half, and I'm famished. This class really takes it out of me. If you have a minute to get a bite at the cafeteria, I'll explain what I mea"

Tina's classes were completed for the day, and although she had wanted to get a head start on tomorrow's tax reading, she simply had to hear the professor's story. "I guess I could use some coffee," she said.

As they walked to the cafeteria, Tina wondered how much of Corrada's explanation would be self-justificatio She simply wanted to know the truth about the situatio Maybe he was not proud of what he'd done. If that were the case, she was probably about to hear a series of half-baked rationalizations. She had seen this before in some Hispanics in Colorado and New Mexico who seemed unable to reconcile their upper-class Mexican roots with their strong feelings for their

subordinated brothers and sisters in this country. How many times had she witnessed these Hispanics (who were usually lighter-skinned) run for statewide office, begin their campaign with a heavy message of economic justice for Latino blue collar workers, only to have the message become diluted and then fade altogether when they became politically successful. This success meant more money from outside sources and outside consultants who advised that strong stances, in this day of the moderate voter, were political suicide. "After all," the consultants would say, "the people in your community will vote for you no matter what."

Tina bristled at the thought, but chastised herself for her own strongly held stereotype. She shouldn't fall into the majority trap of making such generalizations on the basis of the color of one's skin. There were plenty of light-skinned Latinos in both Colorado and New Mexico who were among the strongest supporters of the community. Nonetheless, she feared that she might have struck a chord that Professor Corrada may have preferred not to hear.

As they waited in line, Professor Corrada began to talk. "Did you know I'm Puerto Rican?" he asked.

"Yes, I had heard that you are," Tina replied.

"I think a lot of Chicano students come here and see there's a professor named Roberto Corrada, but when they meet me they don't know what to make of me. I think they think I'm from Spain or South America," Corrada said.

"You could be of Mexican descent or from Latin America," Tina replied. "I think most of us know not to decide simply on the basis of color," she indicated somewhat hesitantly.

"Some people have even said to me, you don't look Puerto Rican, but I *am* Puerto Rican, proudly, and my family goes back for generations on the island."

"*No lo crees*," joked Guillermo the grill chef, as if on cue. Guillermo was from Mexico, and he obviously enjoyed teasing Professor Corrada about almost anything, at any opportunity. Today he was in a particularly jovial mood, but it was clear that he didn't know what Corrada was talking about.

"*Quiero queso americano hoy, no el provolone!*" yelled Corrada over the sizzle of the patties on the grill. He then glanced back at Tina and said "What was I talking about?"

"Proudly Puerto Rican," Tina remarked.

"Oh yes. Right. But clearly of Spanish descent. That was always important in my family. Everyone in my father's and mother's families were intimately familiar with Spain and its culture. My father could trace his roots to the town of Infiesto in Northern Spain, and, in fact, I've been told that if you go to that town and say that you're a Corrada the townspeople will welcome you back as if you're long lost family. My mother is less clear about her roots, but apparently her mother's family comes from around Barcelona."

"I don't mean to interrupt, Professor," Tina said delicately, "but what does all this have to do with your testimony at the NAFTA hearing?"

Professor Corrada looked seriously at Tina and said, “Everything. I learned very early that my family was considered to be, at least some what, among the island’s elite. My great grandfather, José del Rio, had a hand in founding the Statehood Party, one of the island’s big political parties. My uncle Baltasar served as Resident Commissioner of Puerto Rico-the nonvoting representative to the U.S. Congress-in the 1970s. My uncle Alvaro is a bishop on the island, and seemingly always in the news trying to quell some controversy or another for the Catholic Church.”

Great, Tina thought, he’s a light-skinned Hispanic whose family is among Puerto Rico’s elite and so it was easy to testify in behalf of a major U.S. corporatio Could it be as easy as that?

“So,” Tina interrupted softly, “your family’s elite status has some thing to do with your connection to Sprint?”

[1071 “No, of course not. Again, it’s not that easy,” replied a somewhat frustrated Corrada. “First of all, I didn’t say they were among the elite, I said somewhat in the elite. Believe me there are some very wealthy, incredibly influential old-time Spanish families on the island. I wouldn’t say we’re quite in that league, although we certainly seem to have had some influence. But my family history is not as simple as all that, which makes things all the more confusing.” Tina resolved not to interrupt Corrada again during his recital of family history. Corrada continued, “My family’s history contains some harrowing stories of difficulty and hard ship as well. Both of my grandfathers worked very hard for what they got. My father’s father was a farmer, growing sugar cane and tobacco, among other things. My father never really had very much growing up because he had *thirteen* brothers and sisters. Fortunately, the one thing valued in his family above virtually everything else, except perhaps religion, was educatio”

“My mother’s father grew up poor. His childhood playmates were poor sons and daughters of Chinese immigrants. He struggled and saved and ultimately built a successful business.”

Corrada suddenly stopped. “I’m sorry Tina, I didn’t mean to be short with you a second ago, but you’ve hit on matters that are very close to my heart. Family stories are difficult to verify. I’m sure what I’ve just said is not completely accurate, but it’s what I have in my head,” he continued, gazing through the cafeteria window. “I have always been conflicted in some way about my class and racial roots in Puerto Rico. For example, despite stories of hardship, all of my father’s and mother’s siblings went to college. And while everyone knows that the Spanish came to Puerto Rico and over the years intermarried with African and indigenous peoples or Tainos who were subordinated first by the Spanish and then by the Americans, does this description of inter marriage leading to racial assimilation encompass my family?” Corrada shrugged. “I’m not so sure. It’s true that my great grandfather, Cándido, was a captain of the Spanish militia in Morovis during the Spanish-American war. His brother, Rodrigo, I am told, fought against Teddy Roosevelt in Cuba. But there seems to have been a lot of

intermarriage within the family itself. My parents are second cousins; they share a maternal great grandmother. My father's parents are first cousins; they received a special dispensation from the Pope in order to marry. As far as skin color is concerned, I'm fairly light-skinned, and some of that seems to have been engineered, more or less. I'm Puerto Rican and have always identified that way, but I have always felt myself to exist on some kind of race border."

Tina was slightly taken aback by the professor's frankness about [1072 his background. "I really had no idea, Professor," she said thoughtfully. "But I suspect strongly that a lot of that goes on in Mexico where my *antepasados* are from. All you have to do is look around. If social conventions did not discourage racial intermarriage, I suppose everyone would look more or less the same by now. I also think it's no coincidence that the whites are in the elite class governing Mexico, while the darker-skinned Mexicans are, by and large, in the worker class."

"Yes, that's always seemed obvious to me as well," Corrada replied. "For example, all of the Governors of Puerto Rico have been light-skinned Spanish men. But as I'm discovering as I get older, it's really not as simple as all that. I vividly remember conversations with my father about my heritage and how intermixed we Puerto Ricans are culturally," Corrada said. "On several occasions my father told me not to forget that we are an African culture. Our poetry, music, and dance are mixtures of Spanish and African, heavily favoring African rhythms. Everyone in Puerto Rico dances; they all know the same dances and songs, and that knowledge does not appear to vary according to class like it does in the United States." Corrada hesitated and looked at Tina as if he were conveying information that it would be almost impossible for her to understand.

"What I mean," he said to Tina, "is that race and class relations in Puerto Rico are in some ways the same, but also in some ways very different from the way they're viewed here in the United States." He thought for a moment then continued, "I'll give you another example. Growing up, my idol, and I really had only one, was Roberto Clemente. One of the greatest baseball players to ever play the game, Clemente was a legendary hitter who could hit for both average and power. But as good a hitter as he was, it paled in comparison to his ability to play the field. He could catch the ball from virtually anywhere in right field and had a cannon for an arm—both powerful and accurate. And Clemente was black, but honestly I didn't know that. It's not that I was not cognizant of his being black and my being white, but we were both Puerto Ricans. Puerto Ricans had been excluded from major league baseball and were relegated to the Black Leagues. One of the greatest baseball players ever—possibly better than Clemente—was a Puerto Rican named Pancho Coimbre. The exclusion of Coimbre from the Major Leagues is an injustice that every Puerto Rican feels regardless of color. In that sense both white and black Puerto Ricans are and have been raced and erased," Corrada exclaimed.

“Of course, I have not lived my life exclusively in Puerto Rico. My father was in the Air Force, and so we’ve lived all over, but only occasionally in Puerto Rico,” Corrada said. “That served to accentuate my [1073 internal conflict regarding class and race. On top of the conflict related to my race and class roots in Puerto Rico, there is a more supreme conflict involving whether I’m more American than Puerto Rica”

“You know you might be both,” Tina said, a hint of compromise in her voice. “Aren’t all Puerto Ricans citizens of the United States? Why should you be any more conflicted than me, for example? I’m both Chicana and America”

“Exactly,” agreed Corrada. “You have a *double consciousness* because of your identification as an American and as a Chicana—two different communities and two different perspectives. But you live more or less comfortably in both communities. For example, you know American norms and customs because you grew up here. Also, you’re comfortable in the American Chicano community because you all share a common bond of both race and place identity within that community. What I’m talking about is different. What if your entire family was in Mexico, meaning all of your family stories were about Mexico? But then, say, your immediate family moved to Boston, then Chicago, and then Dallas, but you still spent about roughly one third of your life in Mexico. This kind of existence, trust me, leads to a truly bordered identity construct accompanied by a hypersensitivity to similarities and differences between cultures,” Corrada concluded.

“What my straddling of Puerto Rican and American homelands has done for me is make me feel ill at ease in both places —uncomfortable both in the United States or in Puerto Rico,” he said as a deep frown spread across his face. “Of course, the constant kidding I took from two of my “*Independentista*” aunts—Panchy and Ita— didn’t help. They sometimes affectionately called me “*pitiyanqui*,” a term of derision for Puerto Ricans who buy into imperialist American ideas, because of the various U.S. influences in my life.”

As Corrada paused briefly, Tina took another sip of her now lukewarm cup of coffee. I wonder what all of this has to do with Sprint and La Conexion Familiar. Is it that the professor had no appreciation for the race and class aspects of that dispute? That would be hard to believe regardless of all the deep culture and identity clashes in his own back ground. Still, maybe that’s what he’s getting at, she thought.

Tina’s momentary attention lapse must have been detected by the professor because he then said, “I realize our time is getting short, so let me skip ahead a little to show you how this identity conflict has played out in my professional life. I entered law school in the early 1980s thinking that I would like to become a labor lawyer. I was on the debate team in college, and had twice debated topics having to do with labor unions or unemployment. I found the field of labor relations interesting. [1074 My sympathies were generally progressive and so I thought that I might work for a labor union But, of course, I had no family

history of union activity. None of my relatives had, to my knowledge, been in a union. In addition, I myself had very little, actually no, experience with labor unions. In college, I had floated from one minimum wage job to another and was never presented with an option to join a union," Corrada recounted as he stared forlornly at his long-cold cheeseburger.

At least the professor was on the East Coast, Tina thought. If it hadn't been for a close uncle of mine who left New Mexico for a job in Los Angeles, where he ultimately became a shop steward, I, too, would not have ever thought about the field of labor relations. "But surely there were professors at your law school who knew about unions," Tina asked.

"Oh, yes, in fact the professor who taught labor at my law school had substantial ties to unions. I applied to be his research assistant toward the end of my first year," Corrada replied.

"Well, what happened?" Tina asked.

"He hired a student with a working class, labor union background who had grown up in Boston. As I asked fellow students about their summer jobs, I discovered that most of those with paid clerking positions or with summer internships with labor unions were from families with long ties to the various unions headquartered in Washington, D.C. It was easy for me to stereotype labor unions as places where white kids from working class families with union ties went for jobs. In fact, I cannot recall ever seeing a person of color in a position of authority in a labor union the entire time I was in law school."

"Wait a minute," Tina interrupted, "surely you're not going to suggest that a management labor job was easier for you to find than a labor union job."

"In a way it *was* easier to find a management job," Corrada replied conspiratorially, "because it *looked* easier. Think about it. The big firms come to campus every fall to interview. You don't have to know anyone or ask anyone for an interview. You simply dump your resume in a pile, and, if selected, you interview with firm representatives on campus. It's the same process that occurs here at DU, but I was applying for labor jobs in the mid-1980s, the golden era of law firm hiring. I had done well enough (earning high grades and membership on the law review) after my first year to secure a number of interviews. I'm sure I also benefited from some affirmative action. Although my resume did not indicate that I was Puerto Rican, my name and fluency in Spanish was probably enough to get me the benefit of the doubt."

"I remember that the interviewer from one of the large firms at [1075] which I interviewed was a light-skinned Hispanic woman. A partner in the firm, she actually knew more about Puerto Rican politics than I did. It turned out her husband was a lawyer at another large firm and he apparently did a lot of work for the government of Puerto Rico," Corrada recounted.

"So you thought that large corporate law firms had more Latinos in them than did labor unions," Tina remarked. Surely Corrada could not have been that naïve!, she thought.

“No,” replied Corrada, “but people are swayed by their actual experiences, and I couldn’t help but be impressed by a large firm with a Latina partner. Our talk about Puerto Rico was an unexpected surprise and made me feel very comfortable in the interview. When the firm offered me a job as a summer associate, I quickly accepted it. I eventually accepted a permanent offer from the firm.” The seduction of the large corporate law firm, Tina thought. She had heard about it, but had managed to circumvent it herself by eschewing the on-campus interview process.

“I thrived as a management labor lawyer. I especially enjoyed the advice side of the practice,” Corrada continued. “There were the difficult times as well, but for the most part it was a good experience. I felt that the firm partners with whom I worked cared about me as a person and about my development as an attorney. Even though I was a member of the Hispanic National Bar Association, I basically forgot that I was Hispanic at all,” Corrada recalled. Tina nodded, so Corrada went on: “So I wasn’t particularly suspicious when I was asked to be an expert witness for Sprint Corporation in December 1995. I remember asking what being an expert witness would entail? I was told that it was relatively straightforward because the issue in the hearing was whether U.S. labor laws had been enforced. I found out that the hearing was being held by the U.S. National Administrative Office because a Mexican labor union had filed a complaint pursuant to the NAFTA labor side accord.”

Tina looked at Corrada eagerly—this was finally what she had been hoping to hear about.

“I said I would review all available material in the matter to determine whether I would be comfortable serving as an expert witness at the hearing. A few days later I reviewed some briefs filed by both sides in the case as well as copies of an injunction decision by a California federal district court judge and a decision on the merits by an administrative law judge (ALJ). According to all of the documents, Sprint purchased an entity called La Conexión Familiar, (LCF) in 1992. LCF was a tele [1076 communications reseller that had been based in San Rafael, California,” Corrada said.

“I thought LCF was based in San Francisco,” Tina said.

“No. Sprint moved LCF to San Francisco,” Corrada answered. “According to the ALJ decision, Sprint wanted to expand LCF and wanted to be closer to a large labor market of Spanish speakers who could be trained as telemarketers. The decision also noted that at about this time, Sprint discovered that fifty employees, a large majority of the workforce, were undocumented immigrants. Sprint instituted a rescission lawsuit to stop the sale of the business. They eventually completed the purchase, but paid substantially less money. In addition, because of the lawsuit, which was a dispute with the former owners of LCF who had been retained by Sprint, Sprint cancelled the employment agreements it had with the former owners and replaced them with Sprint managers.”

“So, what happened to the undocumented workers after all that?” Tina asked.

“I don’t know,” said Corrada, “the documents didn’t discuss the issue any further.”

“You know, a cynic might suggest that Sprint used the issue of the undocumented workers to get a better deal and to create an opening for them to dismiss the former owners in favor of their own internal managers,” Tina stated wryly.

Corrada winced slightly. “I suppose someone could possibly infer that from the facts, but it did not seem to be a contended issue, and there was no direct evidence.”

“What were you thinking when you read this?” Tina asked, shifting the conversation away from uncomfortable ground.

“Well, like you, I was concerned about this first part. I knew from a colleague of mine, Cecelia Espenosa, that the prohibitions on the hiring of undocumented workers were often manipulated by companies to the detriment of these workers, but I continued reading anyway,” said Corrada. “The ALJ’s opinion recounted some basic facts. Essentially, LCF was a “niche” telemarketing business which targeted the Latino community and attempted to sell long distance service to recent immigrants who spoke only or primarily Spanish and who frequently made long distance calls to family or friends in Mexico. LCF was advertised and marketed as a business “by Latinos for Latinos,” and was designed to appeal to customers who felt more comfortable communicating by telephone in their native language. Thus, its telemarketing and customer service representatives spoke entirely Spanish. The customers’ bills were also in Spanish. Based on the influx and the expected continuation [1077] of a pronounced increase in the migration of Spanish speaking immigrants into the United States, Sprint management predicted growth in LCF’s operations.”

Corrada seemed almost in a trance reciting background facts about the dispute. “In early 1994, LCF started to perform below projected levels financially and Sprint became concerned about the profitability of the enterprise, but at about the same time the Communications Workers of America started to receive complaints about LCF including allegations of unfair treatment and failure to pay promised sales commissions. The union began an organizing campaign and there were instances of interrogation and threats of plant closure.”

Tina shook her head. “Didn’t this bother you, Professor? You’re so adamant in your labor law classes about interrogating employees and threatening plant closure.”

“Yes, that’s right, although you well know there are exceptions to those rules. There are times when you can poll employees anonymously and even times when you can predict plant closure, but I was concerned about whether those exceptions were applicable in this case. However, the ALJ did conclude, based on this evidence, that Section 8(a)(1) of the NLRA, preventing employer interference

with union organizing, had been violated, and therefore, issued a cease and desist order. This seemed proper if the activity was widespread and encouraged by management. Remember, my task as an expert was to testify whether U.S. labor laws were enforced. I remember thinking to myself, so far so good.”

“But wait a minute, Professor,” Tina said, “I thought the ALJ had ruled in favor of Sprint.”

“That’s right, he did,” Corrada replied, leaning over the table, “but on the bigger issue involving whether Sprint had violated Section 8(a)(3) of the Act which prohibits discrimination in terms and conditions of employment based upon union activity. This is the section of the law that prevents an employer from discharging employees because of their involvement with a union. In certain circumstances, this part of the law prevents employers from making business decisions based on union organizing activities. Since Sprint closed LCF in July of 1994, this part of the Act was much more important to the union,” emphasized Corrada.

“Wouldn’t the evidence of threats of plant closure be enough to support a finding of a violation?” Tina asked.

“Not necessarily,” replied Corrada, “despite such evidence, the ALJ must determine whether the employer would have done the same thing even absent union activity. In this case, a substantial amount of evidence existed showing that LCF was losing an enormous amount of [1078] money. For example, instead of turning a projected profit of some \$ 12 million, LCF lost several million by early March 1994 and was projected to lose several million more by year’s end,” Corrada emphasized.

“But isn’t it true that Sprint has no unions and that it’s been relatively aggressive in trying to maintain a nonunion work force,” Tina pressed.

“I had heard that, Tina, but had seen no evidence in NLRB or court decisions,” answered Corrada, “and in any case taking a stance against unionization is not unlawful.”

“Yes, but if Sprint didn’t like unions wouldn’t that diminish their incentive to prop up a failing division? Couldn’t the discrimination have been that Sprint didn’t approach LCF the same way it would have approached a losing division with potential that wasn’t the target of a union organizing drive?” Tina queried.

“That’s a really good point and it certainly would have been relevant in this case,” said Corrada, warming to Tina’s enthusiasm, “but while the union alleged this, neither the union or the NLRB presented much evidence of it. Admittedly, though, that type of intent is almost absurdly hard to prove. In addition, Sprint submitted a lot of evidence regarding exploration of alternatives that would have helped LCF, including a sale to another company and possible relocation”

“Surely some of the evidence caused you concern on the merits,” Tina insisted.

“Yes,” replied Corrada, “I became concerned when I found out that a Sprint labor relations manager had postdated a letter to make it look like a particularly critical economic decision had occurred sooner than it actually did. In addition, when LCF was closed, part of its customer database was transferred to Dallas, Texas where additional Spanish speaking telemarketers were hired to handle the influx. But you should remember what I had been asked to testify about, whether U.S. labor laws had been enforced.”

“I understand,” Tina said, “but isn’t that all wrapped up with the decision on the merits of the dispute?”

“Yes, of course,” replied Corrada, “but I was very focused at the time. I had not been asked how I would decide the dispute; rather, my role was to be a judge more or less, one who would give no real deference to the ALJ or the federal district court judge who had actually decided aspects of the dispute on the merits. So, for example, could I say that a reasonable decisionmaker would reach the same result that the ALJ and the district court judge did in this matter? But my charge was also broader. I wasn’t asked simply to review what the judges had ruled in the matter, but I was asked to discuss whether U.S. labor laws had [1079 been enforced. That meant I would have to review the National Labor Relations Board’s approach to the case. I had to ascertain whether they had prosecuted the case in their usual manner or if they were dogging it, merely going through the motions.”

“So what was your view, then, of the NLRB in this case?,” Tina asked.

“Well the General Counsel of the NLRB was Fred Feinstein. In prior administrations and with prior General Counsel (GCs), I certainly would have had grave concerns about enforcement. Indeed, under some GCs an enforcement action in this case may have never even been brought. However, under Feinstein, the NLRB prosecuted this case heavily, including seeking a 10(j) injunction in federal district court, which is an extraordinary move in any NLRB case.”

“So, based on all of this, you agreed to testify as an expert?” Tina asked. Tina tried to mask her disappointment. She thought staring out the window might help, but she found herself saying, “I guess I’m a little disappointed.”

“Really, why’s that?” Corrada asked.

“The way you just talked about the case is what I might expect from a conservative white male law professor,” Tina replied, “someone who didn’t or couldn’t understand the race, gender, and class implications of the LCF case. But I would expect more from you. Why didn’t you pass this up? Was it the money? Surely they paid you plenty,” Tina said accusingly.

“They paid me what I asked—a lump sum reflecting an expert witness fee of \$ 200 an hour,” Corrada said matter-of-factly. “Certainly the money was good, but could I have passed it up if I had problems agreeing to serve as an expert? I like to think so. It’s certainly true that I would not have been an expert witness without the pay, but in my mind, while the money was necessary, it was not the only factor in my agreeing to testify,” Corrada stated.

“You hit on the harder question, Tina. The fact that this dispute impacted Latino workers had not completely escaped me. I had some inkling that I was called to be an expert at least in part because I was Latino,” Corrada continued. “I certainly did not want to play into *that* too much. In fact, I remember resenting it when I was invited to inter view at some law schools who apparently only wanted me on their list so that they could say they had interviewed a Hispanic candidate,” Corrada said firmly.

Surely the professor knew he was being used, thought Tina. She tried hard to temper the question that followed. “Do you think you would’ve been called if the dispute involved no Latinos?,” Tina asked.

[1080 “I might have bee Remember, I had been a management labor attorney, and there aren’t very many with that background in academia,” Corrada remarked. “But I concede your point. It’s probably true that I would not have been called to testify in a non-Latino matter. That’s why I thought I was reviewing the facts carefully before agreeing to testify. As I read the relevant documents I discovered that there were Latinos on both sides of the dispute. The President of the LCF subsidiary, for example, was Maurice Rosas. Many of the managers involved in the dispute, including those who made threats of plant closure during the organizing campaign, were Latino and Latina. And, of course, the workforce was largely Latina. So I felt at least on a superficial level that the dispute was not about race in that it did not involve whites against Latinos. Rather, I viewed the dispute almost as being one among Latinos,” Corrada concluded.

Tina’s face clouded over. How could she even begin to respond to such an absurd conclusion, she thought. The professor stumbled quickly o “I know what you’re thinking, Tina,” he said, “but let me finish. I’m only telling you about my thoughts at the time of the dispute. My thinking has evolved, to say the least.”

Tina relaxed as she took another sip of her bitter and cold coffee. “Okay, continue,” she mouthed as Corrada once again took up his explanatio

“It’s hard, even now, to analyze and deconstruct the real reasons why I agreed to testify as an expert in this matter. Maybe I didn’t think through the ramifications much at all, but only in retrospect have tried to give some meaning to my decisio Possibly, it was because I was up for tenure here at DU and testifying as an expert is generally considered to be prestigious. Other members of my faculty had been experts in various disputes and this had seemed to be encouraged by the administratio Maybe I did it out of a sense of obligation or loyalty to my old law firm. And, as I mentioned, the money was good. All of those things may have been involved, but looking back, I think two things, on a conscious level anyway, served to help me rationalize my decision to agree to testify. The first related generally, but substantively, to NAFTA itself. I remember thinking that it seemed absurd for a Mexican labor union to file a complaint about the enforcement of U.S. labor laws. The NAFTA labor side accord, after all, was pushed by American labor not Mexico or Mexican labor. As I recalled, U.S. unions were concerned that American companies would quickly move their

operations to Mexico to take advantage of cheap labor because they had no import barriers on goods coming from Mexico.”

[1081 “A fairly biased view of another country’s legal structure, don’t you think?,” chimed Tina wryly.

“True to a point,” replied Corrada. “It’s not that Mexico’s labor laws are necessarily deficient, but that enforcement of those laws leaves more than a bit to be desired. Thus, the labor side accord explicitly discusses enforcement. In the Sprint/LCF case, the Mexican labor union complained that the United States failed to enforce its own labor laws in a circumstance involving an enterprise made up of immigrant workers from Mexico. This is theoretically parallel to American labor concerns in Mexico, but it seemed arrogant and nonsensical to me that anyone could question U.S. enforcement of its own labor laws, especially under a generally pro-labor Clinton Administration, and also, especially, when the General Counsel of the NLRB was Fred Feinstein,” Corrada added.

“That’s a very narrow view, Professor. Moreover, it assumes that our system is flawless,” said Tina. “The labor side accord is really nothing more than a political tool. As such, it should not come as a surprise that it would be used by Mexican as well as American labor workers,” said Tina very matter of factly.

Corrada’s face lost its twisted intensity and softened as he continued. “Be that as it may, Tina, I still remember feeling a great surge of nationalism at the time. I really don’t usually have such jingoistic feelings, and so I was surprised by my strong reaction in this case. In the past any feelings of nationalism have arisen only in the context of Puerto Rican Olympic teams and Puerto Rican baseball players,” Corrada sighed. “The second thing that I remember crossing my mind when I was thinking about testifying for Sprint was related to my tendency to go against the grain I dislike stereotypes about viewpoints of people of color. Many African-Americans and Latinos expect that other group members will toe the same line or express similar opinions,” Corrada stated.

“That’s a rather conservative viewpoint, Professor,” Tina remarked. “Stephen Carter writes about this same kind of stereotyping in his book, *Reflections of An Affirmative Action Baby*. The view, however, is much too narrow and individualistic. The point is that blacks and Hispanics in this country have a common base of experience. You can not be black in this country and hope to somehow dodge race discrimination or the country’s history of slavery—it’s there always—an imposed constant. Is it too much to ask, then, that members of a subordinated group, especially the leaders among them, speak out against oppression and subordination every opportunity they get?” Tina questioned.

“It’s a good point Tina, and I’m not quite sure how Carter would [1082 answer, except possibly to disagree,” Corrada said, “but I part company with Carter and other race neo-conservatives. I believe, for example, that minority viewpoints and voices should be sought out for their own sake, but not necessarily because of the substance they will articulate. Rather, a minority viewpoint is important because of the different perspective it invariably brings to any given

issue. Subordinated peoples have a perspective that is not generally given any account, and therefore should be sought out in all cases. I remember thinking that when people saw a Hispanic testify, for Sprint, this would serve to dash their pre-existing stereotypes. I thought that my testifying as an expert for Sprint might serve to further diffuse race as an issue. Remember, at the time I had rationalized the point that race was not an issue in the dispute,” Corrada concluded.

So far the professor has rationalized his decision quite nicely, Tina thought, even if he seems more than a bit defensive about it. “You seem to have resolved the issues in your mind about testifying quite adequately,” Tina found herself saying.

“Sometimes maybe we’re all a little bit too smart for our own good,” Corrada mused. “Anyway, I prepared my testimony, I attended the hearing in San Francisco and testified. I began to realize the gravity of my mistake, however, when I sat down and listened to the testimony of the person who spoke after me. Her name was Dora Vogel. She was one of the Latinas who had been employed at LCF and she testified in Spanish. She spoke about terrible working conditions. She testified that workers had not been allowed to use the restroom except on breaks. She talked about how commissions were not paid by the company due to sudden and arbitrary changes in sales quotas. She recalled how LCF supervisors changed schedules to require employees to work evenings and Saturdays. She spoke about Latina workers who had been summarily and arbitrarily discharged. Dora also talked about how the workers felt relieved when they thought a union might be able to help them. Finally, she testified about the plant closure and the effect on her family,” Corrada emphasized sorrowfully. “I had been so focused on law, I thought, that I didn’t think enough about the true impact of this entire situation on the lives of the workers involved in the struggle. And, I slowly realized right at that moment, with Dora Vogel testifying, that I had thought too much about whether I *could* testify and too little about whether I *should* testify.”

“What do you mean by that?” Tina asked, now riveted by what the Professor was saying.

“Well,” Corrada added, “any labor law professor in America could have testified the way I did *about the law*. The truth is that the technical [1083 application of the law allows for a large degree of subjectivity on the part of the decisionmaker. What I mean by the “could/should” statement is that the ability to rationalize the correctness of the legal result should not end the inquiry. I should have interrogated myself at a deeper level, somewhat like what I am now doing. I should have thought more about the context of the dispute. I should have thought more about people, and less about law,” Corrada surmised.

“It sounds like you’ve done quite a lot more thinking about this since your testimony in San Francisco,” Tina noted, trying consciously to ease the Professor’s disappointment.

“I certainly have,” Corrada replied. “This experience triggered my own identity crisis. When I returned to Denver, I became more interested in writings

about law and identity, especially Latino and Latina Critical Theory, and I started reading some of the groundbreaking work in critical race theory. I even began teaching a class on critical race theory. As a result, I've developed a few insights into the LCF matter and my rationalizations regarding the dispute."

Tina relaxed a bit as the Professor recollected his path of discovery regarding race matters. She began to understand now the reasons for Corrada's testimony and his passion for civil rights today. Corrada continued the discussion: "The first of these insights is that I have seen myself too much as an outsider. In being so bordered—existing on race, national, and political borders—I have found that I tend to focus too much on difference and not enough upon similarity. The majority of people, on the contrary, don't exist on these same borders and tend to think their experiences are commo They have the opposite problem. They think everyone should be the same and do not appreciate important and meaningful differences among people. However, as I stated earlier, because I tend to focus on difference, I distance and disaggregate myself from communities to which I belong. For example, I think that deep down, possibly because of some internalized classism or maybe the gender difference, I saw myself as different from the Latina workers at LCF. When I was at the hearing, however, I realized that I connected with the workers on many levels, not the least of which was fluency in Spanish. Language is a strong access point, and I remember having the feeling as Dora Vogel testified that she was talking directly, and only, to me," Corrada emphasized.

"It's probably more or less true," Tina stated, "most of those at the hearing must have been supportive of the LCF workers and the unio You were probably one of only a handful there who Dora could possibly sway by her compelling testimony." Tina knew she had hit the mark with this comment as Corrada nodded his agreement. Corrada paused [1084 briefly to think about Tina's observation, but then hurriedly continued with his own reflections. "I don't know how familiar you are, Tina, with the critical notion of 'essentialism.'" Tina gave no reply. "Very simply it means to try to capture, maybe with even one word or idea, someone's essence based simply on their physical features or based on one feature of their personality. The most classic essentializing would be, for example, labeling someone as being "good" or "bad" because he is African American or Hispanic or because she is a woma As we know, people are very complex—there is good and bad in everyone and thus it is invariably inaccurate, despite people's propensity toward it, to label some one as "evil" or "virtuous" based simply on their physical or cultural makeup."

"I committed the error of "essentialism" in this Sprint matter. I essentialized Latinos in this dispute. Remember I had resolved that the dispute did not involve race because there were Latinos on both sides. I therefore looked for the easy marker of Latino identity. In so doing, I ignored meaningful differences between and among the Latinos and Latinas involved. Those important differences included class and gender, for example. I had been so focused on race

that I could not see those other lines of oppressive pressure. My failure to recognize inter sections like gender and class along race lines caused me to essentialize race. Making race predominant over the confluence of gender and race, or race and class, essentializes race even while attempting to deal with race in a non-stereotypical way. In other words, while my intentions were good, I was entirely off the mark,” Corrada remarked.

“The path to hell is paved with good intentions,” Tina blurted out. “Sorry, but it’s one of my favorite Anglo expressions, Professor. I agree with what you’re saying and I appreciate it. It’s extremely hard not to generalize or synthesize what we learn from our own experiences and question whether those experiences or beliefs are properly applied in another context. As I listened to your description of the Sprint/LCF dispute I could clearly see all the implications involved in the matter—race, gender, and class. So I did not understand your race-only perspective. It’s certainly true, though, that my understanding and consciousness comes from my additional perspectives as a woman from a blue-collar background,” Tina added.

“Exactly,” said Corrada, “I can only understand those other perspectives by learning them from others, but there’s more to the essentialism I embraced in assessing the dispute. In my haste to essentialize or generalize about race I accepted a particular context. I absolutely assumed that the dispute occurred in only one entity, LCF, making it easy to dismiss as a dispute between and among Latinos. Why shouldn’t [1085 I have viewed it instead as a dispute between Sprint, a largely white company made up of mostly white senior management, and La Conexión Familiar, a mostly Latina operation? It is no less a white versus Hispanic dispute or a male versus female dispute just because a largely white, male senior management is orchestrating a conflict played out between Hispanics or women in the trenches,” Corrada stated.

“It seems like there really can be no end to essentialism,” Tina remarked, “it is a potent urge seemingly embedded in the human psyche.”

“I agree,” said Corrada regretfully, “you can know not to essentialize and still engage in the practice with fervor,” Corrada emphasized. “Yet it’s not even as easy as just being on guard against essentializing, because if you carry that defense to an extreme you can get caught in a trap of anti-essentialism.”

“What do you mean?” asked Tina.

“Well, let’s get back to the Sprint/LCF matter. At some point in my consideration of whether to serve as an expert I distanced myself from the Latina workers at LCF, and clearly treated them and their circumstances, at least subconsciously, as ‘Other.’ I did this by viewing myself either as an entirely independent actor—too focused on my mechanical and distanced role as a legal expert—or I allowed myself to become sympathetically aligned with management, probably because of class differences between me and the Latina workers at LCF. After all, I had been a management labor attorney and my background was much more similar to the managers than to the workers at LCF.

Also, I myself am Latino. While LCF management included Latinas, the workforce was largely Latina, according to what I had read. In retrospect, it seems that I should have essentialized the broad Latino/a experience more than I did. I disaggregated too much with respect to race and class—I distanced myself from the race and class picture even while I was essentializing race and ignoring class and other important race intersections. Here again, I should have been striving to discover and emphasize connections between me and the Latinas at LCF,” Corrada concluded.

“And when you heard one of the Latina workers, Dora Vogel, speaking in Spanish at the actual hearing you suddenly realized your common heritage,” Tina added.

“That’s right,” Corrada agreed, “I knew then that I had not properly thought through whether I should testify, or that I had possibly overthought the question I should probably have tried harder to decide the issue at a more basic level.”

Tina sighed and stared into her empty cup. “I guess I practiced a little of the essentialism game with you also, Professor,” remarked Tina.

[1086 “What do you mean, Tina?” asked Corrada.

“Well, I could not, in my mind, reconcile the professor that I had seen in class and what I knew about him, his progressive tendencies, with the professor who testified at the NAFTA hearing. In fact, since there is little consistency in the world, I should not have been so quick to judge,” answered Tina.

“Again, I hate to be too Socratic, Tina, but why do you view my NAFTA testimony as inconsistent with what you know about me—my progressive background, as you say? I know this will sound like a rationalization for my actions, but it is fundamental that the tendency to essentialize frees us to wrongly decide what is consistent and what is inconsistent. My testifying was a mistake, but it did not change my leanings or my sensitivities. And, although it was inconsistent with who I am, it should not, but probably will, change perceptions about me. My deciding to testify came as a result of both emotional and intellectual errors in essentializing and not essentializing, mistakes that could only have been corrected by interrogating myself at a deeper level of thought and emotion. And those mistakes were not the only personal errors that I made in deciding whether to testify at the NAFTA Hearing,” Corrada remarked.

“You mentioned something about regretting your feelings of nationalism,” Tina said. “What did you mean by that?”

“That’s one of them, Tina, but there’s another—let me start with it. Remember I mentioned being upset about the general tendency to attribute particular points of view to members of minority groups. My view, as you’ll recall, was that we should make a special effort to seek out minority viewpoints, not because they’ll take a particular substantive position, but because that voice will come at any problem from a different, and important perspective,” Corrada explained.

A flash of recollection came over Tina's face. "This is where you part company with Stephen Carter," Tina stated.

"That's right," Corrada continued, "but this Sprint/LCF dispute has caused me to change my position a bit. It seems to me that it still holds true that if a person of color is asked to opine or comment on an issue or is invited to speak or testify in a context that in no way implicates race or color, that they should feel an independence of thought that is different from what society or even members of that group might expect from that person. For example, an African-American or Hispanic scholar should not be expected to espouse a liberal view on any given subject. However, at the same time, and this is where my thinking has changed, if a person of color is asked to opine or comment about a dispute that involves race or color—even if only in seemingly the minutest of ways, [1087] that person owes some kind of responsibility to the group. The reason is that in those instances, there is a likelihood—possibly even a presumption—that stereotypical thinking about the group or some sort of race consideration has gone into the decision about whom to invite to speak. In these circumstances, the speaker may have been chosen specifically to articulate a particular substantive viewpoint. In these situations if the person cannot help the group by forwarding the group's progress in this society, the invited speaker should simply pass up the opportunity. That, Tina, is probably what I should have done with respect to testifying at the NAFTA hearing. If I agreed, which I still do, that the appropriate legal test supported what the ALJ and district court judge in the Sprint/LCF matter decided on the merits, I should have declined, as a personal matter, the invitation to testify *because* of the race dimension of the dispute," Corrada exclaimed.

"You said there was another mistake that you made—some issue regarding nationalism," Tina inquired.

"Yes," Corrada answered, "I was asked by someone after the NAFTA hearing why I had failed to talk about justice. My response was something like, 'I had not been asked to talk about justice.' The response felt awkward and absurd the moment I uttered it. Was I actually saying that law and justice were separate ideas? I've told students not to get so carried away with the rule of law that they lose sight of what justice requires. Yet there I was in San Francisco, stating that I had done exactly that. Obviously, Tina, there is an important lesson in simply that one insight. Do not, especially if you are a lawyer, lose sight of justice. That insight, however, led me to another one regarding the nature of international versus national law. I think American law can often be too hypertechnical. There is so much sheer detail in the various legal structures we erect—especially those that are created by statute. And, although my status as a law professor suggests that I can navigate that detail in an effective way, it seems to me that a lot can be lost wading through those details. International law has often frustrated me because a lot of it, especially public international law, is stated in very vague, general principles. As I learned from testifying in the Sprint/LCF dispute, however, international law can serve as a check on domestic law that is

characterized by the hypertechnicality of U.S. law. International law can help to remind us not to lose sight of justice,” Corrada emphasized.

Tina’s face brightened as the Professor’s words sunk i “I recall that at that very NAFTA hearing there was some testimony regarding whether the legal test you’ve talked about was a good one for forwarding the general policies of American labor law. You were not asked to [1088 testify about the propriety of the test itself, but merely whether the law had been properly applied. I think you’re right, Professor, that only a forum like the one NAFTA provided in the Sprint/LCF case would allow a deeper interrogation of domestic law against a background of internationally recognized principles of fairness and justice,” Tina remarked.

“Oh my gosh, look at the time. I’ve got to get back to my office for a meeting with the Dean!,” Corrada exclaimed.

“Thanks for taking the time, Professor,” Tina remarked. “By the way, maybe a comparative analysis involving how different countries’ labor laws treat situations like the one presented in the Sprint/LCF case would be a worthwhile directed research project?,” Tina inquired.

“Sure, come by my office next week and we’ll talk about it,” Corrada yelled as he strode rapidly out of the cafeteria.

9. Christopher David Ruiz Cameron,* *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 MIAMI L. REV. 1089 (1999)

Modern man never surrenders himself to what he is doing.

A part of him —the profoundest part— always remains detached and alert.

— Octavio Paz n1

INTRODUCTION

When a strike by 185,000 sorters, loaders, and drivers shut down the nationwide operations of United Parcel Service during the summer of 1997, n2 I received inquiries from a number of news organizations whose reporters inevitably posed the same two questions: (1) how long is the strike going to last, and (2) does the union's victory signal the resurgence of the American labor movement?

I hesitated to answer these questions, but for different reasons.

The first question, which did not fall within my expertise as a labor law professor, was both timely and of great practical importance. Unfortunately, not even the combatants can accurately predict when a given labor dispute will end. Eventually, UPS would take two weeks to agree to the Teamsters' settlement terms before regular deliveries resumed. n3

The second question, which did fall within my expertise, was superficially appealing but ultimately beside the point. Every industry, [1090 every employer, and every workforce is different; it is all but impossible to draw any meaningful conclusions about whether and how the resolution of particular grievances in a single confrontation will affect labor relations generally. n4 What's truly important in a labor dispute, I thought, is who the parties are, and what resources they bring to the battle. Is the labor movement is back? A better question would be, who's backing the labor movement?

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Today, in more American workplaces than ever before, the answer to my question is the same: women and men of Latin origin. While organized labor as a whole is desperately struggling to avoid becoming irrelevant, Latino workers as a group are enjoying unprecedented successes in forming new labor organizations, breathing life into old unions, and winning generous contracts. Largely overlooked during the UPS labor dispute was the fact that so much of the company's workforce, especially in the big cities of the Southwest, consists of Latinos. In Southern California alone, at least half of the package delivery giant's 15,000 employees were of Hispanic heritage—a fact that could not be missed on television. Local news channels broadcast pictures of pickets at the company's downtown Los Angeles distribution facility, where the faces of all but a handful of the rank-and-file belonged to brown people. When Teamster-represented employees won their key demand—10,000 more full-time jobs for UPS' heavily part-time workforce—Southern California Latinos were among the primary beneficiaries.

Just a year earlier, in a local precursor to the UPS dispute, Latino truck drivers represented by the Teamsters had won a smaller-scale, but equally impressive, victory. The drivers, who eked out a minimum-wage living delivering fresh tortillas sold in Los Angeles County retail food stores under the Mission and Guerrero labels, took on mighty Gruma Corporation, the U.S. subsidiary of one of Mexico's biggest food processors. Following an extensive community-based campaign, which included pledges from prominent Anglo and Latino officials to join a boycott against the company's products, drivers persuaded the company to sign a new collective bargaining agreement granting substantial pay and benefit increases.

Due to a growing, and until now, mostly low-wage Latino workforce coveted by employers, Southern California has become “ground zero” for labor organizing during this decade. Since 1990, three of labor's biggest organizing victories—wherein previously non-union workers chose union representation and then successfully negotiated a first contract—have been scored among Latinos there: 1,500 foundry workers, who joined the International Association of Machinists, at American Racing, Inc., in Long Beach; 3,000 drywall installers, who joined the United Brotherhood of Carpenters, in the home construction industry stretching from Santa Barbara to San Diego; and 1,000 janitors, who joined the Service Employees International Union through its “Justice for Janitors” campaign, at high-rise office buildings in Century City on Los Angeles' Westside. And this winter saw the addition of the largest organizing prize in modern labor history: 74,000 low-wage, government-paid home care workers, who joined the SEIU in Los Angeles County.

Southern California is also home to some high-profile union organizing that has yet to bear fruit, at least in the form of new members or new contracts. Periodically, independent truck drivers working the internationally-important Ports of Los Angeles and Long Beach, respectively, have staged wildcat

strikes in support of their demands to join the Communication Workers of America. n14 Porters and chambermaids at the New Otani Hotel in Los Angeles' Little Tokyo—a lodging frequented by Asian business travelers—continue to make claims, before both the National Labor Relations Board and the international court of public opinion, in support of their demand to be represented by the Hotel Employees and Restaurant Employees Unio n15 Even gardeners who maintain the yards of well-to-do neighborhoods have captured public attention through a campaign opposing local ordinances that ban the use of their ubiquitous gas-powered leaf-blowers, a cause championed by the Association of Latin American Gardeners of Los Angeles. n16

Southern California, however, is not the only place where Latinos are forming and joining labor unions. Since 1990, over 20,000 mostly Hispanic immigrant workers have walked off their jobs, or participated in organizing campaigns, across the country. n17 Mexican and Central American culinary workers in Las Vegas, n18 Guatemalan and Salvadoran custodians in Maryland, n19 Mexican poultry processors in Missouri, n20 and Dominican and Puerto Rican health care workers in New York n21 are among the growing ranks of Latinos who are demanding the chance to [1093 bargain for better wages and working conditions. Their appearance on the national scene is hardly surprising; by the middle of the next decade, Latinos are expected to become the largest non-White segment of the American workforce. n22

This essay makes the case that the future of the American labor movement will depend on its ability to harness Latino organizing power. I address the subject in three parts. Part I traces Latinization of the U.S. workforce. Part II discusses what Latinos have to gain from unionism, and what unionism has to gain from Latinos. Finally, Part III summarizes the challenges that a Latino-led labor resurgence faces, and how successfully meeting these challenges can benefit workers of all races.

I. THE LATINIZATION OF THE AMERICAN WORKFORCE

The 1990s could be remembered as the decade in which the “salsification” of the American diet was completed. n23 Since 1991, combined yearly sales of salsa and picante sauce have outstripped those of the all-American flavor-enhancer, ketchup. After climbing at an annual rate of eight to 12 percent, retail salsa and picante sales reached \$940 million in 1994 and are projected to top \$1.5 billion in 1999. The meteoric growth of salsa and picante sales tracks the retail sales record of Mexican food in general, which reached \$2.4 billion in 1994, and is projected to top \$3.4 billion in 1999. n24

Why is salsa beating ketchup? Certainly, it's not because salsa is something new; chiles and herbs native to the New World, salsa's key ingredients, have been centuries-long staples in the diets of many people who trace their roots to Mexico, the Caribbean, and South America. n25 Although the reasons for

salsa's success are probably complex, observers are tempted to reach for pat answers. According to the president of a food marketing firm quoted in one acclaimed cook book, the key factor (besides the burgeoning presence of Latinos on the U.S. side of the Latin American border) is the perception that Mexican food, unlike French or Japanese cuisine, is "idiot-proof." n26 He added: "Mexican food is pretty tasty, no matter what you do to it." n27

[1094 Of course, not all Latinos are Mexicans, and not all Mexican food is "idiot-proof." n28 But the marketing president's simplistic understanding of salsa's popularity should caution us to avoid some common misperceptions held by non-Hispanics about Latino workers—for example, that Latinos are "new" to the U.S.; that the terms "Latino" and "Mexican" are synonymous, referring mainly to the farm workers whose cause was taken up by the late Cesar Chavez in California; or that Latinos will remain loyal workers, "no matter what you do to [them]."

Nevertheless, if the 1990s are remembered for the "salsification" of the American diet, then the 2000s will be remembered for the "Latinization" of the American workforce—even though Latino workers have toiled in the United States for a long time.

Since 1848, when the Treaty of Guadalupe Hidalgo ended the Mexican-American War, turned half of Mexico into the Southwestern United States, and transformed some 120,000 Mexicans into Mexican-Americans, Latino workers have played vital roles in the U.S. economy. n29 Initially, these first U.S. Latinos worked in copper mines and steel mills, and on farms and ranches; eventually, they worked in oil fields, garment sweatshops, and tire factories, on loading docks and auto assembly lines, and in restaurants, hotels, offices, and stores. n30 They were, and are, both native-born and immigrant, documented and undocumented. Employers prized Mexicanos, like many Latinos after them, "because we can treat them as we cannot treat any other living ma" n31 And not infrequently, Latinos responded to the severe discrimination that they faced by forming and joining labor unions. n32

[1095 Indeed, the only thing truly "new" about Latino workers in the United States today is their sheer number. n33 In 1980, the U.S. Census reported that the civilian workforce totaled 106.1 million people, of which 85.2 percent were White, 10.2 percent were Black, 5.7 percent were Hispanic, and 2.6 percent were Asian or Pacific Islander. n34 But by 1990, the civilian labor force numbered 125.2 million people, of which 82.1 percent were White, 10.7 percent were Black, 8.1 percent were Hispanic, and 2.9 percent were Asian or Pacific Islander. n35 As Table 1 indicates, the number of Latinos working in the U.S. grew by 75.4 percent from 1980 to 1990, making them the fastest-growing segment of the American workforce:

TABLE 1 N36 GROWTH OF U.S. LABOR FORCE 1980-1990 (BY RACE)

[SEE TABLE IN ORIGINAL

Moreover, according to the Statistical Abstract of the United States, Latinos made up 9.3 percent of the civilian workforce in 1995, and are [1096 projected to reach 11.1 percent in 2005. n37 As Table 1 also indicates, sometime during the middle of the next decade, as one in nine U.S. workers becomes Hispanic, Latinos will surpass African Americans as the country's second largest racial and ethnic working group.

Nowhere are Hispanic workers more important to the economy than in Los Angeles County, which serves as Southern California's economic engine. In 1980, the California Census of Population reported that Los Angeles County's civilian workforce consisted of 3.7 million people, of which 71.2 percent were White, 24.5 percent were Hispanic, 11.1 percent were Black, and 6.4 percent were Asian or Pacific Islander. n38 By 1990, the County's labor force reached 4.6 million people, of which 59.6 percent were White, 34.5 percent were Hispanic, 10.8 percent were Asian or Pacific Islander, and 10.1 percent were Black. n39 As Table 2 indicates, Latino labor grew at a rate of 73.4 percent during the decade, a substantial increase that was surpassed only by Asians and Pacific Islanders, whose whopping 107.3 percent gain reflected their comparatively small absolute numbers:

TABLE 2 N40 GROWTH OF L.A. COUNTY LABOR FORCE 1980-1990 (BY RACE)

[SEE TABLE IN ORIGINAL

Although Hispanic workers are found in a wide range of jobs throughout the County, they are highly concentrated in the area's vital manufacturing sector n41—a fact that places them in the driver's seat of one of North America's most important economic vehicles.

[1097 For all of Los Angeles' importance as America's entertainment capital, n42 the region is even more important as the country's manufacturing capital. n43 Manufacturing is still critical to the area's economic well-being, and is still growing, despite the continued downsizing of Southern California's once-vaunted aerospace and defense industries. This unheralded manufacturing sector consists of two components: the highly-visible "durable goods" portion, in which transportation equipment, aerospace and defense instruments, fabricated metal products, machinery, electronic goods, furniture, metals, stone and glass, and lumber products are produced; n44 and the less-visible "non-durable" goods sector, in which apparel, printing, food products, rubber and plastics, chemicals, paper, textiles, petroleum, and leather are made. n45 The contrast between the durable and non-durable goods components can be seen in the industries affected

by some of the labor disputes recounted above: under the heading “fabricated metal products,” the durable goods sector took center stage when foundry workers organized a union at American Racing Equipment; under the heading “food products,” the non-durable goods sector came to the fore when truck drivers delivering Mission-and Guerrero-label tortillas took on Gruma Corp.

Not surprisingly, immigrant Latinos hold down half of Los Angeles County’s estimated 700,000 manufacturing jobs ⁿ⁴⁶—a figure that gives the region roughly 50 percent more manufacturing positions than its nearest rival, Chicago-Cook County, Ill. ⁿ⁴⁷ And half of these manufacturing jobs are geographically concentrated along the so-called “Alameda Corridor,” a 20-mile strip linking a vast district of production and distribution facilities located to the northeast of downtown with the Ports of Los Angeles and Long Beach located to the south. ⁿ⁴⁸ About 300,000 new manufacturing jobs are expected to be created there during the next decade, and Latinos are expected to fill most of these too. ⁿ⁴⁹ This expansion will be fueled by three enormous regional construction [1098 projects: a \$8 to \$12 billion plan to increase the capacity of Los Angeles International Airport; a \$1.9 billion plan to connect the manufacturing district to the Ports of Los Angeles and Long Beach by building a high-speed, subterranean commercial rail line in the Alameda Corridor; and a \$650 million plan to overhaul Los Angeles Harbor. ⁿ⁵⁰

In sum, Latino workers, long important to the U.S. economy, are quickly becoming essential to it. Having established this, I now turn to the proposition that, if the workforce of America’s future has a brown face, then the American labor movement of the future (if it has one) must have the same.

II. WHY ORGANIZED LABOR AND LATINO WORKERS NEED EACH OTHER

A. WHAT ORGANIZED LABOR CAN DO FOR LATINO WORKERS

As Professor Juan Gómez-Quíñones has noted, Latino workers, beginning with Mexicans in what is now the Southwestern U.S., have toiled in North America since before the establishment of the United States. ⁿ⁵¹ Although, until recently, labor historians have paid little attention to this community, “few southwestern U.S. capitalists have ignored Mexican resources or the Mexican laborer. Indeed, when the hours were long and the pay short, business interests explicitly sought out Mexicanos.” ⁿ⁵²

Unfortunately, for too many Latinos, the hours are still long and the pay is still short.

For the past three decades, although the U.S. median annual household income earned by Latinos has surpassed that earned by African Americans, it has consistently fallen short of the income earned by Whites. In 1980, Hispanic households earned 76.3 percent of what White households did; ⁿ⁵³ in 1990, the figure was slightly higher at 76.8 percent. ⁿ⁵⁴ The pattern persisted at the local

level, including Los Angeles County. In 1980, Hispanic households there earned 76.9 percent of what [1099 Whites earned; n55 in 1990, the figure dipped to 70.9 percent. n56 Undercut ting this decline further was a one-two punch that the Census Bureau's 1990 figures were collected too early to detect: the end of the Cold War, and the consequent elimination of about half of Southern California's 400,000 aerospace and defense jobs; n57 and the Los Angeles civil disturbances of spring 1992, which drove capital out of the County's industrial heartland. n58 These events seriously damaged the durable-goods component of the region's manufacturing sector, where, as noted above, roughly half of the workers are Latinos.

Following the 1992 civil disturbances, a group of seasoned academic and labor leaders worried that, if nothing were done to improve the economic position of immigrant Latinos, a "permanent underclass" of Latinos would be created. n59 Among other things, these leaders found that, in communities of Los Angeles County having a poverty level of 20 percent or higher, over 15,000 manufacturing firms were generating annual revenues of over \$54 billion, due largely to the low-wage labor of 357,000 Latino employees. n60 Could anything be done to help Latino workers share more equitably in this ample wealth, and thereby raise themselves out of poverty and into a social and political stake in their communities?

The answer, according to these academics and labor leaders, was to undertake a major "economic upgrading" of Latino household income. n61 In 1995, they christened their initiative "LA MAP," or the Los Angeles Manufacturing Action Project. By combining the organizing talents and resources of 15 separate labor organizations, researchers in UCLA's Department of Urban Planning and its Center for Labor Research and Education, and other community groups, LA MAP hoped to raise \$3 million and coordinate the organization of up to 717,000 mostly Latino immigrant workers. n62 According to a mission statement published by LA MAP:

Economic and social stability can be achieved in L.A.'s immigrant [1100 communities by increasing manufacturing wages and offering a selection of comprehensive employer financed benefits, including family health insurance. This economic upgrading can be accomplished with out destroying the competitiveness of the Los Angeles manufacturing complex. Unionization helps workers achieve economic upgrading and a voice in their workplace and their communities. n63

Would LA MAP's plan to spread the gospel of unionism to Latino workers actually improve their economic fortunes? The overwhelming empirical evidence is that it would.

For the past quarter century, labor economists representing a range of conservative to liberal economic philosophies have published a rich scientific literature documenting a positive, statistically significant relationship between the extent of unionization and employees' wages. Put more simply, the earnings of

employees working for union firms are significantly higher than the wages of employees working for their non-union competitorsⁿ⁶⁴

Some comparisons of the wages earned by non-union and union workers will illustrate the magnitude of this wage gap. In 1986, the U.S. median weekly earnings of the typical non-union worker were \$325; by contrast, the weekly earnings of the typical union worker were \$439.ⁿ⁶⁵ By 1996, the median weekly earnings of the non-union worker had grown to \$462; by contrast, the weekly earnings of the union worker had grown to \$610.ⁿ⁶⁶ This wage gap, which is now about 32 percent,ⁿ⁶⁷ has not only held firmly but also widened steadily. As Table 3 indicates, during the ten-year period from 1986 to 1996, the typical non-union employee could expect to find about \$110 to \$150 less in her weekly paycheck than her union counterpart:

[1101

TABLE 3 ⁿ⁶⁸ UNION VS. NON-UNION MEDIAN WEEKLY EARNINGS GAP 1986-1996 (ALL RACES)

[SEE TABLE IN THE ORIGINAL

When analyzed by race, the union wage gap becomes even more pronounced. For example, in 1996, the U.S. median weekly earnings of the typical non-union worker were, for Whites, \$480; for Blacks, \$356; and for Hispanics, \$319.ⁿ⁶⁹ But in the same year the median weekly earnings of the typical union worker were, for Whites, \$630; for Blacks, \$502; and for Hispanics, \$482.ⁿ⁷⁰ As Table 4 indicates, although the wage gap between non-union and union workers in each race category was huge, it was by far the widest for Hispanics:

[1102

TABLE 4 ⁿ⁷¹ UNION VS. NON-UNION MEDIAN WEEKLY EARNINGS GAP BY PERCENT, 1986-1996 (ALL RACES)

[See table in the original

From a strictly economic viewpoint, then, every worker (especially the worker of color) realizes tremendous benefits from unionization, but none more than the Latino worker. Whereas union Whites and Blacks earned 31.3 percent and 41.0 percent, respectively, more than their non-union counterparts, union Hispanics earned a whopping 51.1 percent more than non-union Hispanics.ⁿ⁷² As Table 5 indicates, during the ten-year period from 1986 to 1996, union Latinos consistently benefited from a wage gap in the 50 percent range:

TABLE 5 ⁿ⁷³ UNION VS. NON-UNION MEDIAN WEEKLY EARNINGS GAP BY PERCENT, 1986-1996 (HISPANICS)

[See table in the original

Of course, at \$482, even a 50 percent boost in the weekly paycheck [1103 of the typical Hispanic worker isn't going to make her rich; in fact, it's only \$2 more than the weekly paycheck of the typical non-union White worker. But given a choice, who wouldn't rather make an extra \$163 per week?

In sum, no group of workers has more to gain from the labor movement than Latino workers. By any measure, the tangible economic benefits for individual workers, their families, and their communities would be substantial.

B. WHAT LATINO WORKERS CAN DO FOR ORGANIZED LABOR

After peaking at 38 percent in 1954, private sector, non-agricultural union density—the percentage of workers represented by labor unions—fell to 13 percent in 1993 and is barely 10 percent today. n74 Although during the past three years the AFL-CIO has spent millions of dollars and launched a number of high-profile organizing initiatives designed to turn these numbers around, n75 it may be some time before any measurable improvement occurs. n76 Part of the problem is that changing the culture of any established institution is enormously difficult. For years, labor suffered from a “bunker” mentality; it was too afraid of losing ground to attempt to gain any. “They’re all wearing the same uniform, all reciting the right passages from the prayer book,” says a union representative familiar with the rhetoric of new organizing efforts in Boston “But absolutely nothing has changed. They’re the walking dead.” n77

Against the backdrop of somnambulism projected by so much of the mainstream labor movement, however, the Latino labor movement is projecting dynamism. Paced by major organizing victories in Southern California, over 20,000 mostly immigrant Latinos have walked off their jobs or participated in other organizing activities across the country since 1990. n78 Their efforts are producing new adherents, more job security, and better pay and benefits. How are they managing to do it?

[1104 At least three types of strategies are responsible for Latinos’ organizing success and ought to be studied. To be sure, the AFL-CIO, under the leadership of president John Sweeney, has been exploring and exploiting many of these elements since the mid-1990s, but the value of considering them systematically should not be underestimated. They include (1) building organizing efforts from the grass-roots level, but with the financial and technical support of organized labor; (2) drawing on the expertise of sympathetic members of the academic community; and when all else fails, (3) trying assorted *remedios caseros*, or home remedies, culled from Latino folk traditions.

1. BOTTOM-UP ORGANIZING, TOP-DOWN SUPPORT.

In a number of successful cases, Latino workers took the first steps toward forming or joining unions by organizing from the bottom-up, rather than by being organized from the top-down. By using what Professor Kate Bronfenbrenner of

Cornell University calls “union building tactics,” these workers dramatically increased their chances of winning organizing campaigns. n79 At American Racing, Inc., in Long Beach, Calif., 1,500 Latino and Black foundry workers demanding better pay and working conditions conducted their own five-day strike in 1990. n80 This happened before organizers from the International Association of Machinists got involved by helping to consolidate support for the union and negotiate a first contract. And in the Southern California home building industry stretching from Santa Barbara to San Diego Counties, 3,000 Mexican drywall hangers all but shut down new home construction on their own in 1992 and 1993 by walking off the job and by driving en masse to job sites throughout the region to persuade co-workers to do the same. n81 This happened before the United Brotherhood of [1105 Carpenters began lending logistical support and helped negotiate a first contract. These examples stand in contrast to the longstanding approach of AFL-CIO-affiliated unions, which for decades have tended to target shops or industries for organizing campaigns first from the outside before attempting to gain adherents on the inside n82—if they have bothered to try to organize them at all.

A lot of the work of organizing Latinos was accomplished in safe, familiar settings away from the workplace. Workers discussed their situations, and their desires to do something about them, in meetings held in homes, churches, and social clubs consisting of immigrants who maintained strong ties to their home state or village in Mexico or Central America. n83 In this respect, the workers’ status as recent immigrants was advantageous; outsiders in the community at large, they enjoyed the solidarity of insiders in the mostly Hispanic communities along the Alameda Corridor. They lived and worked together, and they sought out familiar institutions to help them make the tough decisions and stick by them. For example, a priest who lent his visible support to a union campaign could not only reinforce an activist’s resolve but also transform a Catholic fence-sitter into a union adherent. n84 And a patriarch or matriarch who lent his support, especially if s/he commanded respect in the village back home in Mexico, could boost the solidarity behind a given strike, boycott, or job action in the U.S. n85 During the Pacific drywall strike, union activists were aided by the fact that most of them hailed from same handful of villages and towns in Mexico, where the strike had gained support. n86 When truckloads of striking drywall hangers [1106 appeared at a targeted job site to exhort other men to walk off the job, inevitably one or more of the workers would turn out to be an uncle, cousin, or family friend of one of the strikers. Family and peer pressure usually prevailed, and another job site would be shut dow n87

Equally important to the success of these grass-roots efforts, how ever, was the involvement of official labor, but in a supporting rather than a leading role. For example, the Machinists lent bilingual organizers and business agents to the foundry workers’ campaign at American Racing; the Carpenters offered use of their union hall and the advice of their legal counsel to the dry wall hangers’

campaign in the Pacific home building industry. During the “Justice for Janitors” campaign at high-rise office buildings in Century City, the SEIU, one of the few big unions with proven a track record of successfully organizing low-wage workers of color, played a greater role in directing the concerted activities of custodians, but still depended on the initiative of the thousands of marchers whose street rally brought business in normally efficient Century City to a standstill. Later, the SEIU offered legal assistance to workers who were arrested and in some cases injured by police during the rally.

A case study of a successful drive to unionize Latinos at a Los Angeles waterbed manufacturer illustrates why established labor organizations, for all the technical and financial assistance that they provide, still need the support of bottom-up efforts to succeed: on the one hand, unless the workers see themselves as having a stake in the union, a short-term organizing victory might turn into a long-term defeat at the bargaining table; on the other hand, if workers lay their jobs on the line only to find that union professionals don’t care about what happens to them, then they will feel betrayed. A professional organizer recalled a meeting at which one of the shop’s workers, a man respected by his peers, asked him a number of questions on behalf of the group:

“Could we be fired?” I said, “Of course.” “What will the union do if they fire us?” I remember saying that the union would not do any thing for you or anyone if you’re fired. [Instead, I asked: What are you going to do for yourself? How are we going to work together? First, we have to identify who the union is. If we’re going to identify the union as this building or me, it’s better that we don’t do anything. You want to organize the company. What are you going to do for him or him for you if you’re fired? What we can provide is a lawyer and the experience we have on how to minimize the risk. If there is a firing, try to win it. That’s all [a union can do.... “How are you going to guarantee that you don’t sell out?” They had to insure that some idiot like me didn’t [1107 sell out. *The best way was for them to take the reins of the campaign in their own hands. They wanted me to promise that they would get certain wages and benefits, but I said I couldn’t promise it.* n88

In an age when so many other U.S. workers seem reluctant to embrace unionism, it is remarkable that an historically outsider group of working people have managed not only to choose collective representation, but also to achieve tangible progress with it.

2. IVORY TOWER EXPERTISE.

The professionals who lent their expertise to successful Latino organizing campaigns included not only veteran labor organizers but also academics who wanted to make a difference. In Southern California, much of the strategic groundwork that made it possible to finish the job that Latino workers had started was laid by economics and urban planning professors associated with UCLA’s

Community Scholars Program. The Community Scholars, who were organized by Professor Gilda Haas, were drawn from two institutions affiliated with UCLA: the university's School of Urban Planning and its Center for Labor Research and Education.⁸⁹

The Community Scholars undertook the research necessary to target particular industries for organizing. For example, a document entitled *Manufacturing in Los Angeles: Opportunities for Organizing*,⁹⁰ published by LA MAP, attempted to make the case why organizing Latino manufacturing workers in the Alameda Corridor was not only feasible but also necessary to the community's economic health. The twenty-four charts and graphs attached to the document were produced by Professor Goetz Wolff. Professor Wolff's extensive research showed, as noted above, that the region's manufacturing sector is thriving; that low-wage Latino labor produces its profits; and that by carefully targeting certain types of businesses, especially in the non-durable goods segment, unions could successfully organize their workers without driving the businesses away to other communities or other countries.

Among other things, Professor Wolff believed that certain types of manufacturing businesses are extremely sensitive to their locations; that [1108 is, they cannot easily pack up and move away to avoid a union without jeopardizing their access to important markets for their manufactures. He identified nearly 400,000 manufacturing jobs falling into eight clusters of business types as being location-sensitive to Los Angeles County. They included apparel and textiles (112,000 jobs); printing (50,700 jobs); trucking and warehousing (49,200 jobs); fabricated metal products and auto parts (64,300 jobs); food and kindred products (43,000); furniture and fixtures and lumber and wood products (32,900 jobs); miscellaneous plastics products (24,000) jobs; and paper and allied products (15,900 jobs).⁹¹

Professor Wolff's research was quickly put to the test. During the summer of 1996, Latino truck drivers went on strike against Gruma Corp., a U.S. subsidiary of Mexican food giant Grupo Maseca, S.A., for higher wages and more generous reimbursements of the expenses they incurred while delivering Mission- and Guerrero-label tortillas to super markets and restaurants.⁹² The success of the strike, which involved only 170 workers, depended on a community boycott of the company's popular tortillas, which accounted for 60 percent of the huge Los Angeles market.⁹³ According to the executive director of LA MAP, the strategy behind the boycott, based on Professor Wolff's research, was that Gruma could afford neither to wait out a long boycott nor to import tortillas from its facilities outside the region.⁹⁴ Waiting out the boycott could cause the company to lose market share to other local manufactures; importing tortillas could alienate picky Southern California consumers—especially Latinos—who demand that their tortillas be fresh. The reason why Gruma had located its state-of-the-art tortilla plant in East Los Angeles in the first place was to be able to deliver fresh tortillas to area consumers.⁹⁵ After seven weeks, the strike and the boycott

ended with a new contract providing substantial increases in drivers' pay and benefits.

In sum, academics like Professor Wolff have played a key role in Latinos's successful organizing efforts. Law professors would do well to emulate their activism.

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3. HOME REMEDIES.

In the health-conscious 1990s, unconventional therapies for chronic illnesses are gaining widespread acceptance, especially among urban, educated, Anglo professionals. n96 A path-breaking study published by the *New England Journal of Medicine* in 1993 revealed that America's commitment to unconventional forms of therapy is nearly as deep as it is to conventional ones. n97 The study estimated that 34 percent of all United States residents use one or more of sixteen different forms of alternative therapy each year. n98 Tellingly, among patients using unconventional therapy in 1990, nearly two-thirds did not bother to visit an alternative care provider. n99 But the one-third who did made 425 million visits to such care providers at total cost of \$13.7 billion n100 Of this sum [1110 about three quarters —\$10.3 billion— was paid out of pocket. n101 By contrast, the general public made 388 million visits to primary care physicians, and for the conventional hospitalizations ordered by those physicians, paid \$12.8 billion out of pocket. n102 Remarkably, patients tended to seek out unconventional and conventional treatments together, usually unbeknownst to their traditional primary care physicians. n103

Of course, many Latino households have never given up the old *remedios caseros* —home remedies— of our ancestors to cure the common afflictions of human kind. The rich literature available today on home remedies and how to use them owes much to Latino folk traditions, especially those of Mexican-Americans. n104

Why do unconventional therapies continue to flourish alongside the conventional ones embraced by modern medical science? Often, it is because the intervention of Western healing practices alone has failed. "Many of us are searching for a cure, and we take it wherever we can get it —and that is not entirely with traditional medicine," explained a reader who had devoured the *Journal's* study. n105

Like conventional medicine, conventional labor law often fails the very patients that it is supposed to help. The debilitating "on the job" injuries from which so many workers, especially Latinos, suffer —low pay and anti-democratic working conditions— resist the twin conventional cures that the American legal system offers: enacting new laws and bringing legal actions. As suggested by both labor law scholars n106 [1111 and legal commentators, n107 the notion that workers' rights can be vindicated primarily by resort to lawmaking and

adjudication is belied by the facts. In their book *Failed Revolutions*,ⁿ¹⁰⁸ Richard Delgado and Jean Stefancic have identified the source of such failures of law and legal institutions as a defect not in our wills but in our imaginations: “the array of preconceptions, meanings, and habits of mind that limit and frame the horizon of our possibilities.”ⁿ¹⁰⁹ Limitations of imagination necessarily impose limitations on action, whether we are doctors or lawyers, labor leaders or elected officials, legal scholars or society at large.

Organizing among Latino workers has been successful in part because it has not been confined within the conventional limits of labor’s imagination. Three strategies have been particularly useful: (a) undertaking large-scale organizing efforts, (b) pressuring employers through non-traditional self-help tactics, and (c) steering clear of official legal institutions, especially the National Labor Relations Board (“NLRB”) and the law it administers, the National Labor Relations Act (“NLRB”).

(a) *Large-scale organizing efforts.* Organizing is expensive, for employers as well as unions. Facing the wage pressures that unionization entails, most employers are understandably resistant to relinquishing any competitive edge in labor costs to their competition by becoming unionized and are willing to spend great effort now to avoid having to spend more on wages and benefits later.ⁿ¹¹⁰ Facing such resistance, unions are understandably reluctant to commit scarce resources to difficult organizing campaigns. The result is piecemeal organizing. Unions tend to organize on a “shop by shop” rather than on an “industry by industry” basis, and to focus on so-called “hot shops”—places where in-plant organizing is already underway—when they do make a move.

Although shop-by-shop organizing has its place, too often it is ineffective compared to industry-wide organizing. Pacific drywall hangers working in Southern California homebuilding and janitors embracing the “Justice for Janitors” campaign were successful largely because they gained adherents and demanded a place at the bargaining table by [1112 attacking all employers in the target industry at once. When an entire industry can be shut down, employers take notice. As LA MAP strategists put it:

Los Angeles can serve as a successful proving ground of the labor movement’s ability to organize whole industries, geographic areas and communities at once. Single shop by shop organizing does not generate the energy and excitement necessary to create the momentum needed to make the labor movement the instrument it can become in the lives of workers and their families. This kind of “scale” organizing is necessaryⁿ¹¹¹

In this respect, labor is returning to its roots; industry-wide bargaining is the paradigm attached to traditional federal labor law, especially in the years after World War II. Once an entire industry (or at least, a critical mass of it) is organized, labor costs for each employer in the industry can be equalized. Theoretically, no single employer need compete for the consumer’s dollar based on the cost of labor once each employer must pay the same price for it.ⁿ¹¹²

The main problem with this paradigm is that industrial unionism is dead or dying in industries that are global in nature. n113 As physical and cultural barriers to the movement of capital have fallen, the potential labor markets of many industries have grown. In these industries, the labor pool now includes low-wage, non-union workers abroad. Many of these workers are desperate for any work at any wage. Unless these workers are successfully organized, and unless their wages are substantially raised, even successful large-scale organizing of workers unions in discrete parts of the U.S. economy could be for naught.

(b) *Non-strike alternatives.* Traditionally, workers dissatisfied with terms and conditions of employment imposed by an employer resorted to their economic weapons of self-help, especially the strike and the picket line. But the harsh realities imposed by the global marketplace for wage labor in so many industries today means that neither the strike nor the picket line poses the economic threat it used to. n114 More than ever, these are weapons of last, and sometimes futile, resort. Alternative self-help tactics, however, have been developed, and [1113 labor's experimentation with them over the past ten to fifteen years has been promising.

For some time, unions have successfully undertaken a variety of "campaigns" designed "to challenge management in the workplace, in the community, in the board room, and on Wall Street." n115 In a corporate campaign, consumers may be urged to boycott the employer's products and take other actions aimed at influencing corporate shareholders; sometimes, union members buy stock in a company solely for the purpose of gaining a forum at shareholders' meetings. In a community campaign, members of churches and temples, civic organizations, and other community groups may be urged to contact the employer to express their concern about its labor relations policies and to participate in rallies and other public events designed to draw unfavorable attention to the employer's behavior. And in a traditional advertising campaign, members of the public at large may be urged to see things the union's way through radio and television spots.

For example, Teamster delivery drivers at Gruma Corp. used variants of both the corporate and community campaigns—the former, by appealing to consumers to boycott Mission- and Guerrero-label tortillas; n116 the latter, by recruiting and deploying a group of UCLA students to go into the Hispanic communities of East and South Central Los Angeles to build support for the boycott. n117

Moreover, taking a cue from members of academia, some unions are reaching across borders to build solidarity abroad for labor disputes having effects at home. For example, at the New Otani Hotel in Los Angeles' Little Tokyo, officials of the Hotel Employees and Restaurant Employees Union traveled to Japan to rally support among Japanese labor leaders and demonstrate against Kajima Corp., the hotel's owner. n118 It was a small step, but an important one.

As long-time California labor leader Jack Henning put it: “The only answer to global capitalism is global unionism.” n119

(c) *Avoiding official legal institutions.* Latino workers have overcome tremendous legal obstacles to form and join their unions. The [1114 built-in shortcomings of federal labor law in the late Twentieth Century have been well-documented; it hardly needs to be pointed out again that the structure of the National Labor Relations Act itself often stands in the way of the effective enforcement of the very employees’ rights that the law is supposed to protect. n120 Moreover, up to half of Latino workers are recent immigrants; it is no secret that the entry, residency, and citizenship requirements of the Immigration and Naturalization Act, not to mention their unforgiving application, place high hurdles between Latinos and the jobs they seek to gain and maintain in the United States. n121 Whether documented or undocumented, the choice by so many Latino workers to take up union activism defies the conventional wisdom that immigrants tend to avoid getting involved in workplace or community affairs for fear of deportation, calling unwanted attention to themselves, or both. n122

Instead, what these workers avoided was getting involved in the government bureaucracies that administer federal labor and immigration law. As to labor law, organizers of Latino workers consciously preferred to place their hopes in self-help tactics rather than in the NLRB. LA MAP made this “non-NLRB” strategy an explicit organizing principle. n123 As to immigration law, there is little organizers could do to influence the policies and enforcement practices of the Immigration Naturalization Service. But they could recognize that, despite the formidable barriers posed by the statute and the INS, Latino workers inevitably come to the U.S. and find work here. n124 The very fact that Latino immigrants come in spite of everything done through legal institutions to deter them from doing so suggests the strongest desire to improve their own lives, and the potential for doing so without official government assistance.

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III. SOME CHALLENGES FACING A LATINO-LED LABOR MOVEMENT

For everything promising that I have mentioned about organizing among Latinos, there is much that is unsettling. At least three serious challenges confront the labor movement in general and a Latino-led labor movement in particular.

First, the arduous task of labor organizing has a long, long way to go before it is in a position to help even half of the low-wage workforce, whether in Los Angeles County or across the United States, whether Latino or otherwise. At barely 10 percent of the private sector non-agricultural workforce, the labor movement remains on the margins of the working lives of most Americans and is likely to remain so for some time to come. Although the AFL-CIO and its affiliated unions have made real progress under John Sweeney, “the road ahead

remains unsure and bumpy. And the residual weight of decades past makes the ultimate success of Sweeney's project anything but certain" n125

Indeed, there are already significant casualties. Only a few years after it started, LA MAP is all but dead, mortally wounded by the inability of disparate Southern California unions to put aside their parochial interests in order to pursue the broader organizing agenda conceived by its framers. n126 So notwithstanding the contributions of Latino organizing successes, labor's first, and perhaps overwhelming, challenge will be merely to sustain the modest momentum it has achieved during the 1990s.

Second, to be truly successful, labor has to be inclusive; that is, it must build coalitions among all workers, not just Latinos (and for that matter, not just workers living in the U.S.). As Professor Rudy Acuña and others have noted, even in Los Angeles County, the longstanding tensions between Latinos and Anglos are now supplemented by potentially greater tensions between and among Asians, Blacks and Latinos. n127 These tensions show up in many places, including the struggle by poor people for decent jobs at decent wages. Indeed, one of the greatest challenges facing communities of color, including Latino communities, is how to achieve "interracial justice" in an era when their growing influence causes other such communities of color to feel displaced. n128 A Latino-led labor movement that improves the lives of [1116 Latino workers at the expense of, or at the perceived expense of, other "others," is doomed to suffer the same insularity that the Anglo-led labor movement has.

Finally, labor's toughest challenge is not organizing workers, but rather, organizing a new vision of social justice. Once labor recruits all the new members it now plans to get, what is it going to do with them? n129 The tension is age-old. During the Nineteenth Century, organized labor saw itself as a means toward the end of civic republicanism, and for a time, the end of capitalism itself; during the Twentieth Century, it saw itself as means toward "business unionism," working in partnership with the owners of capital. n130 It remains to be seen whether, during the Twenty-first Century, labor will be about more than the pursuit of bigger paychecks and better benefits. As one observer has put it: "Are you organizing workers to empower themselves and confront employers or just building dues-paying units and looking for a seat at the table?" n131

Even the brightest lights in the labor movement don't yet know. "It's too early to devise a strategy," explains SEIU President Andy Ster "First you've got to get people into the boat and get them rowing. We still don't have the hundreds of organizers we need going out every night; still don't have our pension plans where they should be; still don't have enough experience in winning strikes with community support." n132

But if the beginning of a new era is too soon to develop a new vision of social justice, when will it be? If the heyday of Cesar Chavez and the United Farm Workers is any indication, there is some reason to believe many people at the core of labor's new movement, especially Latino workers, hunger for more than

business unionism; they also want justice, morality, and spirituality. n133 It would seem that the time to dis [1117 cuss organized labor's role, if any, in pursuing these goals is now.

CONCLUSION

I began this essay by discussing the significance of the UPS strike during the summer of 1997 for Latino workers. For me, this dispute signaled the great potential of the new American labor movement, and with it, the important role that Latino workers are destined to play. Like the other great organizing victories of the 1990s, the UPS strike demonstrated not only that Latino workers have much to gain from the labor movement, but also that the labor movement has much to gain from Latino workers. Octavio Paz says that modern man "never surrenders himself to what he is doing," and that "the profoundest part" of him "always remains detached and alert." n134 As a law professor who has the luxury of examining "the profoundest part" of women and men at work, I am finding that there is no better place to study the interdependence of Latino workers and the labor movement than Los Angeles, where experiments in the future are being conducted every day.

NOTES:

1. Octavio Paz, *The Labyrinth of Solitude* 204 (Grove Weidenfield ed., 1985, trans. Lysander Kemp).
2. See, e.g., Karen Kaplan, *Teamsters Strike UPS*, L.A. Times, Aug. 4, 1997, at A-1.
3. See, e.g., Jube Shiver, Jr., *UPS, Teamsters Reach Accord*, L.A. Times, Aug. 19, 1997, at A-1.
4. Occasionally, however, a labor dispute is so momentous that it is credited with redefining labor relations for the generation in which it occurs. During the early 1980s, the mass firing of striking air traffic controllers by President Ronald Reagan, see, e.g., Samuel Estreicher, *Labor Law Reform in a World of Competitive Markets*, in Matthew Finkin, *The Legal Future of Employee Representation* 13, 19 (1994), and the plunging of Continental Airlines into bankruptcy by carrier chief Frank Lorenzo, see, e.g., Ray Scippa & Myrtle Davidson Malone, *Point to Point: The Sixty Year History of Continental Airlines* (1995), fit this bill because each event ended the long-term careers of thousands of unionized employees.
5. Once a pillar of American industry, labor unions now face irrelevance, if not extinction. From their peak in the fifties, when they signed up roughly one in three American workers, unions now represent only one in six. Not counting public sector employees, the figure is closer to one in 10. If private sector unions continue to decline at the present rate, they will represent less than 5 percent of the workforce by 2005.
Sean Reilly, *The Case for Unions*, Wash. Monthly, July/Aug. 1995, at 26.
6. See Christopher David Ruiz Cameron, *New Face of American Labor*, J. Comm., Aug. 29, 1997, at 8A.
7. See *id.*
8. Shiver, *supra* note 3, at A-1.
9. See, e.g., Dan Weikel, *Labor Day Rally Backs Drivers' Strike*, L.A. Times, Sept. 3, 1996, at B-1 (noting that then U.S. Secretary of Housing and Urban Development Secretary Henry Cisneros, U.S. Reps. Esteban Torres and Maxine Waters, California Lt. Gov. Gray Davis, state Sens. Richard Polanco and Tom Hayden, and L.A. Dist. Atty. Gil Garcetti had each signed such a pledge).
10. See, e.g., L.A. Union Organizing Project Gets Funding from Teamsters, 1996 Daily Lab. Rep. (BNA) No. 190, at D-11 (Oct. 1, 1996); see also Nancy Rivera Brooks, *Hard Pressed: Truckers' Strike Has Some Areas Low on Tortillas*, L.A. Times, Aug. 8, 1996, at D-1 (detailing effects of Teamsters' strike against Gruma Corp.).

11. Multi-Union Organizing Effort in Los Angeles Aims at Immigrant Workers, 1995 Daily Lab. Rep. (BNA) No. 166, at A-5 (Aug. 28, 1995) (remarks of AFL-CIO California Immigrant Workers' Association Organizer Joel Ochoa).

12. See, e.g., Los Angeles Manufacturing Organizing Project, Organizing the Future 2 (July 20, 1995) (on file with author) [hereinafter LA Map, Organizing the Future; Mary Helen Berg, Labor Leaders Aim Efforts at Immigrants, L.A. Times, City Times, Oct. 30, 1994, at 1, 19.

13. See, e.g., Nancy Cleeland, Home Care Workers Vote for Union a Landmark for Labor, L.A. Times, Feb. 26, 1999, at A-1; Tom Gilroy, Los Angeles Home Care Workers Vote for Service Employees, Union Announces, 1999 Daily Lab. Rep. (BNA) No. 38, at AA-1 (Feb. 26, 1999).

14. See, e.g., Stuart Silverstein, Undaunted by Setbacks, Truckers Look to Union, L.A. Times, Feb. 17, 1997, at A-1 [hereinafter Silverstein, Undaunted; Jeff Leeds, What's Up, Dock? Trucking Dispute Prompts Changes at Local Ports, L.A. Times, May 21, 1996, at D-1; Stuart Silverstein & Jeff Leeds, Independent Truckers, Union Form a Convoy, L.A. Times, May 11, 1996, at D-1.

15. See, e.g., Tom Gilroy, ALJ Rules in Favor of New Otani Hotel in Long-Running Fight with HERE Local, 1997 Daily Lab. Rep. (BNA) No. 157, at D-13 (Aug. 14, 1997); International Group Calls for Boycott of New Otani Hotels, 1997 Daily Lab. Rep. (BNA) No. 129, at D13 (July 7, 1997); Harry Bernstein, Hotel Needs to Deal Straight with Workers, L.A. Times, Dec. 19, 1996, at B-9.

16. See, e.g., Jill Leovy, Leaf Blower Ban Takes Effect Today, L.A. Times, Feb. 13, 1998, at B-1; Bettina Boxall, Leaf Blower Issue a Clash of Expectations, Realities, L.A. Times, Jan. 11, 1998, at A-1.

17. See, e.g., David Bacon, Unions and the Upsurge of Immigrant Workers, dbacon@igc.apc.org (Dec. 3, 1997) (online labor column).

18. See, e.g., Marc Cooper, Labor Deals a New Hand, Nation, Mar. 24, 1997, at 11-12 (remarks of AFL-CIO President John Sweeney) (describing Las Vegas as "the hottest union city in America") [hereinafter Cooper, Labor Deals.

19. See, e.g., Scott Wilson, Hispanic Community Supports Custodians in Labor Dispute, Wash. Post, Nov. 7, 1997, at B-5 (describing union drive by 11 maintenance workers at 590-unit apartment complex in Prince George's County as response to employer's having both made them clean sewers without protective gear and failed to grant pay raise in at least 2 years).

20. See, e.g., Bill Lambrecht, Influx of Hispanic Workers Alters Culture of Small Southwestern Missouri Towns, St. Lou. Post-Dispatch, Dec. 28, 1997, available in LEXIS, News Library, Slpd File (estimating 60% to 65% of workforce at 2 Hudson Foods, Inc., plants in Noel, Mo., to consist of recent Mexican immigrants).

21. See, e.g., Sam Roberts, A New Face for American Labor, Y. Times Mag., May 10, 1992, at 15 (profiling Dennis Rivera, head of Local 1199 of Drug, Hospital and Health Care Employees Union).

22. See, e.g., Howard Fullerton, Labor Force 2006: Slowing Down and Changing Composition, summarized in 1997 Daily Lab. Rep. (BNA) No. 233, at D-24 (Dec. 4, 1997) (excerpting Bureau of Labor Statistics' November 1997 Monthly Labor Review) (projecting Hispanics to become second-largest racial group in workforce by 2006); Hispanic Workers Could Soon Outnumber Blacks, 156 Lab. Rel. Rep. (BNA) 501 (Dec. 12, 1997) (same).

23. Victor M. Valle & Mary Lau Valle, Recipe of Memory: Five Generations of Mexican Cuisine 172, 175 (1995).

24. See id. at 172.

25. See id. at 41-42.

26. See id. at 173.

27. See id.

28. See, e.g., Laura Esquivel, Like Water for Chocolate 45-46, 49-50, 52-53 (Carol Christensen & Thomas Christensen trans., 1992) (sharing complex recipe for quail in rose petal sauce).

29. See, e.g., Juan Gomez-Quiñones, Mexican American Labor: 1790-1990 39 (1994); Rodolfo F. Acuña, Occupied America: A History of Chicanos 141 (3d ed. 1988); Christopher David Ruiz Cameron, "Friends" or "Enemies"? The Status of Mexicans and Mexican-Americans in the United States on the Sesquicentennial of the Treaty of Guadalupe Hidalgo, 5 Sw. J.L. & Trade Am. 5, 13 (1998).

30. See Gomez-Quiñones, supra note 29, at 3.

31. We want the Mexicans because we can treat them as we cannot treat any other living ma We can control them at night behind bolted gates, within a stockade eight feet high, surrounded by barbed wire. We make them work under armed guards in the fields.

Gomez-Quiñones, supra note 29, at 3 (quoting agricultural employer) (citation omitted).

32. See, e.g., Gomez-Quíñones, *supra* note 29, *passim*. A rich literature documents the place of Latino workers, especially Mexicanos, in the U.S. economy. For examples focusing on agricultural workers, see, e.g., Mark Reisler, *By the Sweat of Their Brow: Mexican Immigrant Labor in the United States, 1900-1940* (1976); Carey McWilliams, *Factories in the Fields* (1939); Dennis Nodin Valdés, *Betabeleros: The Formation of an Agricultural Proletariat in the Midwest, 1897-1930*, 30 *Lab. Hist.* 536 (1989). For an example focusing on domestic workers, see Mary Romero, *Maid in the USA* (1994).

33. Of course, Latino workers are not a homogeneous group. In 1980, the Census Bureau reported that the Hispanic workforce consisted of 6.1 million people, of which 57.4% were Mexican, 11.8% were Puerto Rican, 6.5% were Cuban, and 22.9% were “other” Hispanics. In 1990, the Hispanic workforce consisted of 10.1 million people, of which 59.4% were Mexican, 10.9% were Puerto Rican, 5.9% were Cuban, and 24.8% were “other” Hispanics. See Matthias H. Wagener, *Survey of U.S. Hispanic Labor* 17 (Aug. 1997) (compiled from U.S. Census Bureau, U.S. Statistical Abstract, and California Census of Population data) (on file with author) [hereinafter *Survey of U.S. Hispanic Labor*].

In fact, the broad coverage of the term “Hispanic” explains why in both text and tables my percentages of workers, as identified by race, add up to more than 100%. In relying on data compiled by the U.S. Census Bureau, I am compelled to rely also the Bureau’s definition of the term “Hispanic,” which refers to individuals of Latin origin of any race. This means, for example, that an individual who is both Black and Puerto Rican would be counted twice: once as “Black,” plus once as “Hispanic.”

34. See *Survey of U.S. Hispanic Labor*, *supra* note 33, at 15.

35. See *id.* at 14.

36. See *id.* at 66 (graph).

37. See *id.* at 66-67 (compiled from U.S. Statistical Abstract data).

38. See *id.* at 55 (compiled from California Census of Population data).

39. See *id.* at 54-55 (compiled from California Census of Population data).

40. See *id.* (construct graph from bar charts).

41. See Los Angeles Manufacturing Action Project, *Manufacturing in Los Angeles: Opportunities for Organizing* 14-15, 18 (June 24, 1994) (on file with author) [hereinafter *LA Map, Organizing Opportunities*].

42. For example, whereas in 1993 the motion picture industry accounted for 3% of all jobs in Los Angeles County, the manufacturing sector accounted for 19% of all such jobs. See *LA Map, Organizing Opportunities*, *supra* note 41, at 6.

43. See *LA Map, Organizing Opportunities*, *supra* note 41, at 4-5; *LA Map, Organizing the Future*, *supra* note 12, at 2; see also, e.g., Berg, *supra* note 12, at 19 (describing Los Angeles County as “industrial heartland” of U.S.).

44. See *LA Map, Organizing Opportunities*, *supra* note 41, at 12.

45. See *id.*

46. See *id.* at 15, 18; *LA Map, Organizing the Future*, *supra* note 12, at 2.

47. See *LA Map, Organizing Opportunities*, *supra* note 41, at 5.

48. See Berg, *supra* note 12, at 1; James Flanigan, *Remaking L.A. into the New City of Big Shoulders*, *L.A. Times*, Nov. 15, 1995, at D-1.

49. See *Forecast Predicts Manufacturing Jobs in Los Angeles Area Topping 1 Million Mark*, 1997 *Daily Lab. Rep.* (BNA) No. 124, at D-20 (June 27, 1997) (reporting prediction that manufacturing employment in 5-county Southern California area will reach 1,075,700 by 2000).

50. See, e.g., Jim Newton, *3 Huge Projects Could Define 21st Century L.A.*, *L.A. Times*, Dec. 14, 1997, at A-1, A-44.

51. See Gomez-Quíñones, *supra* note 29, at 3.

52. *Id.*; see also Rodolfo F. Acuña, *Anything But Mexican: Chicanos in Contemporary Los Angeles* 109 (1996) (“What many Euroamericans regarded as the ‘Great American Desert’ was thus transformed by Mexican labor although Euroamericans remember only the role played by North American irrigation and drainage technology”).

53. See *Survey of U.S. Hispanic Labor*, *supra* note 33, at 20.

54. See *id.* at 19.

55. See *id.* at 58.

56. See *id.* at 57.

57. See, e.g., *LA Map, Organizing Opportunities*, *supra* note 41, at 9-11; Elizabeth Douglass, *Northrop to Lay Off 2,700 in Downsizing*, *L.A. Times*, Aug. 25, 1998, at A-1, A-15.

58. See Berg, *supra* note 12, at 19.

59. See *id.* (remarks of then-AFL-CIO Regional Director and LA MAP Co-Founder David Sickler).

60. See LA Map, *Organizing the Future*, *supra* note 12, at 2.

61. LA Map, *Organizing Opportunities*, *supra* note 41, at 30.

62. See *id.* at 29-30; LA Map, *Organizing the Future*, *supra* note 12, at 4-5. See also *Organizing Effort Aims at Immigrant Workers*, 150 Lab. Rel. Rep. (BNA) 24, 24 (Sept. 4, 1995) (describing Alameda Corridor as “ground zero” for organizing immigrant Latinos who make up most of corridor’s 300,000 manufacturing employees) [hereinafter *Organizing Effort*].

63. LA Map, *Organizing Opportunities*, *supra* note 41, at 29-30.

64. See Christopher David Ruiz Cameron, *The Wages of Syntax: Why the Cost of Organizing a Union Firm’s Non-Union Competition Should Be Charged to “Financial Core” Employees*, 47 Cath. U.L. Rev. 979, 983-84, 993-96 (1998) [hereinafter *Cameron, Wages of Syntax*].

65. See *Survey of U.S. Hispanic Labor*, *supra* note 33, at 9.

66. See *id.*

67. Although the survey data show the wages of union workers, across all races, to be 32% greater than those of non-union workers, this figure, like the others reported here, does not necessarily mean that unionization is the sole cause of the gap; other variables associated with unionization are also responsible. According to labor economists, the extent of union density does cause higher wages, but the actual differential varies depending upon the particular industry and geographical area. See *Cameron, Wages of Syntax*, *supra* note 64, at 997-99.

68. See *Survey of U.S. Hispanic Labor*, *supra* note 33, at 9 (graph).

69. See *id.* at 7.

70. See *id.* at 6.

71. See *id.* at 11 (graph).

72. See *id.* at 11.

73. See *id.* at 10 (graph).

74. See *Cameron, Wages of Syntax*, *supra* note 64, at 980 (citations omitted).

75. See *id.* at 979 (citations omitted).

76. As one organizer has put it, “These things are very slow to turn around, like an ocean liner.” Cooper, *Labor Deals*, *supra* note 18, at 15 (remarks of Communication Workers of America’s chief organizer). To his credit, Sweeney has helped stem the longstanding hemorrhage of union membership. A year and-a-half into his presidency, unions had gained more than 50,000 members. *Id.* And in 1998, AFL-CIO unions organized 475,000 new members. Michelle Amber, *AFL-CIO Organized 475,000 in 1998, But Net Gain Only 65,000*, Sweeney Says, 1999 Daily Lab. Rep. (BNA) No. 33, at A-14 (Feb. 19, 1999). But this good news was tempered by the continuation of both losses among unionized workers and gains among non-unionized workers, which produced a net increase gain of just 65,000 new members. *Id.*

77. Marc Cooper, *Labor’s Hardest Drive: Organizing a New Politics*, *Nation*, Nov. 24, 1997, at 16, 18 [hereinafter *Cooper, Labor’s Hardest Drive* (remarks of unidentified international union representative)].

78. See *Bacon*, *supra* note 17.

79. See, e.g., Kate Bronfenbrenner, *From the Bottom Up: Building Unions and Building Leaders Through Organizing and First Contract Campaigns* iii (Apr. 30-May 2, 1998) (unpublished executive summary for UCLEA/AFL-CIO Education Conference, San Jose, Calif.) (reporting average win rates as high as 78% in bargaining units with a majority of workers of color where 10 or more “union building tactics” were used).

80. See LA Map, *Organizing the Future*, *supra* note 12, at 2.

81. See, e.g., *Bacon*, *supra* note 17. According to labor journalist Bacon:

One of the most important of the immigrant rebellions was the yearlong strike by southern California drywallers, who put up the interior walls in new homes. In 1992 and (1993), from the Mexican border north to Santa Barbara, an area of 5000 square miles, these mostly-Mexican immigrants were able to stop all home construction. Workers ran their movement democratically, from the bottom-up. They defied the police and the Border Patrol, blockading freeways when their car caravans were roused as they traveled to construction sites.

When the drywallers picketed, their lines often numbered in the hundreds, walking onto construction sites and talking non-strikers into putting down their tools.

Id.

82. The contrast between bottom-up and top-down organizing is portrayed in the film *Norma Rae*, in which the story of a successful drive to unionize a Southern textile mill begins with the arrival of a professional organizer from the big city. He tries to court workers by passing out pro-union literature at the factory gate. The effort is a miserable failure until local resident and mill worker Norma Rae, an acquaintance, develops some interest, and later, a passion, for the union cause. See *Norma Rae* (Twentieth Century Fox 1979) (feature-length motion picture starring Academy Award-winning actress Sally Field in title role).

83. See *Organizing Effort*, supra note 62, at 24.

84. See, e.g., Map Notes, July 1, 1995, at 1 (discussing role of Director of Hispanic Ministries for Archdiocese of Los Angeles Father Pedro Villaroya, C.M., “in beginning to place the LA MAP organization inside the Archdiocese of Los Angeles” and “generating a list of 55 Catholic parishes that are situated in the Alameda Corridor”). See also *LA Map, Organizing the Future*, supra note 12, at 3 (“The ethnic composition and geographic concentration of the targeted workforce means that the strategic involvement of community based organizations like the Catholic Church and Mexican State Federations is crucial to a winning combination”).

85. Conversation with AFL-CIO California Immigrant Workers Association Organizer Joel Ochoa (Mar. 1992). See also, e.g., Nancy Cleeland, *Home for the Holidays*, L.A. Times, Dec. 25, 1997, at A-3 (describing close familial, social, and financial ties between expatriate Mexicans living in Santa Ana, Calif., and the permanent residents of Granjenal, Michoacan).

86. See *Bacon*, supra note 17.

87. *Id.*

88. Hector Delgado, *New Immigrants, Old Unions: Organizing Undocumented Workers in Los Angeles* 37 (1993) (remarks of Amalgamated Clothing & Textile Workers Union organizer Nestor Rivas) (emphasis added) [hereinafter *Delgado, New Immigrants, Old Unions*].

89. Prominent Community Scholars included UCLA School of Urban Planning Professors Gilda Hass (the Community Scholars’ coordinator) and Goetz Wolff and Center for Labor Research and Education Executive Director Kent Wong. They also served on LA MAP’s advisory board. See *LA Map, Organizing Opportunities*, supra note 41, at 30.

90. See *LA Map, Organizing Opportunities*, supra note 41.

91. See *LA Map, Organizing the Future*, supra note 12 (attachment 1).

92. See *Brooks*, supra note 10, at D-10 (before the strike, Gruma Corp. reportedly paid the typical truck driver \$500, including commissions, for a 6-day work week against projected sales of about \$500 million for the year). Union officials complained that the pay was closer to \$200 to \$300 per week. See *Weikel*, supra note 9, at B-1.

93. See *id.*

94. Conversation with LA MAP Project Coordinator Peter Olney (Aug. 1996).

95. See *Brooks*, supra note 10, at D-10 (“The East Los Angeles plant is the most technologically advanced tortilla-making facility in the world, churning out over 15 million tortillas a day.”).

96. See David M. Eisenberg, Ronald C. Kessler, Cindy Foster, Frances E. Norlock, David R. Calkins & Thomas L. Delbanco, *Unconventional Medicine in the United States—Prevalence, Costs, and Patterns of Use*, 328 *New Eng. J. Med.* 246, 248 (1993) [hereinafter *Eisenberg, et al., Unconventional Medicine*; see also, e.g., Daniel J. Hufford, *Folk Medicine in Contemporary America*, in *Herbal and Magical Medicine: Traditional Healing Today* 18 (James Kirkland, Holley F. Matthews, C.W. Sullivan III & Karen Baldwin eds., 1992) (“Patients on unorthodox treatment [for cancer ... tended to be white ... and better educated ... than patients on conventional treatment.”) (quoting Barrie Cassileth, et al., *Contemporary Unorthodox Treatments in Cancer Medicine: A Study of Patients, Treatments, and Practitioners*, *Annals of Internal Med.* 102, 105-12 (1984)).

97. *Eisenberg, et al., Unconventional Medicine*, supra note 96, at 246.

98. *Id.* at 248. These unconventional therapies were:

[Type of Therapy (Other than exercise or prayer)/ Percent Using in Last 12 Months: Relaxation techniques, 13%; Chiropractic, 10%; Massage, 7% Imagery, 4%; Spiritual healing, 4%; Commercial weight-loss programs, 4%; Lifestyle diets (e.g., macrobiotics), 4%; Herbal medicine, 3%; Mega-vitamin therapy, 2%; Self-help groups, 2%; Energy healing, 1%; Biofeedback, 1%; Hypnosis, 1%; Homeopathy, 1%; Acupuncture, <1%; Folk remedies, <1%.

Id. at 248.

99. *Id.*

100. *Id.* at 250; see also Terence Monmaney & Shari Roan, *Hope or Hype?*, L.A. Times, Aug. 30, 1998, at A-1 (describing alternative medicine as “an \$18 billion industry edging into the mainstream, with California leading the way”).

101. *Id.*

102. *Id.* at 251.

103. *Id.* at 249, 250.

104. See, e.g., *Guia Medica de Remedios Caseros* (Prevention Magazine eds., 1995); Michael Moore, *Los Remedios: Traditional Herbal Remedies of the Southwest* (2d ed. 1990); *Roots of Healing: The New Medicine* (Andrew Weil & Michael Toms eds., 1997); Annette Sandoval, *Homegrown Healing: Mexican Home Remedies* (1998).

My great-grandmother, Refugio Presa (“Mama Cuca”) Ruiz, learned many remedios caseros in her hometown of Aguascalientes, in the Mexican state of the same name, and practiced them while raising her family in Gardena, Calif. For a college project, my cousin Shannon Carr Davey interviewed Mama Cuca and catalogued a number of her remedios caseros, including the use of tomato poultices to cure migraine headaches. My grandfather, Frank X. Ruiz, suffered from severe migraines. He recalled having endured Mama Cuca’s treatments, but not having enjoyed them. See Shannon Carr, *Beliefs of Mama Cuca* 3-4 (Spring 1985) (unpublished Folklore 241 term paper, El Camino College, Torrance, Calif.) (on file with author).

105. Letter to Editor from Diane Korte, 329 *New Eng. J. Med.* 1141, 1200 (1993). To the same effect were the sentiments of a reader of *Consumer Reports*, which in 1994 undertook its own investigation of “homeopathic” medicine: “Homeopathy survives because it works and people want it.... I do everything I can to avoid hospitals, chemicals, medicine, and surgery. I see my allopath for medical tests; treatment, when necessary, comes from my licensed M.D. homeopath. God save me from the butchers.” Letter to Editor from Name Withheld, *Consumer Reports*, June 1994, at 6.

106. See, e.g., Paul C. Weiler, *Governing the Workplace* 241-52 (1990) (critiquing merits of last, unsuccessful effort by Congress in 1978 to undertake comprehensive reform of National Labor Relations Act).

107. See, e.g., Thomas Geohegan, *Which Side Are You On? Trying to Be for Labor When It’s Flat on Its Back* 163 (1991) (criticizing “post-strike America” as place where “the rank-and-file stay home and send out their lawyers”).

108. Richard Delgado & Jean Stefancic, *Failed Revolutions: Social Reform and the Limits of the Legal Imagination* (1994).

109. *Id.* at xvi.

110. See Weiler, *Governing the Workplace*, *supra* note 106, at 108-14, 238-41.

111. LA Map, *Organizing the Future*, *supra* note 12, at 2-3.

112. See, e.g., Cameron, *Wages of Syntax*, *supra* note 64, at 990.

113. See, e.g., Michael Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, in Finkin, *supra* note 4, at 62-63.

114. See, e.g., Michael Bologna, *Unions Pursuing Nontraditional Strategies for Leveraging Labor Peace with Employers*, 1998 *Daily Lab. Rep. (BNA)* No. 3, at D-13 (Ja 6, 1998) (remarks of AFL-CIO Department of Corporate Affairs Director Ron Blackwell); *Academics, Union Leaders Examine Union Strikes, Contract Campaign Strategies*, 1997 *Daily Lab. Rep. (BNA)* No. 9, at D-13 (Ja 14, 1997) (remarks of Frank Borgers, labor researcher, University of Alabama, Birmingham).

115. Bologna, *supra* note 114, at D-13.

116. See, e.g., L.A. *Organizing Project Gets Funding from Teamsters*, 1996 *Daily Lab. Rep. (BNA)* No. 190, at D-11 (Oct. 1, 1996) (remarks of LA MAP Project Coordinator Peter Olney).

117. Conversation with LA MAP Project Coordinator Peter Olney (Aug. 1996).

118. See Toshio Aritake, *Sweeney Says New Otani Officials in Japan Did Not Engage in Serious Talks on Dispute*, 1997 *Daily Lab. Rep. (BNA)* No. 69, at D-16 (Apr. 10, 1997); Toshio Aritake, *Japanese Labor Group Says Dispute at Los Angeles Hotel “Tough to Settle,”* 1997 *Daily Lab. Rep. (BNA)* No. 41, at D-14 (Mar. 3, 1997).

119. Joyce Cutler, *Panelists Say Workers Need to Form Alliances to Prevent Erosion of Wages*, 1996 *Daily Lab. Rep. (BNA)* No. 227, at D-14 (Nov. 25, 1996) (remarks of former California AFL-CIO Executive Secretary Jack Henning).

120. See, e.g., Christopher D. Cameron, *Why Labor Unions Are Failing*, *J. Comm.*, Aug. 10, 1992, at 8.

121. See, e.g., Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 *Ind. L.J.* 1111, 1136-40 (1998) (contrasting simultaneous U.S. policies favoring importation of low-wage Mexican labor under Bracero Program and expulsion of same under Operation Wetback).

122. For an explanation why the lack of documents did not significantly interfere with an organizing drive among a largely undocumented Latino workforce at a waterbed factory in Los Angeles, see Delgado, *New Immigrants, Old Unions*, supra note 88, at 8-9, 57-99.

123. See LA Map, *Organizing the Future*, supra note 12, at 3; accord Cooper, *Labor Deals*, supra note 77, at 12 (remarks of Hotel & Restaurant Employees Local 226 Secretary-Treasurer John Wilhelm) (The success of Las Vegas organizing drives is “proof that you do not have to go through the useless L.R.B. mess to come out with a victory.”).

124. For a discussion of the familial and social networks that give many immigrant Latinos a leg up in finding jobs, see Abigail Goldman, *A Hidden Advantage for Some Job Seekers*, L.A. Times, Nov. 28, 1997, at A-1 (contrasting successful job search of immigrant Mexican Pablo Cifuntas with unsuccessful job search of native-born African-American Flossie Bradford).

125. See Cooper, *Labor’s Hardest Drive*, supra note 77, at 16.

126. See Silverstein, *Undaunted*, supra note 14, at A-1, A-24 (“Last year, [LA MAP] drew notice with its bold proposal to link a coalition of unions in a campaign to organize the hundreds of thousands of immigrant workers in the area along the Alameda Corridor When it came time to kick in money, though, most of the support fell apart.”).

127. See Acuña, *Anything But Mexican*, supra note 52, at 127-33, 149-54.

128. See, e.g., Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering in Post-Civil Rights America*, 95 Mich. L. Rev. 821 (1997) (discussing suit by Chinese Americans to invalidate San Francisco court-ordered school desegregation program won by NAACP); Eric K. Yamamoto, *Conflict and Complicity: Justice Among Communities of Color*, 2 Harv.-Lat. L. Rev. 495 (1997) (discussing same and suit by Latino and Asian groups to invalidate Oakland affirmative action program favored by Black contractors). See also George A. Martinez, *African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 Chicano-Lat. L. Rev. 213, 215 (1998) (advocating that Mexican-Americans build coalitions with other people of color by rejecting their official legal designation as White).

129. See Cooper, *Labor’s Hardest Drive*, supra note 77, at 18.

130. See, e.g., Christopher D. Cameron, *How the “Language of the Law” Limited the American Labor Movement*, 25 U.C. Davis L. Rev. 1141, 1147 (1992) (book review) (identifying the goals of “business unionism” as “‘delivering the goods’ at the workplace level by providing higher wages and benefits to workers as well as a voice for them at the bargaining table and on the shop floor”) (citations omitted).

131. See Cooper, *Labor’s Hardest Drive*, supra note 77, at 18.

132. Id. (remarks of Service Employees International Union President Andy Stern).

133. See generally, e.g., Peter Matthiessen, *Sal Si Puedes: Cesar Chavez and the New American Revolution Union* (1969).

134. Paz, supra note 1, at 204.

10. Margaret E. Montoya,* *Introduction: LatCrit Theory: Mapping Its Intellectual and Political Foundations and Future Self-Critical Directions*, 53 MIAMI L. REV. 1119 (1999)

The third annual gathering of LatCrit scholars has resulted in this cluster of essays and articles that continue the work of defining the foundations and the future directions of this legal scholarship movement. As described in some of the articles within this cluster, LatCrit has had the benefit of learning valuable lessons from other slightly older schools of critical legal theory, most particularly from the Critical Race Theory (“CRT”) Workshop. The LatCrit movement has been strengthened because scholars identified primarily with CRT working with and along-side scholars identified primarily with LatCrit have struggled to recognize, name and address the hetero-normativity and racial binarism which plague the U.S. society and its structures, even progressive groups. n1

LatCrit has much to gain from continuing its interactions with other progressive scholars working in other disciplines. In this cluster, Professors Kevin Johnson and George Martínez encourage LatCrit scholars to [1120 recognize the roots of LatCrit within the established field of Chicana/o studies. n2 LatCrit has already integrated a few prominent Chicana/o scholars from other disciplines into its annual meetings. Antonia Castañeda n3 spoke at LatCrit II on the mis/use of children as translators for non-English speaking family members; Tomás Almaguer n4 and Rudolfo Acuña n5 will be keynote speakers at LatCrit IV. All are established scholars within the Chicana/o Studies movement.

As LatCrit examines its connections to other scholarly movements, Stephanie Phillips reminds us that different forms of exclusion are parts of the histories of those movements and organizations. CRT, Chicana/o Studies and other scholarly groups have had to deal openly with issues of such exclusionary practices as homophobia, sexism and/or subtle forms of racism. n6 Some progressive organizations have dealt with such practices quietly by recruiting Outsider scholars (such as scholars of color and Queers n7) to join as prominent participants in conferences as [1121 well as in the directorship bodies of the organizations. Occasionally groups have been formed partially in reaction to the deaess of the majority to the concerns of minority viewpoints. While some might describe LatCrit’s relation to CRT in those terms, it also describes the history of other groups. For example, in 1984 many of the Chicanas fighting against the sexism in Chicano Studies formed MALCS, *Mujeres Activas en Letras y Cambio*

* Professor of Law, University of New Mexico School of Law. As always, kudos to Frank Valdés, Lisa Iglesias and the other organizers of the Miami LatCrit meeting which I, unfortunately, could not attend.

Social [Women Active in Letters and Social Change; fifteen years later the group continues to sponsor a summer workshop and a journal of Chicana studies. n8

In the Afterword that follows, I caution LatCrits against accepting the body of scholarship produced by Chicanas/os without a careful and critical look at the anti-sexist and anti-homophobic struggles that were crucial forces in the development of the National Association of Chicana/Chicano Studies ("NACCS"). n9 In the Afterword I use two transcribed interviews to bring in the voices of Cordelia Candelaria, a writer, and Deena Gonzalez, a historian, who have been active in the formation of Chicana Studies.

PART I: ANTI-SUBORDINATION AND SELF-CRITIQUE AS DEFINING FEATURES OF LATCRIT

Considered as a whole, the articles in this cluster regard LatCrit as a significant community for the production of critical scholarship examining, *inter alia*, issues of race, color and ethnicity as well as sexual identity from a perspective of anti-subordination. LatCrit already functions as a community for scholars of color and a "safe" space in which race, ethnicity, color, language, sexual identity can be explored and expressed in ways that are often not acceptable within the dominant culture or within many of the institutions in which we work. LatCrit also functions as an emotionally nurturing site where relationships and friendships are initiated and developed. Thus, these articles acknowledge that in a fairly short period of time, LatCrit has created a new space for critical legal scholarship and, in doing so, has created greater access to the experiences, histories and narratives of Latino/a communities for a diverse group of progressive scholars.

Whether LatCrit will endure and have an impact beyond the group that gathers for its annual conferences depends not only on its ability to [1122 generate significant scholarship but also to continue to utilize mechanisms for meaningful self-criticism and to create inter-and intra-disciplinary alliances with other progressive organizations including CRT. Following the lead of ethnic studies programs, LatCrit has recognized the potential for increasing the utility of theoretical work by linking oppositional scholarship with teaching and by working with activists and community organizers.

The articles in this cluster advance several of the objectives identified with LatCrit and typify the best scholarship this movement is producing. The articles by Kevin Johnson and George Martinez, Stephanie Philips and Athena Mutua suggest trans-disciplinary directions for LatCrit by strengthening its ties to Chicano/Chicana studies, cooperating with a renewed Critical Race Theory project, and providing new meanings for the shared term "Crit." Kevin Johnson and George Martinez explore the important but not always obvious connections between the scholarly agenda of Chicana/o Studies and that of LatCrit. Stephanie Phillips' article which examines the CRT Workshop's uneven history with issues

of homophobia and Afrocentrism is an outstanding example of conscientious self-criticism. Athena Mutua urges that LatCrit continue to deploy analytical techniques that instantiate intersectionality by interrogating which groups occupy the “bottom” or the “center” at different times and with respect to different identity characteristics. The reflections of Victoria Ortiz and Jennifer Elrod about their welcome reception into the Miami meeting of LatCrit provide some evidence that LatCrit has benefited from prior struggles that link race/ethnicity and sexual orientation

The Mahmud article sustains LatCrit’s emerging and deserved reputation for generating boundary-expanding, race-based scholarship. Tayyab Mahmud focuses outside of the U.S. with a rigorous analysis of the historical racializing and racist practices of Europe in its colonies, especially those of Great Britain in the Indian subcontinent.

PART II: MAPPING LATCRIT ANTECEDENTS, APPROACHES, SPACES AND TRAJECTORIES

This introduction creates a “map” of this cluster that analyzes and inter-relates the articles. (See Appendix A.) But maps, even when they serve the function of guiding us through physical and/or theoretical spaces, inevitably distort reality by filtering out information while focusing and symbolizing other information¹⁰ The map compares the articles [1123 using the following topics: the theoretical antecedents of the LatCrit scholarship, the principal theoretical approaches used in each article, the space/place applicable to the article, and the future directions or trajectories suggested for LatCrit. The map category called “Theoretical Antecedents” attempts to link the article with a larger body of scholarly work besides LatCrit to explore the varied critical discourses that are being expanded upon by this cluster of articles. The category “Theoretical Approaches” oversimplifies each of the articles by identifying the main approach chosen by the author(s) of each entry in order to demonstrate the breadth of styles being used in this cluster. “Space/Place” also demonstrates breadth, this time in the geographic reach of the authors in this cluster, covering Chicanas/os in the Southwest to Indians in their global diaspora. The final category of “Future Trajectories” tries to encapsulate the challenge and the potential that faces LatCrit as we examine ourselves critically even as we continue to develop a LatCrit community and to theorize about the society in which we work, live and love.

Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship by Kevin Johnson and George Martinez examines the “intellectual debt [owed by LatCrit to the generations of scholarship focusing on Chicana/os in the United States.”¹¹ The article should prove to be of immense interest to LatCrits as it recounts the history of scholarship focusing on Mexican-Americans and Mexicans (*los Chicanos/ Mexicanos*) residing in the U.S. Johnson-Martinez emphasize how the 1960-70’s Chicana/o student movement intensified

community activism that resulted in constructing new narratives and new individual and collective identities around the term “Chicano.”

The article illustrates the ubiquity of Law in its multiple manifestations in the lives of this subgroup as evidenced in the writings of Chicana/o scholars. Immigration, civil rights, farmworker rights, economic integration and language rights were all issues being written about by the early Chicano academics.

As I try to show in the Afterword to this cluster, the Johnson-Martinez article mutes the intense controversies generated by the exclusion of Chicana experiences, voices and contributions from the narratives and reality-naming practices of Chicanos, especially within Chicano Studies [1124 and NACS, as its national organization was originally named. Unfortunately, the Johnson-Martínez article re-produces the marginalization of Chicanas by confining their contributions to Chicana/o Studies to one paragraph. n12 And ironically, the anthology of Chicana/o history appended to the article contains more entries by women with non-Spanish surnames than those by women with Spanish surnames. n13

Despite this gendered criticism of the article, I strongly agree with its basic theme that LatCrits should look to the body of scholarship by Chicana/o scholars for inspiration and direction. Also I agree that it is important for LatCrit scholarship to dis-aggregate Latinas/os into sub groups—Chicanas/os, Puertorriqueñas/os, Cubanas/os, etc.—with their concrete histories, stories, commitments, and potentialities. I would, however, question whether all LatCrit scholarship has its roots in Chicana/o scholarship. Indeed, I would posit that the strength of the LatCrit tree derives from the fact that it is rooted in many varied and separate histories with their corresponding bodies of scholarship.

With *The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History*, n14 Stephanie Phillips makes a very useful contribution to the future development of LatCrit providing a context for understanding the overlapping histories of CRT and LatCrit. Written from her perspective as one of the early CRT Workshop convenors, the article concludes that CRT can continue to provide a home for the production of a progressive Black Nationalist body of scholarship.

At times writing in the first person as a participant and an observer, Phillips succeeds in relating a history that is marred by the exclusion and mistreatment of gays and lesbians as well as the dismissal or rejection of peoples of color, other than African Americans, as worthy subjects of race-based theorizing. This is not written as revisionist history. Phillips acknowledges the collective errors made within the CRT Workshops from year to year, and there is, at least to my ear, an undertone of regret but no justifications or rationalizations for the errors.

Phillips proposes that LatCrit sponsor alternate annual conferences with CRT because of the considerable overlap among the persons active in both groups. She wants to preserve CRT for the development of black critical theory

with the collaboration of other scholars of color. In my opinion, LatCrit should give serious consideration to reaching some [1125 accommodation that will insure the collaboration of the widest group of progressive scholars of color in both LatCrit and CRT.

In *Reflections of LatCrit III: Finding "Family,"* n15 Victoria Ortiz and Jennifer Elrod relate a wrenching personal narrative about their lesbian interracial family and the lead-pipe mugging of their son Camilo just before Christmas 1997. Another family narrative appearing in an upcoming CRT anthology n16 and their interactions with Frank Valdés had been their "doorway ... into LatCrit." n17

The article weaves stories of their "actual family" and their previous experiences of discomfort at academic gatherings with reflections on the "intellectual family" they find at LatCrit and their exhilaration at finding kinship, solidarity and hospitality at the Miami meeting. I think many of us Latcrits will remember Elvia Arriola's *cris de coeur* at the first annual meeting describing her pain and alienation from her by rejection by peers and colleagues at the University of Texas and elsewhere. n18

Given LatCrit's commitment to eliminating homophobia, it is gratifying to hear from Ortiz and Elrod that LatCrit offers a welcoming environment, but I wish they had allowed themselves to be critical. I would like to think that as LatCrits we are inclusive but I wonder if a significant number among us have done the moment-to-moment work that is necessary to change our homophobic tendencies and to eliminate care less utterances and hidden bigotry. Homophobia, however, runs deep in many cultures and the various Latina/o cultures persist in their rejection of Queer life, experience and values. Even as we work to increase the comfort level for all LatCrits—Queers and straights, we must be vigilant and candid about the biases that are pandemic in our communities.

With *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, Athena D. Mutua has produced an ambitious analysis debunking the concept called the "Black/White" paradigm and exposing the misunderstandings it has provoked. n19 Her article also provides a comparison of racial and linguistic hierarchies [1126 that trap Blacks and Latinas/os in different ways/places/times. I found Mutua's paper to be especially intriguing because of her ability in capturing the sense of the conversations taking place at LatCrit III and attending to those conversations with this written riposte. She talks seriously about the rivalries and disagreements among Blacks and Latinas/os and then borrows the devices of "bottoms" and "centers" to theorize those conflicts and tensions. She writes, "the *bottom* speaks not to which group is more oppressed but rather speaks to power's obsessions and how those obsessions form the basis of different racial categories of oppressio" n20 About rotating centers she notes that the idea of focusing on issues of concern to other peoples of color besides Latinas/os at LatCrit "institutionalizes a process of both advancing theory and building coalitions." n21

With *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, n22 Tayyab Mahmud initiates an analysis of the seemingly irreconcilable idealization of freedom and equality that characterizes European modernity with its appetite for conquest and colonization. Mahmud begins with an excellent introduction to the discourse of alterity that I associate with European post-colonial studies n23 focusing on the “West” and its confrontations with, and repression of, the “non-Western”

Mahmud’s analysis of the construction of race in India during its colonial period when Europe established and maintained its forceful domination over the subcontinent resonates with other analyses about the construction of race. n24 The processes for the construction of inferiority is familiar: the plasticity of stereotypes, the instability and contingency of the racial hierarchies, and the reinforcement of subtle gradations of difference among the conquered to control and discipline from within. But the variety of racisms can only be understood when studied in terms of their particularities and peculiarities. So if Mahmud is guiding us through familiar territory, he is also leading us through the largely unknown terrain of the Indian varieties of racism.

[1127 In India the colonizer creates new racial mythologies regarding the Aryan race and its evolutionary branches: the pure European Aryans with advanced cultures and contaminated hybrid Aryan India with its stagnant society. Mahmud identifies the principal racial stereotypes manipulated within the colonial framework of India: the martial races, the criminal tribes and the meek Hindu. This is a fascinating juxtaposition of military campaigns, history, geography, occupations, religions, languages and criminality, all being deployed with racialized meanings to maintain the subservience of the conquered/colonized population and the superiority of the conqueror/colonizer.

For me personally because of my own affinity for India, Mahmud’s article is a particularly welcome addition to the explorations of race that are continuing under the RaceCrit/ LatCrit/”OutCrit” n25 umbrella. After law school I traveled on a Harvard fellowship to Asia and spent six months in India. I harbor fond memories from that journey because it gave me, among many other things, new understandings of “racial” and color hierarchies. Mahmud has called this article a preliminary inquiry, and I eagerly await his deepening and broadening of this project that he has so effectively initiated. I hope future articles interrogate the intractability of the caste system and its connections to Hinduism as well as to colonial and contemporary racial hierarchies.

PART III: AFTERWORD: NACS TO NACCS STORIES

A significant body of CRT and LatCrit scholarship, including several of the articles in the following cluster, analyzes and theorizes the de/formation of Latina/o individual and collective identities caused by sexism and homophobia. Consequently, it is prudent and productive to consider the long and painful history

of the National Association for Chicana/Chicano Studies (NACCS) with respect to these two issues. What follows is not intended to pass as a complete retelling of that history. Much of that work has been done already by many prominent Chicana scholars, most notably Teresa Córdova, n26 and Deena Gonzá [1128 lez, n27 and a few Chicanos, such as Gilberto García. n28 I intend to write a longer article connecting that body of scholarship with work done by LatCrits for next year's annual meeting.

My purpose in this Afterword is to use the rhetorical device of listening to two Chicana scholars talk about their experiences within NACS and NACCS (more about that name switch in a moment) in order to consider group dynamics in LatCrit. I am focusing on both the complex intra-group gender dynamics (in this case among Latinas and Latinos in LatCrit by thinking about Chicanas and Chicanos out of LatCrit) as well as inter-group ethnic/racial dynamics (among Chicanas/os and non-Chicanas/os in and out of LatCrit). There is also the probability that the salience of a Chicana-ized anti-patriarchal and lesbian-centered analysis will be contested, even among the Chicanas and the Latinas who are active in LatCrit. Nonetheless, as with racisms, hetero-normativity and homophobia, classism, white superiority, skin privilege and other forms of oppressive thinking, our expositions of sexism must be constantly re-centered and re-integrated into our discourses, otherwise it will reappear in new manifestations.

A few years ago NACS changed its name to NACCS —adding the “C” that symbolized the inclusion of women, thereby becoming the National Association for Chicana/Chicano Studies. By calling ourselves LatCrit, we elide the question of gender, and thus may never have to decide whether to make the kind of symbolic change made by NACCS. LatCrit's nominal elision does not, however, inoculate us against the ways that exclusionary practices against women, whether straight or Queer, replicate themselves. Anti-subordination requires the difficult work of recognizing, naming, challenging and changing marginalizing practices. Let me be blunt—I think that Chicanas/Latinas have been and continue to be marginalized and the Chicana/Latina voice has been and continues to be muted in legal scholarship, including LatCrit. For example, there is often an over-representation of invited Chicano scholars from other disciplines as compared to Chicanas at our annual meetings. In making this claim about the position of Chicanas/Latinas within LatCrit, I have not canvassed other Chicanas/Latinas active in LatCrit and do not presume to speak for the group.

A. AN INTERVIEW WITH CORDELIA CANDELARIA N29 [1129

MM: Can you tell me how NACCS came to have two C's in its name?

CC: Is that your operating question for the interview?

MM: No, I am basically interested in exploring what the lessons are that LatCrit should be learning from NACCS. While I am focusing on sexism and homophobia, I am not limiting it to that. I am particularly interested in the sexism,

because more than homophobia, that issue seems to be submerged in LatCrit. As good Chicanas and Latinas I think we haven't raised that issue in order to maintain the collegiality of the group.

CC: Let me begin with a couple of comments just to situate my own awareness and also my ignorance in terms of NACCS and the two C's in its current name. I have not been actively involved in the organization since approximately 1990-91. Secondly, I was a member of NACS in the early days when the organization was evolving. This was a natural outgrowth for many of us from MECHA n30 and from our college experiences. We were not formally trained in anything like making pluralism work. My own formal studies were medieval studies, language, literature and that's what I have been doing ever since in one form or another. But I was always wanting to learn more about Chicano and Chicana literature—at first we called it “Chicano.” We had raised feminist issues in MECHA in the 60's and 70's, however.

MM: I remember. I was active in MECHA when I was at San Diego State.

CC: So you know what I am talking about. The universe in terms of the 90's is quite different from the pre-80's.... I became actively involved in NACS after I had been a dues-paying member for a long time. I had been asked to serve on the *Mesa Directiva* when I first came to the University of Colorado in 1978. I spent a couple of years at the National Endowment for the Humanities (NEH) where I worked to increase the resources of the Endowment for Humanities by simply calling everybody I knew to expand the names that the NEH was using for its reviewers, analysts, readers, and referees. Many of these scholars [1130 were involved in NACS, and they provided other contacts, too. I was approached to be more active in NACS. I used to go to the conferences and encourage the *colegas* to apply to the NEH for grants and so o After that, I became more directly involved. Gender issues generally tended to be things that we women talked about among ourselves. The few women I knew tended to be more compartmentalized about the dis course of women and gender than we are now in terms of recognizing that it's a more complex cultural and cognitive process. Now we are more aware of the various dynamics and ways in which people engage and, of course, that everything's gendered. The Chicana Caucus is some thing that came out of that. As far as I know it evolved from these informal amorphous discussions. So that is my first comment regarding my NACS background.

MM: Is this when you became more involved in the organization?

CC: Yes, I was asked by Mary Romero, who was the chair of the NACS editorial committee, to join the committee as a reader. From that involvement I took on a much higher profile role. Out of that came my major role in NACS as the conference coordinator for the UC-Boulder conference in 1988. But before that the editorial committee would meet at the same time as the coordinating committee, so I would join some of those meetings. I saw NACS as basically a mutual aid society, folks who had common purpose in promoting Chicano studies

and needed a professional society to do that. This second comment explains how I became more centrally involved in the Associatio

When I made the proposal to host the conference at Boulder, I had to interact more formally with NACS—the coordinating committee, the chair and the treasurer. Preparing for the conference required the sort of accountability expected from established institutions as well as professional organizations. I saw myself as a with good will and wanting to contribute to build a stronger organizatio But I would get frustrated by a lot of problems that seemed endemic to the organization and that needed redress. I interpreted them as gendered even though I didn't think it was perceived as such by some of our male colleagues. I thought some of the organizational inefficiencies proceeded from machismo, or whatever you want to call the patriarchal privilege emerging from old boy dominance of the Associatio That is, they were so used to being in charge and working together that they tended to ignore internal organizational procedures and structures. Anyway, it was in this institutional phase (when the name was still one "C") when I had some problems.

MM: The name [NACCS doesn't include two C's until fairly recently, right?

CC: Correct. Someone said to me, and I have never checked this [1131 out, that the NACCS "C" was added after we, here at ASU, put two C's in the name of our Chicana/Chicano Studies Project, which is now a department. The reason that second C is there is because, when my ASU *colegas*, all males, asked me to take on the next phase of institutionalizing the Project in 1991, I wanted to have a serious discussion about the matter because I was a newcomer, and we needed to understand each other's assumptions. The first issue for me was that we needed to have some symbolic way of including women explicitly. I had several responses prepared for all the flack I expected to get. Immediately one of my colleagues said, it is about time to do that so how do you want to do it? I was so surprised because I had expected resistance and hadn't thought it through completely, but I suggested we put Chicana in there as well as Chicano and that's how it came about here.

Later on I was told by a MALCS [*Mujeres Activas en Letras y Cambios Sociales* member that some of the NACS Chicana Caucus members had pointed to the Arizona model. But I wasn't part of NACCS discussions when it added the second "C", so I'm not sure.

MM: Let me go back to the point that you made about the time that you were the conference coordinator at UC-Boulder. How did the issues that you identified as gendered manifest themselves?

CC: The first [issue had to do with my expecting a certain level of professionalism and accountability. When I came up in the ranks like Diana [Rebolledo, a Chicana literary critic and mutual friend and other folks, we didn't have role models. We didn't have institutional support systems for the institutional reforms we were seeking. That support often came from other non-

academic sources or we scraped around and did it ourselves. One of the things that we learned was how institutions function. From working in the research section of the National Endowment for the Humanities, I knew how to do paperwork to provide institutional accountability. When I prepared the proposal for the conference, I went to the university and got different people to contribute and to be involved. We wanted to have a broad base of support, and many people were involved on my campus as well as NACS. I got a \$25,000 commitment from the university, and, of course, it had to be justified and accounted for, right?

MM: Sure.

CC: Up to then, I had a very even-toned relation with most of the men running NACS at the time, including the coordinator and the board. When I began to interact with them formally on conference business I expected reciprocity and basic efficiency, but I didn't always get it. So this is one way gender manifested itself in my view. I was quite straight-forward and business-like in getting my concerns across and making requests for documentation.

That's when I had encounters which eventually led me to believe they saw me as sort of a professional bitch who "did not understand the organization," as it was often put me. I am not going to name names, but this was reported to me at different times by several NACS insiders. What ended up happening was key people dropping the ball. I enlisted the help of other members of the board since I needed to get answers and documentation, and that's when I would hear excuses made for the ones who dropped the ball from their cronies.

Basically, the conference planning committee wanted to leave a legacy for the future by having a good conference and by producing a conference manual so that every other NACS conference group wouldn't have to rediscover the wheel. The legacy was the conference, but the second thing was to get support and broadly based interest in the conference at Boulder from different sources because I was also trying to build up our Chicano Studies program. The manual would include a computerized registration system and up-to-date mailing list. The registration idea was a wonderful contribution from one of my colleagues, Leonard Baca, at the CU bilingual ed center, who donated a couple of staff and state-of-the-art software for conference registration. It would be on disk and then NACS would have it for future use. At that time, NACS did not have any regularized procedures, nor even an up-to-date mailing list of the membership. It took major effort to get an old mailing list for the conference.

My hope was that Boulder would contribute an efficient conference system, and we could all benefit from it. But some of the old boys didn't want to cooperate, and so they pulled out the "ideology card"—i.e., they said, we want to allow every conference the right to have autonomy. I asked how will it be less autonomous to have a regularized registration process in place; wouldn't that give more autonomy and time for issues of substance? Future organizers wouldn't have to waste time on Mickey Mouse things like setting up a database on basic conference preparations. I was also told that they felt that I was being a bitch, and

somehow wanting to take over the organization. The ones who were most resistant were those who had had the highest profile in the organization. It was astonishing to me that they wouldn't see the benefits of this. Some of the other members told me that the "vatos" just don't want a woman to do this; they want to be the ones who take NACS forward in that way. I saw it as wanting to control everything and not have other people make any improvements that would be perceived as a reflection on them. But the reality was that nobody would have ever known about [1133] it except that the next year's organization hosting conference would have a mailing list on disk and the software would be in place for registration.

What it came down to finally was that I took it to a board meeting. I asked the chair to put on the agenda the matter of procedural regularity and conference format systematization. Well, it actually took a vote and some of the senior people in the organization voted against it. Amazing, isn't it?, that we had to vote to be able to make the registration process more efficient.

MM: The important thing is the subtext of the vote not really the text of it....

CC: Right. Those are the things that you don't get from just looking at a vote. Somebody shrewd would ask, why did you even need to vote on something like that?

This gets to my second point and that is the way in which some organizational meetings were run and business was handled. The "real" business often would take place socially—for example, at the bar over beer with those who wanted to do that. Some of us who had family responsibilities or were not drinkers or whatever would not be part of that. I had gotten complaints from other members about this, and when possible I would confront it directly.

I objected to re-opening settled matters that had been agreed to or voted on, especially when accountability issues were at stake. I didn't think it was appropriate to handle organization business as if the emperor was perfectly dressed in a new suit *cuando estaba casi en pelota* [when he was almost naked]. But by and large people were respectful of me, but I just had a feeling that I wasn't making a dent. For one thing [some of the women in NACS would talk to me privately but wouldn't speak up in the group. This sometimes happens because of inexperience and lack of confidence, as you know. But when these people who are behind-the-scenes allies don't stand up when it counts, then it ends up pitting the same one or two reformers against the status quo.

I never felt maligned in particular, although other women told me they did feel unfairly treated. It just happens that I was older than most of them, or as old as the oldest ones, and I have a very thick head and a very thick skin. Still, I also don't want to make it sound like there was an overly embittered atmosphere. One has to work with a lot of different people. Those of us, mostly women, who have come into the academy with a feminist viewpoint still have a long way to go before we move beyond the present transitional phase and become absorbed into the pulse of academe and other institutions. I don't mean only structurally in

terms of affirmative action numbers, but, rather, conceptually as well. [1134 We're a long way from ideological parity for women and other excludeds with viewpoints and styles which diverge from patriarchal modus operandi. That is what will produce systemic change, I think.

I also learned something else that is not unique to NACS and should not have been a surprise, but it was pretty disappointing. I'm not going to say too much except that there was irresponsible socializing, sexual liaisons, and partying that affected the organization. The partying and "playing" was perceived as residual perks for some, I was told and so it appeared. But it was undermining the organizational leadership. I think the dominant order plays itself out in ways that are historically documented: i.e., patriarchal privilege and sexual double standards will thrive where there are unregulated and unmonitored conflicts of interest and other abuses. I saw some of that in NACS. Personal relations affected the way some key players (mostly men, but some of "their" women, too) used NACS as a political or ideological rationale for their own individual interests.

Although I never did hesitate to talk about gender equity, I wish I had done more. I still have to say that NACCS has been a valuable organization, (even in the one "C" days), because it brought a lot of us together and it allowed us to have substantive exchanges outside of our institutions. That enhanced our daily professional lives by giving us a larger perspective.

MM: Can you explain that? Any examples?

CC: I have found repeatedly that many Chicana and Chicano Studies scholars are very sophisticated institutional players. Many possess a political savvy that some, or even many, of our university peers don't have, perhaps because of our biculturalism or transnationalities or transculturalities. We have learned to move in ways that transform institutional resistance and exclusion into political and instrumental capital. Maybe the *rasquachi* reality of having to scrap your way through the establishment because the institution didn't/doesn't recognize the legitimacy of our pluralist agenda has given us some tools and skills that many of my colleagues in canonical specialties have not had to develop. Some are politically naive because there's an institutional infrastructure for their academic needs, whereas that wasn't/isn't usually the case already for non-traditional newcomers to the institution. I'm sure you find this at the law school and many other places.

MM: Many places. In life.

CC: Yes, this is proven, I think, as well as theorized throughout an essay collection called *Feminisms: An Anthology of Literary Theory and Criticism*.ⁿ³¹ In my "Wild Zone" essay in *Feminisms* I borrowed an idea from a couple of anthropologists studying African villages to address some of the gender/culture issues for Chicanas. They had discovered that over and over again as they researched the literature on Africans, they didn't find direct female reporting about women's rituals and practices. The information was usually obtained from the chief or the husband or a medicine man, some male who was

empowered to speak and who described the women's rituals. Looking at the body of anthropology on African tribes, there had been nothing that went directly to the female subject voicing herself.

I used that concept in "The Wild Zone," first to talk about the fact that that record by and large was very partial, wrong, and/or distorted. As a result, women developed extensive private worlds of experience and female culture that was muted from the empowered male leadership. Over time women have learned to negotiate between their female-identified private worlds and the male-authorized perceptions of that world, and are therefore transcultural in their experience and identity.

In my essay I address Chicana feminism and the need to privilege gender when politically and conceptually necessary. And to do so with out guilt. I think that many men who are reflected in the dominant structures and who cannot relate to women as peers or as leaders haven't developed these multiple transcultural codes because they're comfortable with the dominant order and status quo.

Anyway, Margaret, I think it is important to do what you are doing: to record [our history as a means of learning from it. Many of the early pioneers in Chicana/o studies have been so used to rolling up our sleeves and just doing what needed to be done without chronicling the process. We just move on to other projects. History is lost is one unfortunate consequence. Another is that later on the history is sometimes re-written in terms of making certain actors look good in ways that are totally unsupported by the facts. *Hasta la próxima—gracias, colega.* n32

B. INTERVIEW WITH DEENA GONZÁLEZ N33

What follows is an interview I conducted with Deena Gonzalez, an [1136 out lesbian who has been at the center of the struggles involving NACCS.

MM: Why don't you tell me about your history with NACCS.

DG: Some of the very same issues that arose in NACS in about the same period of time spilled over into MALCS. n34 [There was a shock in NACS in Albuquerque when gay and lesbian issues surfaced, especially around Emma Perez's plenary address on sexuality and discourse. Finally the lesbianized perspective was put before the member ship with about a thousand people in the ballroom.

The other thing that occurred was that NACS didn't have a strong faculty presence after a certain point in the 1980's. When the conference began moving out of California, the faculty presence began to decline and the student membership rose. So many of the old guard that kept NACS going in a particular way were no longer there to answer why something happened the way that it did. New people stepped in with different agendas. At the very moment gay and lesbian presence was finally being defined. Then at the same conference and on the same day, we had organized the lesbian workshop. [There was some

confusion about whether it would be an open panel or a closed workshop. After Emma's plenary, there was enormous applause and kind of a stunned atmosphere about what she said. Then she said I want to continue with this discussion and we are going to have a workshop for woman only. Some homophobia surfaced, but it was relatively quiet. People had been upset about this [woman-only workshop apparently and someone did get up in the plenary to ask about this. Then we got word that some of the men were going to crash the doors.

The workshop became this incredible space. There might have been sixty or seventy people. It was videotaped up to a point and then as women got up and came out, they asked that the video, the camera, the shooting be stopped. It was a very interesting development. There were also all these white women from Albuquerque who had come to hear about lesbians.

So, the audience very quickly got quiet and hushed when they realized there was something else going on in the room that they hadn't quite reckoned with. I think they thought they were going to hear papers. Emma Perez, Lourdes Argüelles, and I gave papers. I was probably the most angry. I gave this rendition of what it was like to be in an [1137 association and have closeted people come out to Emma and to me but not to the associatio Obviously [there are issues of safety and visibility and so o It was a very important turning moment with people get ting up and saying all these things and a lot of people crying. Somebody got up and said I don't treat people badly and I don't like to think I am homophobic; basically saying I don't understand why you're insisting that people come out and then of course she is one in the closet...

There were cross currents and then she got up and left the room. Then other people stayed and just poured out how terrible it was to be in the closet. How wrenching an experience it was to come out in any context but especially this one—among your own community. One of the things that struck me was there were so many dialogues, so many discussions going on all at once. This first workshop organized by lesbian Chicanas on lesbian identity and Latina identity where two Chicanas and Latina (Cubana) were supposed to address everything.

We had someone who positioned herself at the door as guard and she said, "I will keep all men out because women need to have a safe space, a respected space." If the men of NACS don't understand this, it is too bad. And it was also her first time at NACS, she's Latina and lesbian and butch...

Some of the men said if you are going to have a lesbian and a gay caucus, what's next a *marijuanista*, a marijuana caucus? We said let's do something with that and so we decided we would approach individual speakers who had spoken against the notion of a lesbian caucus or of a women-only workshop. In the lobby Emma Perez looked up and said there is Tacho Mendiola, let's go ask him. And so she said, Tacho, who do you think you are? You know, what do you think this is about? And, why are you putting us down this way? What is the matter with you? He was just stunned. The conversation really grew very tense and then the word from those kinds of interactions went out that a group of lesbians were

terrorizing others. Everybody took sides, people got mad, people were calling people back at their home institutions.

People didn't quite get it, but from that moment on gay and lesbian presence could not be ignored at NACS and it hasn't been. Since then there's just been incident after incident every year. Last year in Mexico City, the students attempted to hold a reception. They put up fliers that were offensive to the hotel management who came back and said we're a family institution. The hotel closed the doors and didn't let the students hold this reception and threatened to kick them out. So there had to be negotiations all night long about whether the students would end up on the street or not. It got to be quite tense and finally the mayor's office got pulled in. Mayor Cuatémoc Cárdenas finally had to step in [1138] and make a statement. The city did have an ordinance via the Mexican Chamber of Commerce that specified homophobic acts were not tolerable and that people and businesses could not discriminate. n35

MM: I am amazed that there is such an ordinance. Aren't you?

DG: It was pretty amazing, pretty stunning. It is a huge modern cosmopolitan city, but I don't think anyone would dare test it. Rusty Barcelo pushed herself to the front of the cameras and explained the situation to [the Mayor]. Then he had to respond in that way because the International Chamber of Commerce has to sign off on certain international law agreements. n36 I don't know which one it is, but it's on the books and the hotel belonged to the Mexican Chamber of Commerce.

A lot of people, the officers of NACCS, those on the Mexican side and on the U.S. side had to be up all night basically dealing with the hotel management. They got the students to stay, but they had to agree not to post any flyers. The flyers said "Joto Caucus" "*Noche de Joteria*." The students wanted to take to the streets. That's when I stepped in and said safety is a big issue. You do not want to end up in a Mexican jail.

It was in San Antonio in 1992, the year after Albuquerque, by the time the Lesbian Caucus was formed. At our first Lesbian Caucus meeting, there were straight women. We went around to say who we were, and where we were [working, and whether we were out or not]. One of the women said I'm not a lesbian, but I'm here to support and help. The students who convened the Caucus said this is a Lesbian Caucus and we need to decide. I said that I would be more comfortable if the first Lesbian Caucus were only lesbians in the principle of women-only work shops and space and now lesbian-only workshops and space. And she didn't really take offense, it was her friend who had invited her to this space who did get very upset. She got up and said, "if our allies and friends can't be here, I'm not going to be a part of [this organization]" And she left very pissed off. And immediately everything erupted.

The first meeting of the Lesbian Caucus just laid out the tensions that had built up all along, but that still exist. Even in the spaces we consider to be zones of support and safety. It caused me in the early '90's to think very carefully about

this business of what is a safe zone or space, or what is a women-only declared space. For whom is it safe, and how could these things be constructed and have meaning, application, and existence. That's what I tried to write about in "Speaking Secrets" without getting too upset all over again because it was very upsetting. [1139 It was a very difficult moment and people divided themselves up. Radical lesbian separatists had a sense of how the politics of it operated, but there were a lot of people in the room who had no familiarity with this lesbian prospective.

The politics meant coming out on a lot of different levels and the repercussions were pretty great. There were a number of women at that first Lesbian Caucus who would later begin to assume roles in NACCS as Chicana lesbians, but who didn't go to the caucus meetings the first couple of years because to enter the room would mean that you were a lesbia That was precisely one of the reasons that I said I wanted it to be lesbian-only because I really felt that was the key issue. As long as we stayed in the closet, we would never offer anyone an alternative example, only the traditional one. Rusty Barcelo and Norma Cantu who are out now did not go to those first meetings and reported they found it very frightening. I'm not saying it caused rifts, individual rifts or even problems between and among us, but it certainly did differentiate issues in an interesting way.

On the other side of things, there was an effort to raise the issue of men coming to the Chicana Caucus. I said I don't understand why we keep debating this issue. When Elena Urnutia came to MALCS one summer from Mexico City and heard us heard discuss [this issue seriously, she finally said, "I'm dismayed that you're debating this issue. In Mexico we just don't do this anymore; we just say this is for wome The men who support us they say good. Let it be for wome" Why do we have to keep conversing in this way?

A lot of it resolves itself or ends up having to do with women wanting not to offend and Chicanas especially want very much not to offend. We're raised not to offend the colonizer, not to offend the straight man, not to offend the father. It's very deep. And it keeps coming back.

MM: At the first formal LatCrit meeting in San Diego I and others were troubled by the fact that there were five keynote speakers and all of them were men, all of them Latinos. In the large sessions few of the Latinas were speaking and so during the second day, I called for a Latina Caucus. When we met, it was an incredible moment. We gathered outside in the evening light. There were about sixteen of us. We didn't even know one another's names. We sat in a circle and told our stories while we laughed and cried. It felt so different from the earlier sessions with their heavily male overtones and subtexts.

The next conference in San Antonio was developed around this idea that the meeting itself should feel more female and Latina. There was a wonderful session at which women brought things so that they could engage in narratives; there were a lot of mother-daughter narra [1140 tives. I brought pictures of my

mother and her recipes. Those interactions were very much motivated by women trying to make the space feel different, even though we were not asking for woman-only space.

DG: What year was that?

MM: 1996.

DG: The question keeps coming up again and again. It suggests to me that radical lesbian principles that were grass roots haven't become part of organizational and institutional life. By that I mean the idea of separate space, separate spheres of women-only space, but also the notion that only away from men can women really sort out their thinking and, in a way, de-polute themselves. Men will only move away from not relying on women in traditional ways if they [the women] separate themselves out. So, sort of men's movement stuff.

I wonder to myself when have men worked out their sexism. Where has that happened in a kind of institutional way? There're so few examples even in places that have had very active women's studies programs or departments or caucuses. There seems to be so little progress. I don't think the progress is going to happen just because we say we want it or we say that's our vision. Or because now men get up and nominate a woman for an office whereas five years or ten years ago, they wouldn't even have thought of that.

The support that men give Chicanas or don't give Chicanas is still lagging in the kind of spoken ideal about equality. It becomes perfectly okay to talk about why Chicanas are not present. I heard Richard Griswold del Castillo talk about this. I don't want to isolate Richard because he's certainly trying to understand this stuff, but he spoke about it at the Julian Samora Institute at Michigan and called for a [study of the state of Chicana studies. He said I don't know why Chicanas are not producing books in the '90's. I just wanted to whomp him with a book or something. It takes money; it takes research assistants; and it takes a research institution to produce books. How many of us are lodged in those places? Very few of us. If we do produce books, we produce anthologies or contributory essays. And it takes a lot of time; it takes decades. That's why it took David Montejano fifteen years to write *Anglos and Mexicans in the Making of Texas, 1836-1986*, Tomás Almaguer fifteen years to produce *Racial Fault Lines*, and Ramon Gutiérrez eleven years to finish *When Jesus Came, the Corn Mothers Went Away*.

It takes promotions and money; large grants produce books. There's an uninvestigated lack of empathy, or sympathy, or understanding, or political outlook towards Chicanas. We need a tough line on the issue of Chicanas supporting one another and especially within institutionalized work. The organization of life in the U.S. just doesn't lend itself to much of what we are about.

We're just kind of looking out for others, thinking about others before ourselves and preserving what we've got and building on it. It's my feeling that if men just listened, really listened and then translated [what they'd heard into jobs,

tenure decisions, promotions, letters of evaluations, fellowship committees and fellowships, then I'd say ok, it has helped. But I don't see them doing that; in fact, things are probably even getting worse in some ways. We [Chicanas are going to have to do it for ourselves. We may have allies who run interference and help behind the scenes and provide a lot of unacknowledged support. But the more visible interactions are still shaped by a kind of sexism that runs deep in Chicano me They're not willing to give it up because it gives them power and authority when they have so little of it in so many other places.

MM: It's an issue we continue to grapple with. Let me ask about your work with other people of color and with white lesbians. What opportunities do you have to move out of Chicana/Latina circles? LatCrit is by design a site and an approach to theoretical work that is not exclusively Latino/Latina. From the beginning we joined with other progressive scholars of color. And a few whites I might add. Despite the fact that LatCrit is about theorizing the Latino/Latina condition from a legal perspective, it has always been in the company of and in collaboration with other people of color and other progressives. So I was wondering the extent to which NACCS has been, or whether you individually have been, trying to collaborate with other people of color and other progressives.

DG: It is still very limited within NACCS. People go there for the particular purpose of being refreshed and re-energized and provoked into thinking different things within Chicano Studies. Academic and cultural work that is more broadly based or more multi-voiced goes on in other places.

[1142

Appendix A: A Mapping Model

[SEE TABLE IN ORIGINAL

NOTES:

1. In a forthcoming article, Frank Valdés analyzes the ways in which antiracist communities, strategies and discourses are influenced by social and legal homophobia, and their analyses largely limited to white/black relations, thereby "reproducing white domination, black subordination and nonwhite/nonblack erasure in intra-and inter-group levels." He offers the terms "hetero-normativity" and "racial binarism" to express these complex outgrowths of the dominant culture's white supremacy and their internalization by the multiple subordinated subgroups. See Francisco Valdés, *Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits, and LatCrits*, 53 *U. Miami L. Rev.* 1265 (1999); Foreword: *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 *La Raza L. J.* 1, 5 16 (1996).

2. Kevin R. Johnson & George A. Martinez, *Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship*, 53 *U. Miami L. Rev.* 1143 (1999).

3. See, e.g., Antonia I. Castañeda, *Gender, Race and Culture: Spanish-Mexican Women in the Historiography of Frontier California*, 11 *Frontiers* 8 (1990); *The Political Economy of Nineteenth-Century Stereotypes of Californianas*, in *Between Borders: Essays on Mexicana/Chicana History* (Adelaida R. Del Castillo, ed., 1990).

4. See Tomas Almaguer, *Racial Fault Lines: The Historical Origins of White Supremacy in California* (1994).

5. See Rudolfo Acuña, *Occupied America: A History of Chicanos* (3rd ed. 1988); *Anything But Mexican: Chicanos in Contemporary Los Angeles* (1996). Acuña has been a controversial figure for some Chicanas. The 1984 National Association for Chicano Studies annual conference focused on women for the first time. At the plenary panel on the position of la mujer Chicana within Chicano Studies, historian Cynthia Orozco observed that Acuña's book, *Occupied America*, perhaps the most widely read book about Chicanos (a work which should be considered the 'Chicano Bible') epitomizes the lack of a conceptualization of gender. Acuña cogently describes racial and class oppression, but he does not mention gender oppression. We must not underestimate the power of Acuña's book: teachers have organized courses around it, and it has taught thousands how to think about the oppression Mexicans experienced. See Cynthia Orozco, *Sexism in Chicano Studies and the Community*, in *Chicana Voices: Intersections of Class, Race, and Gender* 12-3 (Teresa Cordova, et al., eds., 1990).

6. I can speak from personal experience about the Society of American Law Teachers (SALT) and its struggles with racial analyses that are confined to the experiences of African Americans. These struggles were most evident at its teaching conference held in Minnesota in 1994. A series of reflection pieces about this conference appear in the SALT newsletter *The Equalizer*, Vol. 1994:4, at 5-20. Scholars of color including Sumi Cho, Frank Valdés, Lisa Iglesias, Leslie Espinoza, Anthony Farley, Sharon Hom, myself and others active in LatCrit have been a part of re-vitalizing SALT's agenda, advocating for affirmative action by organizing a march in San Francisco in January 1998 involving hundreds of law professors, lawyers, and law students, and mobilizing against the "Solomon Amendment," inhibiting law schools from preventing the military from recruiting on law school campuses, despite its discriminatory activities against sexual minorities and women.

7. I use the word "Queer" strategically, in alliance with others who deploy this term to denote those who see sexual identity as a fluid and relational position that can be named, so as to destabilize the stereotypic and homophobic perspectives of the general society.

8. See, Teresa Cordova, *Forward to Third Printing*, in *Chicana Voices: Intersections of Class, Race and Gender* xii-xiii (Teresa Cordova, et al. eds., 1993).

9. I consulted with Frank Valdés as an editor of this symposium and obtained permission from Kevin Johnson and George Martinez as authors of the piece before deciding to write the Afterword. I see the Afterword as a colloquy with Kevin and George that is intended to indirectly examine LatCrit practices by listening to the voices of two Chicana scholars active over the years in NACCS.

10. See Boaventura de Sousa Santos, *Towards A New Common Sense: Law, Science and Politics in the Paradigmatic Transition* 459 (1995). He writes:

Jorge Luis Borges told us the story of the emperor who ordered the production of an exact map of his empire. He insisted that the map should be exactly to the most minute detail. The best cartographers of the time were engaged in this important project. Eventually, they produced the map, and, indeed, it could not possibly be more exact, as it coincided point by point with the empire. However, to their frustration, it was not a very practical map, since it was of the same size as the empire.

(Citing Borges, *Obras Completas* 90 (1970)).

11. See Johnson & Martinez, *supra* note 2.

12. *Id.*

13. Counting last names is admittedly a tricky business. Nonetheless, I report it here because I think it offers a rough measure of the extent to which Chicanas' agency in the construction of our reality can be overlooked. Moreover, I believe in "head counting" as one mechanism for exposing the presence or absence of particular subgroups.

14. See Stephanie Phillips, The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History, 53 *U. Miami L. Rev.* 1247 (1999).

15. See Victoria Ortiz & Jennifer Elrod, Reflections of LatCrit III: Finding "Family", 53 *U. Miami L. Rev.* 1257 (1999).

16. See Victoria Ortiz & Jennifer Elrod, Construction Project: Color Me Queer + Color Me Family = Camilo's Story, in *Critical Race Theory: Histories, Crossroads, Directions*, (Angela P. Harris, Jerome Culp & Francisco Valdés eds., forthcoming 1999). Coincidentally, I wrote the introduction to the cluster of articles on narrative, including this entry, which will appear in this book. See Margaret E. Montoya, Celebrating Racialized Narratives, id.

17. See Ortiz & Elrod, *supra* note 14, at 4.

18. See Elvia Arriola, Welcoming the Outsider to an Outsider Conference: Law and the Multiplication of Self, 2 *Harv. Latino L. Rev.* 397 (1997).

19. See Athena D. Mutua, Shifting Bottoms and Rotating Centers: Reflections on LatCritIII and the Black/White Paradigm, 53 *U. Miami L. Rev.* 1177 (1999).

20. Id. at 9-10. (footnotes omitted) (emphasis added).

21. Id. at 17.

22. Tayyab Mahmud, Colonialism and Modern Constructions of Race: A Preliminary Inquiry, 53 *U. Miami L. Rev.* 1219 (1999).

23. See, e.g., *Racism, Modernity & Identity* (Ali Rattansi & Sallie Westwood eds., 1994); Floya Anthias & Nira Yuval-Davis, *Racialized Boundaries: Race, Nation, Gender, Colour and Class and the Anti-racist Struggle* (1992). Mahmud's references reveal a library that, I believe, will prove quite intriguing to LatCrits, ranging from such well-known authors as Frantz Fanon and Edward Said to the military handbooks of the Indian army.

24. See Michael Omi & Howard Winant, *Racial Formation in the United States*, (1986); George Frederickson, *White Supremacy: A Comparative Study In American And South Africa History* (1981).

25. Valdés, *supra* note 1, at 2. Frank Valdés offers the term "OutCrit" to indicate an aspirational coalition among critical scholars working in the areas of CRT, LatCrit, Queer, Feminist, Race-Fem and other legal discourses focused on anti-subordination

26. See Teresa Cordova, Introduction to Third Printing, in *Chicana Voices: Intersections of Class, Race and Gender* (1993); Teresa Cordova, Roots and Resistance: The Emergent Writings of Twenty Years of Chicana Feminist Struggle, in *Handbook of Hispanic Cultures in the United States: Sociology* (Felix Padilla, ed. 1994); and, Teresa Cordova, Anti-Colonial Chicana Feminism, 20 *New Pol. Sci.* 379 (1998).

27. See Deena J. Gonzalez, Speaking Secrets: Living Chicana Theory, in *Living Chicana Theory* (Carla Trujillo, ed. 1998).

28. See Gilberto Garcia, Beyond the Adelita Image: Women Scholars in the National Association for Chicano Studies, 1972-1992, 5 *Persp. Mex. Am. Stud.* 35 (1995).

29. Professor, Chicana and Chicano Studies Department, Arizona State University. Cordelia Candelaria is an accomplished poet, essayist and writer. She is the author of numerous books, including *Chicano Poetry, A Critical Introduction* (1986); *Seeking the Perfect Game: Baseball in American Literature* (1989); and, *Feminisms: An Anthology of Literary Theory and Criticism* (1997). She was the editor of *Frontiers: A Journal of Women Studies and Multiethnic Literature of the United States: Critical Introductions and Classroom Resources* (1989).

30. MECHA is the acronym for Movimiento Estudiantil Chicano de Atzlan, a Chicano student activist organizatio

31. Cordelia Candelaria, *Feminisms: An Anthology of Literary Theory and Criticism* (1997).

32. Revised 4/10/99 by Cordelia Candelaria.

33. Associate Professor of History, Pomona College; Chair of Chicano Studies, Claremont. Deena Gonzalez has authored numerous articles on nineteenth century history, some with a focus on the will-writing practices of widows in Santa Fe, New Mexico. One of her books, *Refusing the*

Favor: *The Spanish-Mexican Women of Santa Fe, 1820-1880*, is forthcoming from Oxford University Press, and the other, *The Dictionary of Latinas in the U.S.*, is forthcoming from Garland Press.

34. MALCS is the acronym for *Mujeres Activas en Letras y Cambio Social* (Women Active in Letters and Social Change), a progressive group of Chicana academics that formed in 1982 in Northern California, who sponsor an annual summer workshop. In the summer of 1999, Guadalupe Luna (University of Northern Illinois) and I will participate on a panel on LatCrit Theories and Practices at the MALCS summer meeting being held in Minnesota.

35. See Deena Gonzalez, *Speaking Secrets: Living Chicana Theory*, in *Living Chicana Theory* (Carla Trujillo, ed. 1998).

36. *Id.* at 1.

11. Kevin R. Johnson* & George A. Martínez,⁺ *Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship*, 53 MIAMI L. REV. 1143 (1999)

INTRODUCTION

As the century comes to a close, critical Latina/o theory has branched off from Critical Race Theory. n1 This article considers how this burgeoning body of scholarship finds its roots in a long tradition of Chicana/o activism and scholarship, particularly the work of Chicana/o Studies professors. In the critical study of issues of particular significance to the greater Latina/o community, we owe an intellectual debt to the generations of scholarship focusing on Chicana/os in the United States.

This praise might strike some knowledgeable observers as odd. Chicana/o Studies developed with an exclusive focus on the subordination of persons of Mexican ancestry in the United States and still adheres to the view that investigation of the histories of other Latin American [1144 national origin groups is beyond its scope. In contrast, LatCrit theory from its inception has attempted to focus on the commonalities of persons tracing their ancestry to Latin America. Despite Chicana/o Studies offers important lessons for LatCrit theorists scrutinizing the legal treatment of all Latina/os.

Part I of this article considers the link between Chicana/o Studies activism and Latina/o legal scholarship. Part II analyzes how LatCrit theory finds its intellectual roots in Chicana/o Studies scholarship. In this analysis, we hope to establish the relationship between Chicana/o Studies activism and scholarship, which blossomed as a result of the 1960s Chicano movement, and LatCrit theory. We also show how the Chicana/o Studies model helps us think about some vexing

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⁺ Associate Professor of Law, Southern Methodist University; B.A. 1976, Arizona State University; M.A. (Philosophy) 1979, University of Michigan; J.D. 1985, Harvard University. Section I of this paper was presented on the plenary panel on Activism at the 1998 Sixth Annual Western Law Teachers of Color Conference sponsored by the University of Oregon Thanks to Keith Aoki, Steve Bender, and Ibrahim Gassama for graciously inviting us to participate in the Western Teachers of Color conference. Thanks also to Frank Valdés and Sumi Cho for their encouragement. We are thankful to Professor Dennis Valdés for allowing us to include his bibliography of Chicana/o history as an Appendix and offering comments on the article. *Muchísimas gracias* to Mary Romero and Guadalupe Luna, both who went above and beyond the call of duty to carefully read and review a rough draft of this article and offer many helpful comments and correct many errors.

challenges posed to LatCrit theorists. Finally, we highlight a rich body of Chicana/o Studies scholarship on which future critical Latina/o scholarship may build in critically analyzing how law affects the Latina/o community.

I. GENERATIONS: LATINA/O SCHOLARS, SCHOLARSHIP AND ACTIVISM

This section considers the generations of activism by Chicana/o scholars. In so doing, we go beyond law teachers because of the need to view Chicana/o scholar activists as part of long tradition not limited to legal academics.

A. WORLD WAR II AND BEYOND

World War II remains widely recognized as a watershed moment in the history of Mexican-Americans. n2 With changes —good and bad— wrought by war, Mexican-Americans came of age and achieved a new political understanding. n3

After the war, a group of Mexican-Americans, some of whom had taken advantage of the G.I. Bill, formed a small cadre of scholar/activists. George Sánchez n4 (University of Texas), Ernesto Galarza, n5 Julian [1145 Samora (University of Notre Dame), n6 and Quino Martínez (Arizona State University).

In 1951, George Sánchez founded the American Council of Spanish-Speaking People, which filed civil rights lawsuits designed to halt discrimination against Mexican-Americans. n7 Sánchez served as of arguably, the most prominent self-help group of his generation, the League of United Latin American Citizens (LULAC). n8 LULAC was “middle class, accepted only U.S. citizens for membership, and tended towards assimilatio” n9 Through a variety of means, Sánchez sought to induce the U.S. government to ensure the full civil rights of Mexican-Americans. n10 For example, he took the position that discrimination against Mexican-Americans would hurt U.S. foreign relations with Latin America. n11 On the controversial topic of immigration, he argued that Mexican immigrants hurt Mexican-Americans by taking away their jobs and undermining their prospects for assimilating into mainstream society. n12 Today, many would criticize his positions, but at the time, these views reflected conventional Mexican-American attitudes about assimilation and immigratio

Like George Sánchez, Ernesto Galarza also dealt with the issue of immigration, but in the specific context of its impact on farmworkers. n13 He argued that dominant society created negative stereotypes about undocumented workers that reinforced racism against Mexican-Americans. n14 As part of his activism, Galarza established the National Farm Workers Union in the mid-1940s, which served as a precursor to the [1146 United Farm Workers Union of Cesar Chavez, and which opposed the immigration of Mexican workers that undercut the wage scale. n15 In addition, Galarza helped establish the Mexican-American Legal Defense and Education Fund (MALDEF), which ultimately became perhaps the most potent weapon for protecting the legal rights of Mexican-

Americans (and, ironically enough, in light of Galarza's views on Mexican immigrants, for Mexican immigrants). n16

Julian Samora pioneered the field of Mexican-American studies by constructing a sociological perspective on Mexican-Americans. n17 Through his scholarship, he sought to influence policy toward Mexican-Americans and improve their condition. As a scholar-activist, Samora helped found the Southwest Council of La Raza, an advocacy group supporting full civil rights for Mexican-Americans. n18

A specialist in historical linguistics, Quino Martínez actively supported a number of major Mexican-American community projects in Arizona. For example, he supported the Guadalupe Organization, an important activist group that advanced the interests of the Mexican-American community of Guadalupe, Arizona. n19 In addition, Martínez served as a mentor to the Chicana/o student activists at Arizona State University in the 1960s and 1970s.

Scholars of this generation generally believed that Mexican-Americans should assimilate into the mainstream. Viewing undocumented labor as thwarting full integration of Mexican-Americans, they advocated restrictive immigration laws. n20 Though these views are antithetical to today's Chicana/o Studies and LatCrit scholar activists, these pioneers understood that dominant society demanded assimilation as a prerequisite to Mexican-American membership. They also saw, more generally, the relationship between Mexican immigration and the domestic civil rights of the Mexican-American community.

This generation of scholar activists eventually learned that restrictive immigration laws and policies failed to help, and indeed adversely affected, the Mexican-American community. n21 For example, the U.S. government in 1954 embarked on "Operation Wetback" and deported many long-time U.S. residents, breaking up Mexican-American families, and resulting in U.S. citizens of Mexican ancestry leaving the country. n22 "The Mexican American community was affected because the campaign was aimed at only one racial group, which meant that the burden of proving one's citizenship fell totally upon people of Mexican descent. Those unable to present such proof were arrested and returned to Mexico." n23 This experience caused Mexican-American scholar activists to reconsider their positions on immigration and assimilation. n24

B. THE CHICANO MOVEMENT OF THE 1960S

Providing powerful leadership, the post-World War II generation of scholar activists made important contributions to the advancement of Mexican-American civil rights. They set the stage for Chicano activists of the 1960s and 1970s. Building on previous generations of Mexican-American activism and inspired by the civil rights and anti-war movements, the farm worker movement in the west, and the efforts by Mexican-Americans to recover land in New Mexico, activism grew in the 1960s among politicized Mexican-American

communities throughout the United States. n25 Chicana/o youths voiced concerns with racial discrimination, poor education, and the lack of equal opportunity. The Chicana/o student movement saw Mexican-Americans dramatically walk out of schools throughout the southwest. Activists constructed a new “Chicano” self-identity, which represented an effort to redefine them selves by their own standards. As LatCrit theorists would later put it, they sought to “name [their own reality.” n26 Political leader Corky Gonzáles’s epic poem “I Am Joaquin” became the anthem for the Chicana/o [1148 movement and the effort to create a new identity. n27 The expression “Chicano,” the core to the new self-identity, symbolized pride in Mexican ancestry and traditions. “Long used as a slang or pejorative in-group reference to lower-class persons of Mexican descent, in the 1960s the term *Chicano* was adopted by young Mexican-Americans as an act of defiance and self-assertion and as an attempt to redefine themselves by criteria of their own choosing.” n28

Chicana/o Studies also promoted the idea of “*Chicanismo*,” which was then used by activists in establishing Mexican-American solidarity. n29 The Chicano movement gave dignity to a positive self-identity, and helped redefine Mexican-American heritage as something to be proud, not ashamed of, as past generations had bee n30

With the goal of Chicana/o pride, activists drew up a “Spiritual Plan of Aztlan”: a separatist vision of a Chicana/o homeland. n31 In set ting out this plan, they rejected assimilation into the mainstream on the ground that it reinforced subordination n32

Activism was closely linked to Chicana/o Studies scholarship. Indeed, “the most visible vestige of the [Chicano movement is to be found in academia in the many university Chicano studies programs and departments that exist throughout the Southwest.” n33 Through Chicana/o Studies courses, many Mexican-Americans became aware of the significance of the Treaty of Guadalupe Hidalgo to the subordinate status of Mexican-Americans. n34 Fernando Gomez explored how the Treaty of Guadalupe Hidalgo could be used to advance the civil rights of present-day Mexican-Americans. n35 Showing the link between scholarship and [1149 activism, Reies Lopez Tijerina relied heavily on the Treaty in his fight to reclaim land for persons of Mexican ancestry in New Mexico. n36

The important work of other Chicana/o Studies scholars had activist ends. A renowned activist, Rodolfo Acuña developed new theoretical approaches for understanding the situation of Chicana/os and specifically argued that Chicana/os had been colonized by the United States in a way that parallels the colonization of third world countries. n37 In analyzing the intersection of race and class in Chicana/o subordination in the Southwest, Mario Barrera allowed Chicana/os to better understand the complexity of immigration law and the Mexican-American community. n38 He also offered a new political theory of Chicana/os in the United States. n39

Chicanas also have been instrumental in creating a body of Chicana Studies scholarship. For example, Roxanne Dunbar Ortiz studied the history of Chicana/o resistance to loss of land in New Mexico. n40 In revisiting Chicana/o history, Vicki Ruiz documented the important activist role that Chicanas played and how they defied the stereotype that women of Mexican ancestry are passive. n41 Mary Romero studied the lives of Mexican-American women in the domestic service industry in the Southwest. n42 Most recently, Carla Trujillo has edited a book of scholarship on Chicana theory. n43

Besides political activism, the Chicana/o movement resulted in efforts to bring change through traditional means. The creation of the Mexican-American Legal Defense and Educational Fund (MALDEF) and the Southwest Voter Registration and Educational Project (SWVREP), are important examples. n44 SWVREP helped register new Mexican-American voters and facilitate political action. MALDEF has vindicated the rights of persons of Mexican ancestry in the legal process [1150 in cases such as *White v. Regester*, n45 a voting rights action, and *Plyler v. Doe*, n46 which protected the right of undocumented Mexican children to a public education. MALDEF also helped strike down California's Proposition 187, which stripped public benefits from undocumented immigrants. n47

In sum, Chicano movement leaders combined activism with scholarship in fighting for land rights, educational reform, language rights, and equality. As Chicana/o Studies began to define itself, it produced new scholar activists. Chicana/o Studies began to serve as the place where people could learn their history and become "active" within the community.

C. LATINA/O LEGAL SCHOLARS, SCHOLARSHIP AND ACTIVISM

Against this background of the Chicano movement, we encounter the Chicana/o law professors of the 1970s and early 1980s. As with the formation of Chicana/o Studies, student activists demanded for law schools to hire Latina/o law professors. n48 Among these first Chicana/o law professors are scholar activists, including but not limited to Leo Romero, n49 Cruz Reynoso, n50 and Richard Delgado. n51 For example, an early article by Delgado and Vicky Palacios argued that Mexican-Americans should be recognized as a "class" for purposes of bringing civil rights actions. n52 (Such "class" actions are most effective in bringing about structural reform.) An article by Romero, Delgado and Reynoso identified problems that Chicana/o students face in studying law, especially the cultural conflict faced by them in law school. n53 As scholar activists, they made concrete suggestions to make legal education more [1151 hospitable for Chicana/s, including recommendations that law professors should analyze the racial interests at stake in legal rules to make law relevant to Chicana/s.

Another person who fits within this long history of Mexican-American scholar activists is Michael Olivas (roughly of this generation), considered to be

the “Dean” of Latina/o law professors, who began teaching law in 1982. He pushed law schools to hire Latina/s and helped them gain tenure and promotion. When Olivas began teaching there were only 22 Latina/o law professors, n54 and, due in no small part to his efforts, there were 125 in the spring of 1998. n55 The first Latinas, including Rachel Moran and Berta Hernández, two prominent LatCrit scholars, joined the academy in the 1980s. To pressure law schools to increase the number of Latina/o law professors, Olivas, with the backing of the Hispanic National Bar Association, established the so-called “Dirty Dozen” list, i.e., a select list of law schools in areas with a significant Latina/o population but with no Latina/o faculty. The well-publicized list placed pressure on law faculties to hire Latinos/as; some schools did. n56 Olivas also conducted workshops for lawyers interested in law teaching at the annual Hispanic National Bar Association convention. Besides his activism in academia, Olivas helped establish a law student clinic to help Central American immigrant children detained by the Immigration and Naturalization Service in South Texas. n57

[1152

D. THE LATINA/O AS SCHOLAR ACTIVIST CONTINUES WITH LATCRIT THEORY.

Activism generated Chicana/o studies. Activism created LatCrit Theory. Due to the hard work of activists, a critical mass of Latina/o legal scholars has been established. Critical Latina/o theory is the result. LatCrit has emphasized the need for connection between theory and practice. n58 This focus fits comfortably within a well-established tradition of Chicana/o scholar activists. For example, contending that “all legal scholarship is necessarily and fundamentally political,” Frank Valdés has argued that LatCrit theorists must view themselves as activists. n59

More importantly, LatCrit theory has generated powerful perspectives and analysis important for activists. For example, LatCrit theorists recognize that perhaps the key area for activists to focus on is cultural preservation and retention of language rights. n60 There is a long history in this country of attempted forced assimilation, such as the infamous “Americanization” programs in the 1920s designed to teach Mexican-Americans the values of Anglo Saxon society. n61 Interestingly, these efforts do not stop at our border. Thus, the North American Free Trade Agreement (“NAFTA”) may be viewed as a way to “Americanize Mexico.” n62 The philosophical ideal of authenticity requires Latina/os to be true to that history. n63 For this reason, Chicanas/os suffer severely in attempting to assimilate. n64 Traumatic attempts to lose Spanish language skills and accents, for example, have injured Mexican-Americans. n65 [1153 Activists must resist the English-only movement that represents an effort to use the law to force abandonment of the Spanish language. Similarly, activists must resist those who contend that the immigration should be restricted because Latina/os fail to assimilate. n66

Similarly, society often treats Latina/os as foreigners, which contributes to the perception that they are racially and culturally different. Activists must combat this perception. Beyond this, LatCrit theorists have called us to recognize the importance of coalitions with other subordinated groups. For example, Rachel Moran and Bill Piatt have urged African Americans and Latina/os to work together in order to preserve remedial programs like affirmative action.⁶⁹

Careful study of school desegregation efforts by LatCrit scholars also have benefited activists.⁷⁰ Activists should promote a multicultural approach in areas like education and immigration. If, as Nathan Glazer has proclaimed, “we are all multiculturalists now,”⁷¹ it is time to work to realize that ideal.

LatCrit theorists also have noted that legal self-definition is important. For example, the Mexican-American’s legal definition as “white,” while superficially appealing, may actually serve to allow for continued oppression of Mexican-Americans and create barriers to coalitions with other non-Whites.⁷² As Chicanismo recognized, activists understand the importance of group self-definition and challenge how white definitions of Chicanismo may reinforce subordination.

In pursuing social change, we must not forget that, as LatCrit theorists have emphasized, there are limits to the utility of litigation. Courts often exercise their discretion against Mexican-Americans.⁷³ Legal success often does not translate into meaningful change. This suggests that [1154] activists need to supplement litigation efforts with political movements.⁷⁴ A well-known success story in Chicana/o Studies circles illustrates this point. In successfully resisting an effort to segregate the public schools in Lemon Grove, California in the 1930s, Mexican-Americans combined political action with litigation.⁷⁵ More recently, the “Mothers of East Los Angeles,” a group composed of Mexican American women, successfully organized to fight the placement of toxic waste sites through grassroots activism combined with litigation.⁷⁶ Chicana/o Studies and LatCrit activism is inextricably linked to scholarship. The next section analyzes this relationship.

II. CHICANA/O STUDIES AND THE EMERGENCE OF CRITICAL LATINA/O LEGAL SCHOLARSHIP

Critical Latina/o theory, the subject of five symposia in the last couple of years,⁷⁷ represents the first sustained critical consideration of legal issues of particular significance to the Latina/o community. The development of LatCrit scholarship is attributable in no small part to the new generation of Latina/o legal scholars. This new generation has focused on issues of particular concern to the Latina/o community, and has contributed a growing body of scholarship on Latina/o legal issues. The group added to the relatively small body of scholarship that previously existed on issues such as the impact of the immigration laws on

the Latina/o community, national origin discrimination against persons of Latin American ancestry, and language discrimination. This new scholarship has been long in coming. For example, not until the 1970s did Latina/o scholars analyze the fundamental question whether Mexican-Americans might be able to bring class action, an important tool in civil rights litigation.⁷⁸

Much of this new Latina/o scholarship is “critical.” How could you be Latina/o in the United States and look at the status quo on certain legal issues important to the Latina/o community and not be critical? [1155 Even some deeply conservative Mexican-Americans, for the most part disowned by Chicana/o activists, are critical of how this society treats Mexican-Americans. Linda Chavez has expressed concern with the anti-Mexican undercurrent to the immigration debate in the 1990s.⁷⁹ Richard Rodríguez and Rubén Navarette are critical of how Mexican-Americans have been treated in the United States.⁸⁰

Latina/o legal scholarship has responded to the perceived need to study specific issues of particular relevance to Latina/os that have not been squarely addressed in the civil rights scholarship, including Critical Race Theory. To address these issues, LatCrit theorists must grapple with some difficult questions. In doing so, we should look to the teachings of our Chicana/o Studies predecessors.

A. THE NEED FOR A DISTINCTIVE CHICANA/O LEGAL SCHOLARSHIP

LatCrit scholars have begun to address internal issues, namely the deep diversity within the pan-Latino community.⁸¹ Far from homogeneous, Latina/os are a “community of different communities.”⁸² There are differences among many Latina/os in terms of national origin, ancestry, language, skills, immigration status, class, skin color and physical appearance, “race” (as that term is traditionally used), and other characteristics. At the same time, there are many commonalities to the Latina/o experience in this country, including discrimination, perpetual treatment as foreigners, and devaluation of culture and language. Latina/os thus face the difficult task of focusing on commonality while recognizing difference.⁸³

Though important to emphasize commonality to build community, each national origin sub-group of the Latina/o community must be afforded the space to critically study its specific history in the United States. For example, Mexican-Americans in the Southwest have a distinctly different experience in this country than other Latina/o groups, such as Cubans and Puerto Ricans.⁸⁴ This history has been explored in [1156 the Chicana/o Studies scholarship, which has focused on the Chicana/o experience in the United States as opposed to the experiences of other sub-groups of the greater Latina/o community. Nor are the experiences of all persons of Mexican ancestry in the United States identical. Mexican-Americans and Mexican immigrants live different lives. Tension, as suggested by

some early Chicana/o scholars' views on immigration, n85 exists between these groups. n86

The different experiences necessarily affect scholarly inquiry. Mexican-Americans must be permitted to explore their own histories and analyze how the law has operated to reinforce their subordination. Some LatCrit theorists have embarked on the study of the Mexican-American experience. n87 Mexican-Americans indeed may have a distinctive "voice" in analyzing issues concerning the Mexican-American experience in the United States. n88

Some of the differences of perspective were brought out at a conference in 1998 marking the 150th anniversary of the Treaty of Guadalupe Hidalgo, which ended the United States-Mexican War in 1848. n89 Divisions of opinion between leading Chicana/o Scholars in the United States and scholars from Mexico, including the prominent Mexican intellectual Jorge Castañeda, became evident. Chicana/o scholars, including Rudy Acuña, pointedly accused the Mexican intellectuals of not being even remotely concerned with the status of Chicano/os in the United States. The Chicana/o Studies experience suggests that LatCrit Theory should encourage—or, at a minimum, should not discourage—distinctive scholarly inquiry into the histories and realities of subordination of Chicana/os. This study should not be considered as a threat to Latina/o unity but should be viewed as essential to a full understanding of racial subordination in the United States. One interesting aspect of [1157 this development is that Chicana/o Studies has been consciously nationalistic in outlook. It has focused exclusively on the Chicana/o experience, not that of other Latina/o groups. Premised on inclusiveness, LatCrit theory, however, generally has considered issues common to the greater Latina/o community. The focus of Chicana/o Studies has produced fruitful scholarship, but may be limited in its ability to assist in the building of political coalitions among all Latina/os. LatCrit theory strives to build pan-Latina/o community. Ultimately, Chicana/o Studies and LatCrit theory may move in opposite directions—with Chicana/o Studies becoming more inclusive n90 and LatCrit theory allowing for focused inquiry when appropriate.

B. LATCRIT THEORY AND OTHER CIVIL RIGHTS SCHOLARSHIP

One controversial question is how does Latina/o legal scholarship fit into other civil rights scholarship. Some have viewed LatCrit theory as a challenge to the traditional black-white binary view of civil rights in the United States. n91 This does not mean that various minority groups must engage in a race for the bottom to show that they suffered the most discrimination or that coalition-building is not possible. As Professor Angela Harris has outlined the argument, the African American experience in the United States, marked by the brutality of forced migration and chattel slavery, may well be exceptional to that of other groups. n92 Assuming this to be true, there remains room to analyze the Latina/o experience with discrimination in the United States. Indeed, the oppression of all

racial groups —Asian Americans, Native Americans, and Latina/os, as well as African-Americans— deserve study. The various groups have been oppressed in different, though often similar ways. These historical experiences all deserve serious scholarly attention.⁹³

[1158 This approach to the study of racial subordination is not a novel idea on university campuses (though they have been subject to attack at various times).⁹⁴ It was an implicit if not explicit understanding in the 1960s and 1970s as African American Studies, Asian American Studies, Chicana/o Studies, Native American Studies, and Ethnic Studies scholarship blossomed and flourished. Each of these fields studied issues of special concern to particular minority communities. Each has made, and continues to make, valuable contributions to the understanding of racial subordination in the United States. We have outlined some of the important contributions of Chicana/o Studies scholars. Scholars like Michael Omi and Ron Takaki have offered important insights from an Asian American perspective.⁹⁵ Kwami Anthony Appiah, Henry Louis Gates, and Cornel West have explored the place of African Americans in the modern United States.⁹⁶ Native American Studies scholars also have added to the race discourse.⁹⁷ Moreover, scholars in these disciplines generally have engaged in respectful dialogue about the intricacies of racial subordination. Realizing the need for separate investigation of the experiences of different racial groups, these scholars recognized commonality while respecting difference.

A multifaceted approach is warranted by the need to look at the whole of racial discrimination and subordination.⁹⁸ The various forms of racial subordination in the United States are related. As philosophers put it, the “web of belief” requires a study of all these groups.⁹⁹ Consequently, LatCrit theory should not be seen as a challenge to Critical Race Theory (“CRT”) but viewed as building on its achievements while [1159 moving in an independent direction to shed additional light on the racial subordination of Latina/os.

The study of language rights, immigration, and citizenship issues—all central to the Latina/o experience in the United States— had not been focused upon by CRT. Consequently, the unexplored questions deserved the scrutiny offered by LatCrit theorists. Indeed, Latina/o subordination, and racial oppression generally, cannot be fully understood without consideration of these important issues.

Such an analysis becomes apparent when one considers how inter ethnic conflict allows for minority groups to be pitted against one another, which can be seen in the African American, Korean American, and Latina/o conflict in South Central Los Angeles.¹⁰⁰ Similar episodes occurred last century when African Americans interests were pitted against those of Chinese immigrants.¹⁰¹ Similarly, race relations in Texas cannot be fully understood unless we consider the history of subordination of African Americans, Mexican-Americans, and poor whites in the state.¹⁰² Today, we see various minority groups at odds on the

issue of affirmative action¹⁰³ Only through analyzing the historical experiences of each minority can we fully understand the whole of racial subordination

C. THE NEED TO LOOK TO CHICANA/O STUDIES SCHOLARSHIP

In analyzing issues of particular importance to the Latina/o community, we should learn from the rich body of Chicana/o Studies scholarship. It is presumptuous of legal scholars to believe that we are the first to consider the issues of particular importance to Latina/os. The well-developed body of Chicana/o scholarship is the first generation of scholarship in the area. Critical Race Theorists emphasize the need for interdisciplinary discourse.¹⁰⁴ Accordingly, it behooves us to consider the foundational scholarship analyzing issues of importance to the Chicana/o community. While the first generation of scholars included people like Julian Samora, Ernesto Galarza, and George Sánchez,¹⁰⁵ the next generation included scholar activists like Rodolfo Acuña,¹⁰⁶ author of the classic *Occupied America*, and Mario Barrera.¹⁰⁷ The latest generation includes too many prominent Chicana/o scholars to name. None of this is meant to suggest that we should limit our scrutiny to Chicana/o studies scholarship. A body of Chicana/o history, sociology, and other social science warrants our consideration

To offer a concrete example of the wealth of literature for exploration by Chicana/o legal scholars, we include as an appendix to this article a bibliography of Chicana/o history compiled by Dennis Valdez, a Chicano Studies Professor at the University of Minnesota.¹⁰⁸ This bibliography offers a sample of the rich body of literature available to those interested in serious study of Chicana/os in the United States. Put simply, Latina/o legal scholars should learn from and build upon this rich body of scholarship. In analyzing these difficult issues of race and class in the United States, we should build on the generations of thought, rather than ignore them. Moreover, with legal training, law professors have what economists might call a “comparative advantage” in analyzing legal history. Legal skills prove invaluable in analyzing the history and development of law and how it has been used to subordinate Latina/os. Historian Richard Griswold Del Castillo wrote a fine book analyzing the court decisions dealing with the enforcement (or lack thereof) of the Treaty of Guadalupe Hidalgo.¹⁰⁹ Law professors have much to add to his study. The dispossession of Chicanos from the land was done through a variety of legal (and illegal) mechanisms. Though some of this work has been done,¹¹⁰ much remains. Similarly, important work has been done in recent years analyzing desegregation efforts in the public schools involving Mexican-Americans.¹¹¹ The intricacies of school [116] desegregation litigation gain much from a lawyer’s eye.

Immigration is another area in which legal skills allow for critical analysis. The U.S. immigration laws are incredibly complex, with many discriminatory impacts obscured by technical detail. In addition, enforcement of the laws often is

discriminatory, even if the letter of the law is not. This suggests that work with others trained in other academic fields might help, as they have, in analyzing how the law on the books differs from the law in practice. n112

While Latina/o law professors may apply legal training to the analysis of Chicana/o history, we must take care not to overlook broader political and social meanings of the events that Chicana/o Studies activists have identified. For example, while adding to the insights of Chicana/o historians about the Treaty of Guadalupe Hidalgo ("the Treaty"), n113 law professors should not be oblivious to the larger politically important aspects of the Treaty. n114 The hope symbolized by the Treaty mobilized a generation of Chicana/os to move for social change. It allowed activists like Reies Lopez Tijerina to rally New Mexicans to organize a potent political force. The Treaty has been a centerpiece of Chicana/o Studies on university campuses across the nation, one of the semi-permanent sites of focus on issues of importance to Chicana/os. It would be short-sighted for formalistic lawyers to focus on technicalities of the law and miss the broader political-social impacts of the Treaty of Guadalupe Hidalgo. n115

CONCLUSION

This article has outlined the relationship between the tradition of Chicana/o Studies activism and scholarship and the LatCrit movement. The roots of LatCrit theory can be found in Chicana/o Studies activism and scholarship. This article hopefully will encourage Latina/o legal scholars to consider this rich body of literature. The existence of Chicana/o scholarship provides valuable lessons for LatCrit theorists. Space exists for analysis of the experiences of various national origin groups [1162 that comprise the umbrella Latina/o community. In addition, the ability of Chicana/o Studies to co-exist with other allied disciplines analyzing issues of race, including African American Studies, Asian American Studies, Ethnic Studies and Native American Studies, suggests that it is not inconsistent for different groups with similar goals to explore the specific intricacies of their histories. Only through the study of the history of each minority group will we be able to understand the whole of racial subordination in the United States.

A similar analysis applies to LatCrit theory. Critical Race Theory and LatCrit theory can work together to study the intricacies of racial oppression. Moreover, in analyzing the place of Latina/os in the United States, we must understand that not all Latina/os are created equal. Different Latina/o national origin groups have had different experiences. To fully understand the whole, we must look at the various parts. Consequently, the Mexican, Cuban, Puerto Rican, and other experiences must be dissected and analyzed individually. Only then will we have a fuller understanding of Latina/o subordination in this country.

[The appendix to this article is included in this collection as Appendix 3, *infra*.]

NOTES:

1. For themes common to LatCrit Theory, see Francisco Valdés, Foreword—Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Employment, 2 *Harv. Latino L. Rev.* 1, 52-59 (1997). See generally Symposium, Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory, 19 *UCLA Chicano-Latino L. Rev.* 1 (Spring 1998); Symposium, LatCrit: Latinas/os and the Law, 85 *Cal. L. Rev.* 1087, 10 *La Raza L.J.* 1 (1998); Symposium, LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship, 2 *Harv. Latino L. Rev.* 1 (1997); Colloquium, International Law, Human Rights and LatCrit Theory, 78 *U. Miami Inter-Am. L. Rev.* 177 (1996-97); Colloquium, Representing Latina/o Communities: Critical Race Theory and Practice, 9 *La Raza L.J.* 1 (1996).

2. See David G. Gutierrez, Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity in the American Southwest 117 (1995). This is not to suggest that Mexican-Americans did not fight for civil rights before World War II; despite poll taxes, literacy tests, and violence designed to limit Mexican-American political power, they fought for equality. See generally Juan Gomez-Quinones, Roots of Chicano Politics, 1600-1940 (analyzing this history). Nonetheless, World War II, and the surrounding social, political, and economic forces, commenced a resurgence in the insistence on demands for equal rights.

3. See, e.g., Rodolfo Acuña, *Occupied America: A History of Chicanos* 251-306 (3d ed. 1988) (analyzing the transformative impact of World War II on Mexican-American community).

4. See, e.g., George I. Sánchez, *Forgotten People: A Study of New Mexicans* (1940).

5. See, e.g., Ernesto Galarza, *Farm Workers and Agri-Business in California 1947-1960* (1977); Ernesto Galarza, *Merchants of Labor: The Mexican Bracero Story* (1964); Ernesto Galarza, *Spiders in the House and Workers in the Field* (1970).

6. See, e.g., Julian Samora, *Los Mojados: The Wetback Story* (1971); Julian Samora, Joe Berna, & Albert Pena, *Gunpowder Justice: A Reassessment of the Texas Rangers* (1979).

7. See Ricardo Romo, George I. Sánchez and the Civil Rights Movement: 1940-1960, 1 *La Raza L.J.* 342, 342 (1986).

8. See Gutierrez, *supra* note 2, at 131.

9. F. Arturo Rosales, *Chicano! The History of the Mexican-American Civil Rights Movement* 93 (1997).

10. See *id.* at 125.

11. See Gutierrez, *supra* note 2, at 132. Similar arguments later eventually facilitated successful desegregation efforts by African Americans. See Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 *Sta L. Rev.* 61 (1988); see also Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 *Harv. L. Rev.* 518, 524 (1980) (“The [Brown decision helped to provide immediate credibility to America’s struggle with Communist countries to win the hearts and minds of emerging third world people. At least the argument was made by lawyers for both the NAACP and the federal government. And the point was not lost on the news media.”) (footnotes omitted); Mary L. Dudziak, The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy, 70 *So. Cal. L. Rev.* 1641 (1997) (analyzing the relationship between U.S. foreign affairs and civil rights during the Eisenhower administration).

12. See Gutierrez, *supra* note 2, at 144-45.

13. See *supra* note 5 (citing Galarza’s work in the area).

14. See Gutierrez, *supra* note 2, at 158 (reviewing Galarza’s writings and personal papers).

15. See Rosales, *supra* note 9, at 119-20.

16. See Luis R. Fraga, Preface, in “Seventh Annual Ernesto Galarza Commemorative Lecture 1992” (Stanford Center for Chicano Research, Stanford University).

17. See Cordelia Chavez Candelaria, Introduction of Guest Lecturer, in “Seventh Annual Ernesto Galarza Commemorative Lecture 1992” (Stanford Center for Chicano Research, Stanford University).

18. See *id.*

19. See Ernesto Galarza, Herman Gallegos & Julian Samora, Mexican-Americans in the Southwest at x, 9 (1970).

20. See *supra* text accompanying notes 12, 13, 15, and 16. Chicana/o Studies scholars later criticized the assimilationist model. For analysis of the limits of Mexican-American assimilation, Kevin R. Johnson, “Melting Pot” or “Ring of Fire”? Assimilation and the Mexican-American Experience, 85 *Cal. L. Rev.* 1259 (1997) and George A. Martinez, Latinos Assimilation and the Law: A Philosophical Perspective, 19 *UCLA Chicano-Latino Law Rev.* (Spring, 1998).

21. See Gutierrez, *supra* note 2, at 163. LatCrit scholars have analyzed how immigration law and policy disparately impacts the Mexican-American community. See, e.g., Kevin R. Johnson, Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class, 42 *UCLA L. Rev.* 1509 (1995); Elvia R. Arriola, LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids, 28 *U. Miami Inter-Am. L. Rev.* 245 (1996-97).

22. See generally Juan Ramon Garcia, Operation Wetback: The Mass Deportation of Mexican Undocumented Workers in 1954 (1980) (documenting deportation campaign).

23. *Id.* at 230-31.

24. See Gutierrez, *supra* note 2, at 164-68. For a general historical analysis of the Chicana/o movement see Carlos Muñoz, Jr., youth, identity, power: The Chicano Movement (1989).

25. See generally Rosales, *supra* note 9.

26. See Richard Delgado & Jean Stefancic, The Latino/a Condition: A Critical Reader 251 (1998).

27. See Muñoz, *supra* note 24, at 61-62; Rosales, *supra* note 9, at 180.

28. See Gutierrez, *supra* note 2, at 184.

29. *Id.* See generally Armando B. Rendon, Chicano Manifesto (1971) (articulating demands of Chicana/o movement). For a historical analysis of the development of the ideology of Chicanismo, see Ignacio M. Garcia, Chicanismo: The Forging of a Militant Ethos Among Mexican Americans (1997).

30. See Rosales, *supra* note 9, at 252-53.

31. See Rosales, *supra* note 9, at 183-84; see also Muñoz, *supra* note 24, at 75-78 (1989) (discussing 1969 conference in Denver at which the plan was developed).

32. See Gutierrez, *supra* note 2, at 185.

33. Rosales, *supra* note 9, at 253; see Muñoz, *supra* note 24, at 127-69 (analyzing demands by activists for Chicana/o Studies departments on campuses and the evolution of the field over time).

34. See Richard Griswold Del Castillo, The Treaty of Guadalupe Hidalgo: A Legacy of Conflict 145 (1990). One leading legal expert on the Treaty was introduced to it through Chicana/o Studies and teaches Chicana/o Studies courses in addition to law. See, e.g., Guadalupe T. Luna, “Agricultural Underdogs” and International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy, 26 *M. L. Rev.* 9 (1996); Guadalupe T. Luna, Chicana/o Land Tenure in the Agrarian Domain: On the Edges of a Naked Knife, 3 *Mich. J. Race & L.* 39 (1999).

35. See Griswold del Castillo, *supra* note 34, at 145.

36. See Rosales, *supra* note 9, at 154.

37. See generally Acuña, *supra* note 3. Until Acuña’s pathbreaking first edition of his book in 1972, the standard in the field was Carey McWilliams, North from Mexico: The Spanish-Speaking People in the United States (1948). An activist in his own rite, McWilliams was involved in the

successful overturning of the conviction in the infamous Sleepy Lagoon case in which Chicano youths were wrongly accused of murder. See Gutierrez, *supra* note 2, at 128.

38. See Mario Barrera, *Race and Class in the Southwest* (1979).

39. See Mario Barrera, *The Study of Politics and the Chicano*, 5 *Aztlan* 9 (1974).

40. See Roxanne Dunbar Ortiz, *Roots of Resistance: Land Tenure in New Mexico, 1680-1980* (1980).

41. See Vicki L. Ruiz, *From Out of the Shadows: Mexican Women in Twentieth Century America* (1998); Vicki L. Ruiz, *Cannery Women, Cannery Lives: Mexican Women, Unionization, and the California Food Processing Industry, 1930-1950* (1987).

42. See Mary Romero, *Maid in the U.S.A.* (1992).

43. See *Living Chicana Theory* (Carla Trujillo ed., 1998).

44. See Rosales, *supra* note 9, at 264.

45. 412 U.S. 755 (1973).

46. 457 U.S. 202 (1982).

47. See *League of United Latin Americans v. Wilson*, 1998 U.S. Dist. LEXIS 3368 (C.D. Cal. Mar. 17, 1998); *League of United Latin Americans v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

48. Cf. Derrick A. Bell, *Diversity and Academic Freedom*, 43 J. Leg. Educ. 371, 377 (1993) ("When under pressure from students or alumni law schools look beyond law school credentials and hire the best minority they can find").

49. Leo Romero began his law teaching career in 1970. He has taught for many years at the University of New Mexico School of Law, including six years as its dean.

50. Cruz Reynoso entered the legal academy in 1972 and later served for five years as a Justice on the Supreme Court of California. He now teaches at the UCLA School of Law and is a member of the U.S. Commission on Civil Rights.

51. Richard Delgado began teaching law in 1974. A founder of the Critical Race Theory movement, Delgado is currently teaching at the University of Colorado School of Law. Among his many books and articles, he is co-editor with Jean Stefancic of *The Latino/a Condition*, *supra* note 26, an anthology of readings on LatCrit Theory.

52. See Richard Delgado & Vicky Palacios, *Mexican-Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause*, 50 *Notre Dame L. Rev.* 393 (1975).

53. See Leo Romero, Richard Delgado & Cruz Reynoso, *The Legal Education of Chicano Students: A Study in Mutual Accommodation and Cultural Conflict*, 5 *M. L. Rev.* 177 (1975).

54. See Michael A. Olivas, *The Education of Latino Lawyers: An Essay on Crop Cultivation*, 14 *UCLA Chicano-Latino L. Rev.* 117, 128 (1994) [hereinafter Olivas, *Latino Lawyers*. Though active in his efforts to increase the numbers of Latina/os into legal academia, Olivas is a well-established scholar whose important works include *The Law and Higher Education* (2d ed. 1997), *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 *Hastings Const. L.Q.* 1019 (1995), *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom"*, 45 *St. L. Rev.* 1835 (1993), *Legal Norms in Law School Admissions: An Essay on Parallel Universes*, 42 J. Leg. Educ. 103 (1992), "Breaking the Law" on Principle: An Essay on Lawyers' Dilemmas, Unpopular Causes, and Legal Regimes, 52 *U. Pitt. L. Rev.* 815 (1991) [hereinafter Olivas, "Breaking the Law"], *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 *St. L. & Pol'y Rev.* 159 (1990), and *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders as Racial History*, 34 *St. Louis U. L.J.* 425 (1990) [hereinafter Olivas, *Slave Traders Chronicle*].

55. See Michael A. Olivas, *Latino/a Law Professor Newsletter*, spring 1998; see also Francisco Valdés, *Under Construction: LatCrit Consciousness, Community and Theory*, 85 *Cal. L. Rev.* 1087, 1134-37 (1997), 10 *La Raza L.J.* 1, 48-51 (1998) (analyzing impact of underrepresentation of Latina/os in legal education). Of the 117 of the Latina/o law professors whose backgrounds are known, 71 are of Mexican ancestry. See Olivas, *Latino Lawyers*, *supra* note 54.

56. See Yale Law's Lack of Latinos, *Con L. Trib.*, Nov. 3, 1997 (reporting release of annual Dirty Dozen list); Ken Myers, Hispanic Bar Raps 'Dirty Dozen'—Institutions Without Latinos, *Nat'l L.J.* Nov. 9, 1992, at 4 (same).

57. See Olivas, "Breaking the Law", *supra* note 54, at 833-35 (describing efforts).

58. See Valdés, *supra* note 1, at 31. Critical Race Theory also has begun to focus on linking theory to practice. See, e.g., Eric K. Yamamoto, Critical Race Praxis: Race Theory and Political Lawyering Praxis in Post-Civil Rights America, 95 *Mich. L. Rev.* 821 (1997).

59. See Valdés, *supra* note 1, at 53.

60. See, e.g., Max J. Castro, Making Pan Latino: Latino Pan-Ethnicity and the Controversial Case of the Cubans, 2 *Harv. Latino L. Rev.* 179, 185-87 (1997); Berta Esperanza Hernández-Truyol, Borders (En)gendered: Normativities, Latinas, and a LatCrit Paradigm, 72 *Y.U. L. Rev.* 882 (1997) (analyzing the role of culture to Latina/o identity).

61. See Martinez, *supra* note 20.

62. Stephen Zamora, The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement, 24 *Law & Pol'y Int'l Bus.* 391, 395 (1993); see George A. Martinez, Dispute Resolution and the Treaty of Guadalupe Hidalgo: Parallels and Possible Lessons for Dispute Resolution Under NAFTA, 5 *Sw. J.L. & Trade in the Americas* 147 (Spring 1998).

63. See Martinez, *supra* note 20.

64. See Johnson, *supra* note 20, at 1281-86 (analyzing limits imposed by society on Mexican Americans seeking to assimilate).

65. See, e.g., Steven W. Bender, Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience, 2 *Harv. Latino L. Rev.* 145 (1997); Christopher David Ruiz Cameron, How The Garcia 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), 10 *La Raza L.J.* 261 (1998).

66. See, e.g., Peter Brimelow, Alien Nation 272-74 (1995).

67. See Kevin R. Johnson, Some Thoughts on the Future of Latino Legal Scholarship, 2 *Harv. Latino L. Rev.* 101, 117-29 (1997).

68. See Kevin R. Johnson, Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century, 8 *La Raza L.J.* 42, 66-67 (1995); Valdés, *supra* note 1, at 53-54.

69. See Rachel F. Moran, Neither Black Nor White, 2 *Harv. Latino L. Rev.* 61, 87 (1997); Bill Piatt, Black and Brown in America: The Case for Cooperation 156 (1997).

70. See Jorge C. Rangel & Carlos M. Alcala, Project Report: De Jure Segregation of Chicanos in Texas Schools, 7 *Harv. C.R.-C.L. L. Rev.* 307 (1972) (documenting history of segregation of Mexican-Americans in public schools and Texas society generally).

71. See Nathan Glazer, We Are All Multiculturalists Now (1997).

72. See George A. Martinez, The Legal Construction of Race: Mexican-Americans and Whiteness, 2 *Harv. Latino L. Rev.* 321 (1997).

73. See generally George A. Martinez, Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980, 27 *U.C. Davis. L. Rev.* 555 (1994) (reviewing key judicial decisions involving civil rights of Mexican-Americans and concluding that courts frequently exercise discretion to detriment of minorities).

74. See Johnson, *supra* note 68, at 55-56.

75. See *id.* at 48-49 (summarizing events); Robert R. Alvarez, Jr., The Lemon Grove Incident: The Nation's First Successful Desegregation Case, 32 *J. San Diego Hist.* 116 (1986); see also *Westminster School Dist. v. Mendez*, 161 *F.2d* 774 (9th Cir. 1947) (holding that public school system had unlawfully segregated Mexican American students).

76. See Mary Pardo, Mexican American Women Grassroots Community Activists: "Mothers of East Los Angeles", *Frontiers*, Vol. 11, at 1 (1990).

77. See *supra* note 1 (citing symposia).

78. See Delgado & Palacios, *supra* note 52. Indeed, not until the 1950s was it clear that the Equal Protection Clause applied to persons of Mexican ancestry, see *Hernández v. Texas*, 347 U.S. 475 (1954); see also Ian F. Haney Lopez, Race and Erasure: The Salience of Race to LatCrit Theory, 85 *Cal. L. Rev.* 1153 (1997), 10 *La Raza L. J.* 57 (1998) (analyzing significance of Hernández).

79. See Linda Chavez, Immigration Not About Race, *USA Today*, May 31, 1995, at 13A (objecting to restrictionist claims that immigrants of color are somehow transforming United States).

80. See Ruben Navarrette, Jr., *A Darker Shade of Crimson* (1993); Richard Rodriguez, *Hunger for Memory* (1982).

81. See Johnson, *supra* note 67, at 129-38.

82. See *id.* at 129.

83. See Valdés, *supra* note 1, at 54.

84. Indeed, the Mexican-American communities in Texas, New Mexico, Arizona, and California developed differently based on historical, economic, and political circumstances peculiar to each state. See Iris H.W. Engstrand, The Impact of the U.S.-Mexican War on the Spanish Southwest, in *Culture y Cultura: Consequences of the U.S.-Mexican War, 1846-1848* at 18-24 (1998). The different experiences between Cuban American and other Latina/os are implicit in Castro, *supra* note 60, which analyzes the potential for integrating Cubans into a larger Latina/o community in light of the specific historical experience of Cuban Americans.

85. See *supra* text accompanying notes 12, 13, 15, and 16.

86. See Gutierrez, *supra* note 2 (analyzing tensions among Mexican-Americans on issue of immigration). Some of the differences and tensions are explored in Kevin R. Johnson, Immigration and Latino Identity, 19 *UCLA Chicano-Latino L. Rev.* 197 (Spring 1998).

87. See, e.g., Arriola, *supra* note 21 (studying impact of immigration enforcement on Mexican-American community); Martinez, *supra* note 73 (analyzing Mexican-American litigation experience); Haney Lopez, *supra* note 78 (analyzing racialization of Mexican-Americans in Texas); Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and legal Discourse*, 17 *Harv. Women's L.J.* 185, 15 *UCLA Chicano-Latino L. Rev.* 1 (1994) (analyzing how Chicanas adopt "masks" that are acceptable to dominant culture).

88. Cf. Alex M. Johnson, Jr., The New Voice of Color, 100 *Yale L.J.* 2007 (1991) (contending that minority professors have distinctive "voice" to add to legal scholarship).

89. For a collection of the papers presented at the conference, see Symposium, Understanding the Treaty of Guadalupe Hidalgo on its 150th Anniversary, 5 *Sw. J.L. & Trade in the Americas* 1 (Spring 1998).

90. There are some nascent suggestions that this might occur with the advent of Latina/o Studies. For example, a recent book, *The Latino Studies Reader: Culture, Economy, and Society* (Antonia Darder & Rodolfo D. Torres eds., 1998), includes readings on various Latin American national origin sub-groups).

91. See, e.g., Richard Delgado, Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary, 75 *Tex. L. Rev.* 1181 (1997). This challenge is not limited to LatCrit scholars but has been asserted by academics in disciplines other than law. See, e.g., Mary Romero, Introduction, in *Challenging Fronteras: Structuring Latina and Latino Lives in the U.S.* at xiv (Mary Romero, Pierette Hondagneu-Sotelo, & Vilma Ortiz eds., 1997) ("Clearly, we cannot rely on the dominant culture's notions of 'whiteness' or 'blackness' to assess racial identity among Latinos in the U.S. The binary thinking of race relations in this country is so ingrained in the dominant culture that it continues to shape what we see.").

92. See Leslie Espinoza & Angela P. Harris, Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race, 85 *Cal. L. Rev.* 1585, 1594-1605 (1997), (articulating this argument).

93. Showing the need for a multiracial approach to race scholarship, Michael Olivas analyzed one of Derrick Bell's famous fictional parables, "The Chronicle of the Space Traders," which suggested that whites might surrender all African Americans to "space traders" for world peace, and concluded that comparable actions had been taken in this nation's history by the U.S. government against Asians, Mexican-Americans, and Native Americans. See Olivas, *Slave Traders Chronicle*, *supra* note 54.

94. See Frank Bruni, California Regent's New Focus: Ethnic Studies, *Y. Times*, June 18, 1998, at A20 (reporting that Ward Connerly, the Regent of the University of California who led the effort to end affirmative action in the UC system, questioned the soundness of ethnic studies programs).

95. See, e.g., Michael Omi & Howard Winant, *Racial Formation in the United States* (1994); Ronald Takaki, *Strangers From a Different Shore: A History of Asian Americans* (1988).

96. See, e.g., Kwame Anthony Appiah, *In My Father's House: Africa in the Philosophy of Culture* (1992); Henry Louis Gates et al., *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (1994); Cornel West, *Race Matters* (1994).

97. See, e.g., Jack D. Forbes, *Africans and Native Americans: The Language of Race and the Evolution of Red-Black Peoples* (2d ed. 1993).

98. See Kevin R. Johnson, Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?, 76 *Or. L. Rev.* 347, 358-69 (1997).

99. See George A. Martinez, African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition, 19 *UCLA Chicano-Latino L. Rev.* 213(Spring 1998).

100. See Bill Ong Hing, Beyond The Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Drive Multiracial Society, 81 *Cal. L. Rev.* 863, 889 (1993); Lisa C. Ikemoto, Traces of the Master Narrative in the Story of African/Korean American Conflict: How We Constructed "Los Angeles," 66 *S. Cal. L. Rev.* 1581 (1993); Reginald Leamon Robinson, "The Other Against Itself": The Violent Discourse Between Korean and African Americans, 67 *S. Cal. L. Rev.* 15 (1993).

101. See Kevin R. Johnson, Race, The Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness, 73 *Ind. L.J.* 1111(Fall 1998) (analyzing this episode of interethnic conflict).

102. See generally Neil Foley, *The White Scourge: Mexicans, Blacks and Poor Whites in the Cotton Culture of Central Texas* (1997).

103. See, e.g., Yamamoto, *supra* note 58 (analyzing conflict between various minority groups in public school educations that implicated affirmative action); see also Gabriel Chin, Sumi Cho, Jerry Kang, & Frank Wu, *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice* (1997) (offering arguments by four Asian American law professors in support of affirmative action).

104. See Margaret M. Russell, Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice, 43 *Hastings L.J.* 749, 756 (1992).

105. See *supra* text accompanying notes 4, 5, and 6.

106. See Acuña, *supra* note 3.

107. See Barrera, *supra* notes 38, 39.

108. For an annotated bibliography of critical Latina/o scholarship, including work by academics in disciplines other than law, see Jean Stefancic, *Latino and Latina Critical Theory: An Annotated Bibliography*, 85 *Cal. L. Rev.* 1509, 10 *La Raza L. J.* 423 (1998).

109. See Griswold Del Castillo, *supra* note 34.

110. See *supra* note 34 (citing articles).

111. See Martinez, *supra* note 73, at 574-604 (analyzing school desegregation litigation brought by Mexican-Americans); Rachel F. Moran, Getting a Foot in Door: The Hispanic Push for Equal Educational Opportunity in Denver, 2 Ka J.L. & Pub. Pol'y 35 (1992) (analyzing interests of Mexican-Americans in school desegregation litigation in Denver).

112. See, e.g., Kitty Calavita, *Inside the State* (1992) (analyzing how U.S. immigration bureaucracy transformed law to suit its own agenda in Bracero Program).

113. See Christopher David Ruiz Cameron, *One Hundred Fifty Years of Solitude: A Law Professor Critiques the Dominance of Historical Scholarship on the Treaty of Guadalupe Hidalgo*, 5 Sw. J.L. & Trade in the Americas (forthcoming 1998) (contending that historical studies of Treaty often oversimplified complex role of law in stripping away rights of persons of Mexican ancestry).

114. See generally Richard Griswold del Castillo, *The U.S.-Mexican War: Contemporary Implications for Mexican Civil and International Rights*, in *Culture y Cultura*, *supra* note 85, at 76 (analyzing efforts to protect Mexican American civil rights through Treaty).

115. See generally Richard Delgado & Jean Stefancic, *Failed Revolutions* (1994) (analyzing limits of legal imagination in achieving social change).

12. Athena D. Mutua, * *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 MIAMI L. REV. 1177 (1999)

INTRODUCTION

This essay chronicles my participation at the LatCrit III Conference and examines some of the issues raised. It touches on battles that rage within our efforts to build coalitions across boundaries of race and ethnicity, and it poses questions of centers, bottoms and models.

Specifically, it asks: 'What group should be at the center of a given study or enterprise? [n.1](#) Whose 'faces are at the bottom of the well;' [n.2](#) and, ***1178** What model shall we use to analyze a given situation? [n.3](#) ' At first glance, the questions seem simple and the answers self-evident: everybody should be the center of attention sometime many of the groups are at the bottom together, or at one point or another; and the model you use depends on what it is you are trying to analyze. Actually, the questions are complex, and the answers unclear because limited resources of time, space, money and energy often pit group against group when priorities must be set. More significantly, the problems of building coalitions and developing political agendas bring us face-to-face with the reality that different racial and ethnic groups have distinct histories and interests, some of which collide.

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I believe LatCrit is attempting to address these complexities, not only in theory but in practice. Institutionally, LatCrit has implemented the concept of 'rotating centers,' whereby a session in each conference is devoted to an issue of primary concern to a non-Latino group. Further, LatCrit theory encompasses both race theory and ethnicity theory. [n.4](#) I advocate using the racial paradigm of the Latino/a experience because, I believe this model is the common ground between blacks and Latinos/as. A racial analysis illuminates each group's respective conditions and emphasizes the similarities and connections between those conditions; connections which, I hope, facilitate coalition-building efforts. Nevertheless ***1179** there are differences between the two groups and different faces appear at the bottom of the well depending on the issue analyzed. Thus, I tentatively propose that LatCrit embrace a notion of 'shifting bottoms' as a complement to the process of 'rotating centers'.

Part I of this essay is a prologue, reporting some thought-provoking conversations I encountered at the conference and my initial reactions.

Part II presents a critique of a LatCrit sentiment that appears to blame African-Americans for the erasure of Latino/a histories, experiences and struggles. [n.5](#) This sentiment is present in Juan Perea's article entitled The Black/White Binary Paradigm of Race: The 'Normal Science' of American Racial Thought. [n.6](#) Perea's description of the Black/White paradigm as a binary relationship obscures the key insight of the Black/White paradigm: its relationship to power. It obscures the reality of the unequal, hierarchical, power relations between different groups, which places whites at the top, blacks on the bottom, with other groups in between. I therefore endorse the formulation that the paradigm is better called the 'White Over Black' or 'Black Subjugation to White' paradigm. [n.7](#) The aspects of American racial reality that are accurately captured in the 'White Over Black' paradigm must not be ignored even ***1180** though the paradigm is inadequate to describe all dimensions of the experiences of various American peoples of color.

Part III encompasses my preliminary thoughts on the operation of multiple racial systems as well as my initial thoughts on what constitutes the 'bottom.' In this section, I take the metaphor of the 'bottom' from the White Over Black' paradigm [n.8](#) and apply some of its characteristics to examine the different historical experiences and issues related to blacks and Latinos/as.

The key to the 'bottom' metaphor is that the 'bottom' is constructed by the particularities [n.9](#) of 'white power's' (hereinafter White Power) obsessions, which result in the creation of different racial categories and systems. [n.10](#) That is, the 'bottom' speaks not to which group is ***1181** more oppressed [n.11](#) but rather to 'white power's' obsessions [n.12](#) and how those obsessions form the basis of different racial categories as sites of oppression. The 'bottom' is the embodiment of a particular obsession, and it represents the role a specific group plays in a particular racial system.

First, I believe the 'bottom' is that which 'white power' opposes.

Secondly, it is those aspects of group identity that often incorporate meanings different from those imposed by 'white power' and challenge 'white power's' conception of itself and its social vision (i.e. white, upper class, Anglos). These aspects are particularly threatening when the bearers are significant in number. Third, the 'bottom' is the relentless institutionalization of oppression and suppression of that aspect or energy which is a source of group unity and white opposition, even in the face of radically altered social conditions. The continuity of obsession and oppression during different historical periods gives the bottom a feel of permanence. And last, the 'bottom' is obsession reinforced by resistance from the groups who feel the weight of the particular oppression. This resistance often intensifies 'white power's' obsession. [n.13](#)

I argue that one of the constants in 'white power's' obsessions has been blackness. [n.14](#) It forms the basis of a colorized category (loosely *1182 based on skin color) upon which oppression is organized and blackness is the central construct marking the 'bottom' of a colorized racial system. This colorized system of racial oppression has been the principal racial system in America and has significantly affected how we think about race. [n.15](#) Consequently, a substantial part of the paper analyzes the construction of blackness as the opposite of whiteness, both as a concept and in the experience of slavery and its aftermath. This analysis is developed with the use of Omi and Winant's [n.16](#) theory of racial formation and shaded by an awareness of other non-white experiences.

Additionally, the works of Cheryl Harris [n.17](#) and William Wiecek [n.18](#) are used to demonstrate that black people are on the 'bottom' of a colorized racial system. This argument is furthered by examining Ian Haney- Lopez's [n.19](#) analysis of the Mexican American condition in 1950's Texas. It is argued that although Mexican Americans believed themselves to be white or one notch above blacks conceptually at that time, their experiences, particularly as they relate to their material conditions, suggest that Mexican Americans at least shared the 'bottom' with blacks. I comment on this suggestion in two ways. First, as Haney- *1183 Lopez implies, the subjective recognition of these shared experiences, even now, may well suggest a commitment to anti-racist struggle, whereas ignoring these objective conditions may indicate Latino/a acquiescence or complicity in the maintenance of white supremacist ideology and practice. [n.20](#) Additionally, however I posit that the similar conditions of blacks and Latinos result from the operation of different, though overlapping and mutually reinforcing, systems of racial categories. These systems of racial oppression are linked and informed by white power's self-conception and goals. Thus, while 'blackness' is the central construct in a colorized racial system, it is not the only category subject to racial oppression or the only system operating. Rather, 'white power's' obsessions have racialized groups that are neither white nor black, categorized and oppressed other groups as 'foreign,' and attempted to wipe out non-Anglo ethnicity.

The term 'shifting bottom' captures the different impact that 'white

power's' obsessions have on various groups. The meaning of the term is illustrated by briefly turning to the issue of language, which suggests, by reference to Susan Kiyomi Serrano's [n.21](#) account of the English Only movement, that Spanish has been racialized and is on the bottom of a language hierarchy. I then hypothesize in schematic form, that Spanish is a mark of a racial system that combines cultural, national origin, lineage and colorized categories comprising a system of racial oppression I call hybridity. Finally, it appears that on the issue of language, the 'bottom' has shifted and Latinos are on the 'bottom' of a racial system marked by it. Thus while blacks are consistently at the bottom of color-lined racial hierarchy, as posited by the 'White Over Black' paradigm, the bottom and those on it, shifts to other groups around other characteristics depending on the issue and my shift among various racial systems.

Part IV is my conclusion, where I return to the LatCrit institution of 'rotating centers', and endorse it as, among other things, a reflection of the reality of the 'shifting bottom.'

I. Prologue: Conversations and Reflections

The LatCrit Conference was more than I expected. It was intellectually stimulating, personally motivating and just plain fun. The panels, organized from an anti-subordination perspective, ranged from discussions on identity and culture to democracy and structural impediments to *1184 empowerment, providing me, an African-American woman, a greater insight into the Latino/a condition in the United States and the law's relation to that condition. I had an opportunity to embrace old and new friends while debating the complexities of immigration policy regarding Cubans and Haitians, religion as a natural site for the Latino/a struggle, and Latino/a ambivalence toward their indigenous Indian heritage, among other issues. I also discovered possible avenues for future scholarship and action! It was a divine experience!

As with many conferences, there was as much discussion taking place outside the scheduled sessions as there was inside. The assembled group was diverse, yet consisted of mostly self-identified Latinos/as.

A. Institutional Orderings

As I roamed around the tropical Eden Roc hotel, I bobbed in and out of various conversations. One set of conversations involved the possibility of setting aside at least one session in each LatCrit conference to discuss an issue of particular concern to a non-Latino/o ethnic/racial community, possibly, Asian Americans, African-Americans, Native Americans or other groups. This process, in which a series of non-Latino groups would have their issues, concerns or

insights spot-lighted, was dubbed 'rotating centers.' The concept of 'rotating centers' reflects both intellectual insight and experience. As an intellectual matter, we have learned each group's perspectives enhance the thinking and theory of all the groups. The experiences of LatCrit organizers participating in critical race theory workshops, and critical race theory organizers participating in the critical legal studies movement brought forth new and different perspectives to a variety of legal issues. Although these groups' formations owe their starts to a variety of scholars and theories, and these experiences were unfortunately ones of exclusion, [n.22](#) the fact remains that with each additional group and insight, the theory has flourished. [n.23](#)

***1185** The idea of 'rotating centers' institutionalizes a process of both advancing theory and building coalitions, while maintaining the focus of the LatCrit conference on Latinos and Latinas. [n.24](#) It does so by bringing together various groups to participate, analyze and theorize about their individual and community experiences, thereby facilitating the understanding, trust and camaraderie needed to build coalitions. A similar thought must have occurred to the organizers of LatCrit III, who initiated a panel called 'From RaceCrit to LatCrit to BlackCrit' and invited many Blacks and other Critical Race Theorists to participate. [n.25](#)

B. Rivalries

Another conversation featured a debate between two fairly friendly factions. One party insisted the 'Lat' needed to be put back into LatCrit, while the other maintained the more serious problem was LatCrit seemed to lack a 'Crit.' Thus one group questioned whether the conference focused enough on issues of general concern to the Latino/a community, while the other wondered whether the conference was critical enough, that is, whether it employed the tools of critical thought that were supposed to be associated with both LatCrit and Critical Race Theory. [n.26](#) What struck me at first was not the merit of either position, but how both positions reminded me of the difficulty of building and maintaining ***1186** coalitions among different groups, given multiple interests and intergroup rivalries.

The rivalry between blacks and Latinos/as came to mind, a rivalry that is played out in urban centers all over the country. It is fueled by innumerable factors, including contests over jobs, access to education and housing, and politicking of a wedge variety, all of which cause mutual suspicion and distrust. Thus, blacks often see Latinos/as as a racially mobile group capable of leapfrogging over them, with access to whiteness and all that it entails (as if all Latinos were capable of such a leap or as if this were the only option). White, Latinos often see themselves in competition with blacks as the 'largest and most

powerful minority' (as if South African apartheid hadn't demonstrated numerical strength demands recognition and portends power, but cannot always be equated with power). Unfortunately, these rivalries also manifest themselves in some intellectual circles, -and- scholarship.

Some Latino and Latina intellectuals seem to blame African-Americans for the distortion of the 'White Over Black' paradigm that appears to contemplate only two races, thereby making invisible the histories, struggles and experiences of Latino/as. Simultaneously, black intellectuals have an abiding suspicion that the more-racially-mobile Latino/as will demand resources and support for their fight against subordination, only to forget an antisubordination perspective as soon as they can assimilate. After all, it has been repeatedly demonstrated that assimilation into the American mainstream requires a group to distance itself from blacks. [n.27](#) This of course, reinforces both the oppression of blacks and the power of whites. When Latinos and Latinas describe their condition using an ethnic model rather than a racial one, [n.28](#) are they merely using the best analytical tool for the task, or are they attempting to distance themselves from blacks? If the latter, should Latino/as and blacks consider themselves part of the same intellectual community?

***1187** I left the discussion about 'Lat' and 'Crit' feeling a bit like an outsider. Well, I am an outsider. As a socially- and self-identified African-American woman, [n.29](#) whose insights arise, in part, from that position, I lay no claims to Latina-ness. Yet, I care deeply about Latino/a experiences from a humanist perspective and am moved by almost everyone's stories, recognizing myself, both intellectually and spiritually, in others who are oppressed. Further, like many LatCrits, I believe the insights gained by analysis of the contextualized experiences of other groups will aid in the fight to eliminate oppression. An outsider yes, but also an insider in relation to all those people at the conference with whom I share a commitment to social justice.

As it turned out, my outsider/insider perspectives at the conference confirmed the deeper inquiries I began upon returning home.

II. Blame and Misunderstandings: The 'Black/White' Paradigm

Juan F. Perea's article, [n.30](#) suggests the 'Black/White' paradigm is a binary theory of race relations and argues this binary theory contemplates and reinforces the idea that there are only two races in the United States, black and white. [n.31](#) Thus, the paradigm effectively erases the histories and racialization of Asian-Americans, Latino/as, and Native Americans. [n.32](#) Perea thus advocates, therefore, that LatCrit and Critical Race scholars shift away from the Black/White

paradigm, in favor of research that scrutinizes the particular histories and experiences of each people of color, to gain insights into the operation of oppression and *1188 possibly new avenues for its eradication. [n.33](#) While there is ample justification for Perea's contention that distilling race in America into black and white often overlooks or marginalizes the struggles of other groups, [n.34](#) there are, nevertheless, two serious deficiencies to his analysis.

First, Perea's description of the Black/White paradigm as a 'binary' theory of race relations is problematic because it implies that the two groups, blacks and whites, have equal power. His articulation, therefore, both feeds and reflects a sentiment that blames blacks, equally with whites, for Latino/a invisibility. In Perea's case, this view is perplexing. After all, he does not claim that scholars should never focus on the black experience and he understands that the Black/White paradigm encapsulates racial hierarchy. He further agrees 'slavery and the mistreatment of Blacks. . . . were crucial building blocks of American society,' [n.35](#) and that the 'struggles over the legal status of Blacks have been central in shaping the Constitution and the Supreme Court's decisions on race and equality.' [n.36](#) In fact this history and Perea's argument that black/white relations have become paradigmatic of race relations support the view that colorized racial hierarchy with white on the top and black on the bottom has been the principal racial system in the United States. The problem is that Perea's use of the word 'binary' combined *1189 with his tone, [n.37](#) place blame on blacks for the erasure of other groups of color from America's racial history. However, blacks did not invent white racism, [n.38](#) nor do we control the primary institutions supporting racial hierarchy. Moreover, while we have produced texts on race, we are not the principal purveyors of conventional wisdom on race issues. This is not meant to deny that blacks have contributed to the erasure of other non-white groups, to claim that we have exercised no agency in the construction of race relations, or to dispute that we have indulged in negative, stereotyped thinking which reinforces the oppression of other groups of color. [n.39](#) We have. We thus share responsibility for the failure of certain interracial coalitions, and for triggering resentment in other groups. However, as people of color assign and accept blame for various mistakes made, we must remember that our principal enemies are the institutions of white supremacy, not one another.

A potential way of reducing the sentiment that blames blacks for erasing 'other non-whites' is simply to rename the paradigm the 'White Over Black' or 'Black Subjugation to White.' [n.40](#) These alternative formulations better reflect the reality of unequal and hierarchical power relations, and point to the key objective of anti-racist struggle: the overthrow of white supremacy.

Furthermore, the 'White Over Black' paradigm posits not only that whites are at the top of a particular racial hierarchy and blacks at the bottom, but

arguably all others--including Asian Americans, Latinos/as, and Native Americans--are in the middle. Perea slights or ignores ***1190** this dimension of colorized racial hierarchy when he suggests the Black/White paradigm be discarded. [n.41](#) I would suggest the American colorized racial system is essentially equivalent to that of South Africa during the apartheid state, which, by law, created a middle racial tier of people with less power and status than whites, but more than blacks. To the extent the 'White Over Black' paradigm alludes to these rankings or colorized groups, it should remain an important part of how we conceptualize race in America. Nevertheless, I contend the 'White Over Black' paradigm should not be the sole paradigm for race, because racial paradigms generally are inadequate to capture all valences of the experiences of people of color but also because it is possible that multiple racial systems, which are structured around other group characteristics exist. If these exists then who is on the 'bottom' depends on the specific constellation of issues and groups present in a given controversy. As we explore alternatives, however, we should remember the lesson learned from reformulating the 'White over Black' paradigm: any paradigm concerning the circumstances of people of color or subordinated racial groups should encapsulate an understanding of the dynamics of power.

III. Power's Obsessions

A. Historical Context

The history of the United States is complex and anything but linear. However, a cursory look reveals that the United States was a de jure racial dictatorship from its founding until the Voting Rights Act was passed in 1965. [n.42](#) The white American dictatorship went far beyond the mere failure to extend the franchise. It exterminated Indians and appropriated their land; enslaved blacks and appropriated their labor; excluded and oppressed Chinese and other Asians; conquered and annexed the land of Mexicans; interred the Japanese, and, employed Jim Crow, immigration, citizenship and property laws, among other tools, to maintain this racial dictatorship. [n.43](#) The theory was Anglicized white ***1191** supremacy; the goal, a White nation. However, the nation moved from one ruled through brutal dictatorship to one ruled through hegemony after the 1960's. Today, it is hegemony informed by Anglicized white supremacy and privilege. It is also hegemony influenced by the struggles and survival of the other, as well as new constituent groups. [n.44](#)

In this process of constructing a nation, American race, races, racism, and racialism were born. [n.45](#) So too were white power's obsessions. These obsessions are many, varied and changing, but even today are ultimately informed by the same Anglicized, White, upper-class male perspectives that ruled the

historical dictatorship. This perspective reflects the "core culture" of U.S. society, [n.46](#) which is "white, Protestant, English-speaking, Anglo-Saxon," [n.47](#) and, one might add, heterosexual. Moreover, this perspective views itself as being superior to others, having dominated the country since its inception. Consistent with its dominant position, this perspective has projected its own reflection onto the nation, all too often defining itself as the only legitimate America. [n.48](#) The social goals envisioned by this perspective include ideas of liberty and equality. Yet, these ideas are organized around its core culture and are limited by its values as well as one of its primary goals--maintaining itself in Power. At the same time, this perspective defines, and is defined by, aspects of others' group identities, usually those aspects that most challenge white power's conception of itself and its social vision. In the assertion of these aspects of group identity, an assertion that often embodies meanings and visions contrary to those imposed by white power, people bearing these aspects of identity will be bitterly opposed. This is particularly so when the bearers are significant in number. The opposition will manifest itself in many kinds of institutional and societal oppression, despite opportunities for society to do otherwise. This oppression calls forth resistance, which further fuels the obsession, unless the resistance is crushed or is successful in altering power relations. It is these factors which constitute the "bottom."

Although there is a danger in imposing upon contextualized histories a universalized American construct about how white power maintains***1192** itself, thinking about our varied oppressions in this way provides some intellectual insight and clears the path for our coalition efforts.

B. The Mark of Blackness [n.49](#)

It is often said that blacks are at the 'bottom' of the American racial hierarchy. [n.50](#) Is this true? And if so, what does it mean? The statement is correct to the extent we are talking about a colorized racial hierarchy and noting the tremendous influence that this colorized racial system has had in the United States. As to its meaning, most obviously it suggests when the races are ranked from most degraded to most exalted, blacks are in the lowest rank and whites in the highest. Let us, however, parse this a bit more. I wish to posit equivalence between these two propositions: blacks, as a race, are at the 'bottom;' and, one of white power's greatest racial obsessions has been with 'blackness' and the black body. [n.51](#) In fact, I would assert that the black body consistently has been the primary symbol of 'race.' [n.52](#) From this perspective, it is the intensity of white obsession marked by conceptual opposition (or "otherness") and continuous oppression despite societal changes that determine the 'bottom.' Furthermore, in the context of colorized racial categories, blackness has had no close competition for at least the past four hundred years. [n.53](#)

***1193** Detailing albeit in a stylized way, the long history of white oppression of blacks and blackness will demonstrate why the colorized racial system has been central to our current understandings of race and why blacks are at the bottom. Black people represent the metaphorical bottom of a colorized racial hierarchy, in part, because: - blackness is an aspect of black people's humanity, based partially upon their dark colored skin, around which they have been forced, and have often chosen, to identify, [n.54](#) and which is opposed by white power as well as defined in opposition to whiteness; the assertion of blackness as black humanity, particularly when people marked by blackness have been in sufficient numbers, has posed the most direct challenge to white Power's conceptualization of itself and its social vision as white and consequently privileged; [n.55](#) - white power has oppressed people marked by blackness and institutionalized that oppression fairly consistently throughout American history, despite radically changing circumstances and opportunities to do otherwise, providing the dynamic of oppression a feel of permanence; and, - black people have resisted this oppression, thereby reinforcing White Power's obsession with blackness.

1. Blackness as an Aspect of Identity Opposed by White Power and Defined in Opposition to White Power

It seems observably true that blackness is an aspect of identity by which blacks, or people marked by dark skin (presumably of African descent), [n.56](#) have been forced, and often choose to cohere. I adhere to the theory that blackness and the race of black people are social constructs, that find their most defining moments in the collision of people from Africa and Europe and the enslavement of African peoples.

As such, White Power's obsession with blackness begins with slavery. White power created blackness, parasitically defining itself in opposition to it and seeking to oppress and suppress it in order to maintain ***1194** the power it derived from blackness, in both tangible and psychological terms. White power, wealth, and privilege required both blackness as subjugation and black people as slaves; and therefore, black humanity could not be tolerated.

Conceptually, whiteness as the polar opposite of blackness had meaning in European history long before slavery. [n.57](#) Whiteness was a symbol of cleanliness, purity, virtue, godliness, etc., and was in stark contrast to blackness. [n.58](#) Blackness, on the other hand, signified the devil, evil, dirtiness. [n.59](#) These notions undoubtedly influenced Europeans during their initial contact with

Africans, their most salient feature in European eyes being blackness. [n.60](#) Whites almost immediately began to contemplate and obsess over the possible origins and meanings of people encapsulated in black skin. [n.61](#) Even though there were other, more cultural differences between the two groups, such as dress, family structure, and religion, among others, [n.62](#) in the context of slavery, both the color and cultural differences would mesh into an overarching concept of blackness marking blackness as twice removed from 'normalcy' defined in whiteness and Anglo Saxon norms. [n.63](#) In slavery the conceptual opposition between blackness and whiteness would be experienced.

William M. Wiecek, argues the institution of slavery evolved over time in U.S. colonies as the importation of African slaves spread. [n.64](#) He ***1195** explains that Africans initially entered many of the colonies as free people or in some form of indentured servitude. As black slavery spread, however, European notions about Africans hardened from ethno-centrism into racism. [n.65](#) Wiecek notes that in areas with fewer slaves, race relations were more fraternal and relaxed, with opportunities for social mobility, even for those enslaved. [n.66](#) This reality, Wiecek comments, suggests that "a future other than slavery [had been possible for African immigrants]." [n.67](#) In the process of expanding and institutionalizing African slavery, however, slavery fused with race. [n.68](#) In other words, in white minds, slavery, a system of labor coercion, combined with color-delineated races, cementing in experience the conceptual opposition of whiteness and blackness while reinforcing both. This fusion between slavery and color-delineated "races" was partly a result of how slavery came to function in America a function White Power consolidated and encoded into law. [n.69](#) Slavery operated primarily along differences in skin color, embracing descent. It thereby created the color line where 'white' came to mean free and 'black' came to mean slave. Cheryl Harris, explains.

'Black' racial identity marked who was subject to enslavement, whereas 'white' racial identity marked who was 'free' or, at a minimum, not a slave. . . .Because the 'presumption of freedom [arose from color [white] and the 'black color of the race [raised the presumption ***1196** of slavery, whiteness became a shield from slavery, a highly volatile and unstable form of property... Because Whites could not be enslaved or held as slaves, the racial line between white and black was extremely critical. [n.70](#)

The color line, therefore, functioned not only to define people marked by black skin as presumptive slaves, but it also defined white people as privileged. This 'privileging' of white people started the process of whites consolidating themselves as a racial group. [n.71](#) Poor whites aligned themselves with upper class whites in opposition to, and parasitic upon, people marked by black skin. For example, Wiecek, summarizing Edmund Morgan's work, suggests that in

Virginia, Bacon's Rebellion, a lower class white rebellion, was resolved in part by expanding the African slave trade. [n.72](#) He explains that black slavery satisfied the colony's labor needs while privileging poor whites in relation to slaves. This resolution united lower and upper class whites against blacks [n.73](#) in a way that slavery alone might not have accomplished. Thus, racial [black slavery provided the glue for white racial solidarity vertically aligning white interests across class lines. [n.74](#) As a result of this merger of slavery with race, or rather slavery with the color line that delineated the races, White Power was enriched, white people privileged, and white racial identity coalesced.

In this context, whiteness became more than just a concept, it became a valuable commodity. Cheryl Harris has argued persuasively that whiteness became a property interest, shielding people defined as white from slavery and privileging them during slavery and thereafter. [n.75](#) Blackness, on the other hand, came to mean everything that whiteness was not. Whiteness was free, powerful, superior, privileged, civilized, industrious, intelligent, and beautiful, while blackness was slave, subjugation, inferior, savage, lazy, dumb, and ugly. [n.76](#) In other words, while ***1197** slavery functioned to enrich White Power, blackness functioned to further define and privilege it. [n.77](#)

As color-delineated race fused with slavery, blackness merged with subjugation and inferiority. Slave owners obsessively branded their names, and inscribed their desires and disgust on these bodies, including the designation "chattel." [n.78](#) Thus, a people marked by blackness were branded subordinate.

Ultimately, White Power came to view those who possessed whiteness as human while those marked by blackness were viewed as subhuman, three-fifths human, [n.79](#) chattel. The color line separated people of African descent from their humanity. [n.80](#) And, White Power, defining itself in opposition to blackness, denied humanity and human treatment, particularly the freedom desired by the human spirit, to the people marked by blackness. [n.81](#) Consequently, what emerged from slavery was not the Asante, Yoruba, Bakongo, [n.82](#) and other groups that initially entered slavery, but rather, a race of people. These people, marked by blackness as subjugated and inferior, were organized in solidarity around the black body. Their culture was a mixture of various African cultures and the emerging "American" culture, which was heavily influenced by the experience of slavery and resistance. They were identified as, and identified themselves as, Coloreds, Negroes, Blacks, and African- Americans in a century-long contest over the meaning of blackness. [n.83](#) Since ***1198** White Power viewed people marked by blackness as less than human, it obsessively opposed blackness and the humanity of and human treatment for anyone marked by it. This humanity challenged White Power's conceptualization of itself and fueled its obsession.

2. Blackness Challenges Power's Conception of Itself

The increasing numbers of African slaves in the colonies confirmed White Power's conception of itself as free, privileged, and superior. Humanity, however, marked with a black face, and asserting itself through insurrection, was perceived to threatened this tidy system of color categorization experienced in the expanding slave societies. Insurrection not only threatened white wealth and health, but it also compromised the very self-conceptions that the expanding slave societies confirmed. This is where the real seeds of obsession lie.

Wiecek argues the increasing numbers of African slaves in slaveholding states were accompanied by the implementation of more virulent laws to control blacks, which marked the emergence and further development of slavery. [n.84](#) As the number of African slaves grew, so did the apparatus to control Blacks. [n.85](#) The laws however, made clear that the threat of insurrection was one of White Power's overriding concerns. [n.86](#) Insurrection, humanity asserting itself in a black face and possibly resulting in black freedom, increased White Power's obsession with blackness because insurrection not only threatened the wealth of some Whites, but it also undermined the concept of white as free, privileged and in control. [n.87](#) In order to prevent rebellion and to reassert this conception, White Power had to codify ____ and exercise violence that severely regulated all black life. [n.88](#) Consequently, no detail of black life *1199 was too petty to note and White Power obsessively regulated every aspect of life for those marked as black. [n.89](#) The more numerous the slaves, the harsher the codes, even in areas with sizable free black populations. [n.90](#) What emerged therefore, was a particular kind of slave law, namely race control laws. [n.91](#) Wiecek explains, labor extraction, the goal of slavery, was privatized, meaning the owner himself had to coerce labor from slaves, [n.92](#) while race control, managing the movements and activities of blacks in society generally, became a matter of public concern and legislation. [n.93](#) Ostensibly, the public control of black lives facilitated the extraction of labor by keeping slaves in their place in white homes and plantations. But ultimately all black life, both slaves lives, and the lives of free Blacks had to be regulated and denigrated. [n.94](#) What lingered after slavery's demise was the concept and practice of race control meant to devalue black humanity and to maintain blackness as subjugation and inferiority. [n.95](#)

3. Institutional Oppression, Resistance, and Obsession

Black freedom posed innumerable challenges to White Power's conception of itself and its social order on the eve of Reconstruction. These

challenges included concepts of white privilege and the nation as a white country. However, subjugation had been indelibly inscribed on black bodies and faces, that it is not surprising that White Power moved to oppress it in new ways. [n.96](#) The Civil War, Emancipation, Reconstruction, and the passage of the Thirteenth and Fourteenth Amendments, all *1200 of which embroiled the nation into considerations of what slavery and blackness meant, marked instances where White Power could have reconstructed whiteness and blackness as something other than in opposition. [n.97](#) But it did not. These efforts only appear to have hardened the color-line and increased the obsession. If blackness could be maintained as subjugation and people marked by blackness oppressed, then whiteness could retain its supposedly justified privilege and power on a psychological, political and economic plain. The result was that meanings of whiteness and blackness as superior and inferior remained after the abolition of slavery. White Power invented new and different institutional and systematic oppressions to maintain blackness as subjugated and black people as oppressed. These new institutional mechanisms were evidenced by legal segregation, new forms of labor exploitation, excessive legal violence and discrimination. At the same time, people marked by blackness and organized around blackness resisted oppression. However, such resistance, in the form of establishing functioning and prosperous black towns, was often met with fire and destruction; independence was met with lynching; and defiance was met with violence. Resistance seemed to fuel the obsession and rebound with additional violence despite the altered conditions.

Similarly, the civil rights movement asserted black power; pronounced black as beautiful, and demanded just and human treatment for black people. It therefore presented White Power with another lost opportunity to re-create itself as something other than in opposition to blackness and to provide blackness with alternative meanings in white minds. [n.98](#) Although the Civil Rights movement brought about some progress, many have noted the progress was limited. [n.99](#) It appears the claims of the movement proved too contradictory to both the practice and concept of black as subjugated and inferior.

The endurance of the obsession and oppression of blackness and blacks, despite the tremendous opportunities for change, has led some to *1201 believe the position of blacks on the colorized racial bottom is permanent. [n.100](#) Some argue this relationship is permanent because of the role blackness plays in white racial cohesion. [n.101](#) Others believe in its permanence because the relationship is evidence of inherent black inferiority. However, the seeming permanence of these relations and meanings, is a crucial insight of the 'bottom' metaphor.

I have attempted to demonstrate the foundation of White Power's obsession with blackness and the reasons why that obsession persists: the

foundation lays in slavery and the creation of blackness. Blackness served to facilitate an economic operation in slavery, but it became much more. By its very definition, it marked a people as subjugated and inferior both innately and culturally to whiteness. White Power was opposed to blackness as the assertion of black peoples' humanity, in part because the elevated definition and experience of whiteness depended on the definition and experience of blackness as less than human. [n.102](#) This notion among whites of the limited humanity of blacks justified the white perception that black people were entitled to less of society's resources, particularly, human treatment. This challenge to the very premises of whiteness reasserted itself in different periods. Throughout each period, White Power sought to re-confirm blackness as subjugation and inferiority and to oppress black freedom both representatively and institutionally. These recurring episodes of resistance and imposition fueled white obsession and continued to define the boundaries of color-lined categorization and subjugation as well as color-lined experience and awareness. The episodes currently support the feeling that the meanings and oppression of blackness and blacks is permanent. Although this need not be the case, it is further evidence that blackness was and remains the central construct of a colorized racial system. Further, given the Nation's engagement with this system of racial categorization and oppression, the system informs and is fundamental to America's understandings about race.

***1202 B. Sharing 'the Bottom'**

Ian Haney-Lopez, argues that the language of race describes the meanings, conditions and dominant community attitudes related to ostensibly different human bodies. [n.103](#) Haney-Lopez explains that it is the language of race, rather than ethnicity or national origin, that marks people as twice removed from normalcy defined as whiteness and Anglo Saxon norms. Further, he argues that the language of race most adequately describes the experiences and conditions of segregation, subordination, social alienation, systematic inequitable distribution of resources and institutional practices of discrimination imposed on Mexican Americans in the 1950s who were legally characterized as white. [n.104](#) He supports his argument by describing their circumstances, demonstrating that: 1) the dominant white community viewed Mexican-Americans as a 'race'; 2) Mexican Americans were marked as a racial group by such practices as being required to use separate bathrooms from Whites; and, 3) segregated schools institutionalized racial oppression of Mexican Americans, with dilapidated school houses and inferior education. He argues that denying this racial history may facilitate the denial of legitimate need and access to anti-discrimination practices and institutions.

There are two points Haney-Lopez makes that are important for our

purposes. First, his description of Mexican Americans' views of themselves and White Power's views of them confirms, in part, the insight of the White Over Black paradigm, which assigns blacks to the colorized racial 'bottom.' Second, his argument characterizing Mexican American experiences as "racial," conspicuously features the experiences Mexican Americans shared with blacks.

Mexican Americans in the 1950's viewed themselves as white or as a different race, one notch above Blacks. This view is confirmed in the context of Mexico's history with black slavery and in the context of their dealings within American society. [n.105](#) For instance, Takaki tells the story of Wenceslao Iglesias who, in the 1920's, wanted to eat in a restaurant. He complains "they told us that if we wanted to eat we should go to the special department where it said 'For Colored People'. I told my friend *1203 that I would rather die from starvation than to humiliate myself before the Americans by eating with the Negroes." [n.106](#)

Furthermore, white power, as evidenced by the census, viewed and classified Mexican Americans differently at different time periods. They were viewed as a separate race in 1930, as white from 1940-1970, as members of the "other" racial designation in 1980 and as a "racially unspecified Hispanic ethnic" group from 1990 to the present. [n.107](#) Although Haney Lopez suggests that White Power's reasons for classifying Mexican Americans as white in the 1950's may have been suspect, [n.108](#) the various classifications suggests a number of tentative conclusions. First, it demonstrates that Mexican American's colorized characteristics were not consistently defined and suggests the possibility of upward mobility toward whiteness over time, similar to that experienced by other ethnic, presumably white, groups. In other words, the physical features of Mexican Americans were not assigned a fixed meaning; nor were these features consistently categorized in a way that necessarily singled Mexican Americans out for oppressive policies, at least within the context of a colorized racial system. Second, it gives credence to the idea that White Power was obsessed to some degree with different, distinct human bodies, as manifested perhaps in color or phenotype as evidenced by attempts to categorize them in relation to color. That is, it was obsessed with these distinctive, and perhaps brown, bodies and the meanings it assigned and associated with those bodies. And finally, it suggests that even though White Power may have been concerned with different coloring and other distinctive physical characteristics, it was not simply the feature of coloring that made Mexican Americans different and subject to subordination. White Power's ambivalence toward the colorized racial category Mexican Americans inhabited may suggest that cultural and other differences played a role in conceptualizing Mexican American identity and justifying their subjugation. Nonetheless, despite the views of Mexican Americans as one notch above blacks it can be argued that Mexican Americans in the 1950's shared the "bottom" with

blacks as objects of White Power's obsession. This obsession is evidenced by the institutionalization of oppression in segregated facilities justified on the basis of innate inferiority to whites. If one accepts the idea that blacks, throughout this period, were on the bottom of a colorized racial system, then segregation suggests that Mexican Americans shared with blacks the same conditions *1204 of oppression and therefore, at least materially, the "bottom." [n.109](#)

The failure of Mexican Americans to appreciate the similarities between their oppression and blacks' oppression may have been an indication of their complicity in the colorized racial system and hierarchy, as well as their aspirations to distance themselves from blacks in an effort to assimilate into whiteness. Recognition of these shared experiences, both then and today, may be an indication of a commitment to anti-racist struggle. [n.110](#)

Finally, if the experiences shared with Black's favor the conceptualization of a group as a race, as Haney Lopez suggests, then arguably, those attributes not shared with Black's favor an "ethnic" characterization. For instance, arguably forcing Spanish-speakers to learn English is analogous to the pressure that was put on white ethnic immigrants to abandon their native tongues. While the suppression of language might be characterized as a form of either ethnic or racial oppression, both characterizations implicate White Power's obsessions, and neither the 'White Over Black' paradigm nor the notion of Blacks as the colorized racial 'bottom' contributes much illumination. Here, in the case of Mexican Americans, White Power's obsession is either with brown bodies or the Spanish language; black bodies have nothing to do with it. [n.111](#) Yet the reality is more complicated than this when races are ethnicized and ethnicities racialized and when multiple systems of racial categorization and oppression are visible.

C. Shifting Bottoms: A Language Hierarchy and Multiple Racial Systems

Blacks are not on the 'bottom' with regard to language oppression, as the 'Black Over White' paradigm might suggest. [n.112](#) Instead, it appears Latinos/as are on the 'bottom' because they embody, so to speak, a shared language uniting them that is the object of White Power's obsession. In other words, Spanish translates to a central site or category of oppression, thereby relegating its speakers to the metaphorical 'bottom'. This appears in contrast to speakers of so-called black English, which is denigrated, but whose speakers can be said to 'at *1205 least speak English'. Similarly, although Asians and Native Americans' language are suppressed, no single shared language exists to unite the groups nor does it appear that any of their languages have been singled out for sustained denigration. But what if Latinos are on the 'bottom' are they 'on the bottom' of?

1. Language Hierarchy

I believe there are four reasons Spanish-speakers constitute the 'bottom' in a language hierarchy. These four reasons meet the criteria of the bottom discussed above.

a. Language as an Aspect of Ethnic Identity

Many writers have noted that language is an aspect of ethnic identity. [n.113](#) Language is central to culture and fundamental to ethnicity. [n.114](#) We not only communicate through language, but language structures how we think. [n.115](#) The Spanish language, having been spoken by Latinos three centuries before Anglo expansion and up to the present day, is central to the Latino identity. [n.116](#) It is a basis for cohesion in the community, and historically, has been a basis upon which they have been discriminated. [n.117](#) Christopher David Ruiz Cameron explains: If ethnicity is "both the sense and the expression of collective, intergenerational cultural continuity," then for Latino people, the Spanish language is the vehicle through which this sense and expression are conveyed. Spanish speaking bilinguals associate the use of Spanish with the family, friendship and values of intimacy. [n.118](#)

Further, Cameron argues that historically, white society has discriminated against Latinos/as on the basis of the Spanish language. He notes the epithet "spic" is one that emphasizes how Latinos speak, as opposed to how they look. [n.119](#)

b. Spanish and the Racialization of Spanish as a Challenge

Spanish spoken in the United States challenges White Power's conception of itself and its social goals in two significant ways. First, the ***1206** increasing numbers of Latinos/as portend significant political power for a group that speaks a language other than English. [n.120](#) This threatens White Power's mythical vision of a solitary nation united around one language, occupied by one people descended from the same ancestor. [n.121](#) Second, Spanish is associated with a racialized group and culture. [n.122](#)

With regard to the first point, Spanish now represents the most widely spoken language in the United States after English, [n.123](#) and the number of Spanish speakers is growing. [n.124](#) This numerical strength may portend political power in the future for those who speak Spanish. [n.125](#) Although Spanish cannot

realistically threaten the dominance of English as the prevailing language spoken in the United States, [n.126](#) it does undermine the myth that the United States is an English-speaking country from coast to coast. That myth has been present since the inception of the Union, despite the existence even then of multiple languages. [n.127](#) According to Perea, the myth is reasserted in times of national stress when White Power labels non- English speakers as foreign and un-American, urging them to conform to the core culture. [n.128](#) Specifically, large numbers of Spanish-speaking immigrants arrived in the United States after 1965, during economic recession. Combined with the overall growth of Spanish-speakers within the Latino community, White Power's conception of itself and its social vision of mythical cultural *1207 homogeneity, albeit real cultural hegemony, is challenged. [n.129](#)

This challenge is made more serious by the second point, the fact that Spanish language is associated with a racialized group and culture.

Susan Kiyomi Serrano, argues Arizona's 'English Only' amendment was racialized; that is, it was imbued with racial meaning and impact. [n.130](#) Specifically, she argues the amendment was associated with generally recognized racial groups [n.131](#) and sought to exclude these groups participation in the American polity. [n.132](#) She demonstrates the racialized nature of the amendment debate by noting how proponents of the statute connected the issue of non-English languages to negative stereotypes often endemic to the images of racialized groups. Examples included such phrases as "rampant bilingualism;" "linguistic ghettos;" and, "language rivals," which Serrano argued called for 'reservation of American [white Anglo-Saxon culture while racializing the issue by rhetorical sleight of hand." [n.133](#) According to Serrano, these phrases conjure images of black ghettos, black, Latino, and Asian gangs, and hordes of Mexicans storming the border. [n.134](#) As to Spanish and Spanish- speakers, she quotes John Tanton, the founder of "U.S. English," the group responsible for financing the campaign for the Arizona amendment. Tanton warned of a "Latin onslaught," [n.135](#) while another former spokesman for the organization, Terri Robbins, had this to say:

If Hispanics get their way, perhaps someday Spanish could replace English here entirely. . . .[It's precisely because of the large numbers of Hispanics who have come here, that we ought to remind them, and better still educate them to the fact that the United States is not a mongrel nation. We have a common language, it's English and we're damn proud of it. [n.136](#)

Robbins makes a connection between Hispanics, their increasing numbers, *1208 the Spanish language, and mongrels. Spanish, as the language spoken by the growing mongrel Latinos/as, is associated with an unwanted racialized 'other'. The Arizona Civil Liberties Union, in its Amicus Brief, also

noted this association of Spanish with an unwanted racialized group.

Spanish, when combined with the dark skin color of Mexicans, became a badge of inferiority in the minds of Anglos. Inversely, whiteness, English, and superior attributes went hand-in-hand. Thus, when Mexicans were rejected on racial grounds, so was their language. [n.137](#)

Although Serrano argues only that the amendment and the events surrounding its enactment have been racialized, I would suggest the Spanish language itself has been racialized. That is, the Spanish language has been imbued with racial meaning because it is associated with a racialized group, and White Power seeks to eliminate both Spanish and Spanish-speakers from the public sphere completely.

c. Institutional Oppression and The 'English Only' Movement

The 'English Only' Movement is both a sign of White Power's movement to institutionalize its social vision of America, and of White Power's increasing obsession. It is noteworthy that twenty-two states passed laws declaring English the official language, [n.138](#) and national 'English Only' bills have been introduced in Congress every year since 1983. [n.139](#) The goal of the legislation is, in part, to force Latinos/as to assimilate; [n.140](#) to disenfranchise those who primarily speak Spanish; [n.141](#) and to exclude Spanish-speakers from the American polity. [n.142](#) In this context, the 'English Only' movement is linked to efforts to dismantle bilingual education, toughen immigration laws, and to deny social welfare benefits to immigrants. [n.143](#) In trying to eliminate Spanish as a basis of cohesion for the Latino/a community, while simultaneously limiting their participation in American society, White Power is reinforced and its cultural hegemony left firmly intact. Although these institutional moves constitute oppression, it is unclear whether this oppression manifest ***1209** the element of seemingly permanence that is crucial to the bottom metaphor. White Power's obsession with Spanish, as seen in the English only movement, has a relatively recent history even though White Power has been concerned with the presence of other languages since the beginning of the Union. [n.144](#) Whether this activity actually reflects a much longer history requires further research. Alternatively, these institutional moves to suppress Spanish may contain the seeds of obsession that will manifest themselves repeatedly in the future, even as society changes and efforts to eliminate this oppression are undertaken. In such a case, Spanish oppression would manifest the element of seeming permanence necessary to the bottom metaphor. A third alternative may be that periodic episodes of Spanish oppression are endemic to a system of racial oppression which has been continuous since the incorporation of Mexicans and other Latino/as into the

United States, and, as such, seems to be permanent.

d. Resistance

Latino/as have resisted language oppression out of necessity, but also in defiance. As they have done historically, Latino/as have brought cases to court; [n.145](#) insisted on communicating in Spanish with those who speak Spanish; [n.146](#) written articles challenging language and other types of discrimination; [n.147](#) and, voted and engaged in activism against exclusion and discrimination. [n.148](#) They have argued that language discrimination often encompasses racial discrimination, [n.149](#) and is usually a proxy for national origin discrimination. [n.150](#) These activities are likely to fuel White Power's obsession with Spanish as a trait inconsistent with White Power's conception of itself and of its social goals.

2. Language--An Ethnic Category of Oppression, A Racial Category of Oppression, or A Mark of Another Racial System? Language differences, like religion, national origin, color, and alienage, are all categories***1210** upon which oppression has been based. Many of these categories are perceived as ethnic categories because they reflect ethnic or cultural differences, while others are perceived as racial, because they are embodied in or relate to, distinctive body types. This distinction between ethnic and racial oppression may be less defined in current practice. [n.151](#) Nonetheless, White Power's opposition to language differences generally, as manifested in the institutional oppression of 'English Only' statutes despite of growing numbers of Spanish-speakers, suggests that Spanish-speakers/Latino/as, at a minimum, are on the bottom of a language hierarchy, or of a category of oppression marked by language. This hierarchy or category of oppression can be seen as an ethnic, as opposed to racial, category of oppression. Further, the fact the language has been racialized can be interpreted as simply part of the process that White Power has historically engaged in, stigmatizing and oppressing differences. From this perspective, the oppression of Latino/as based on language is no different than the experiences of various European ethnic groups, [n.152](#) such as, Italians. Therefore, the 'bottom' as between Blacks and Latino/as shifts between an ethnic category of oppression and a racial one.

On the other hand, because Spanish has been racialized, its suppression can be viewed as a racial category of oppression with the 'bottom' shifting from one category of racial oppression to another. Here, as between blacks and Latino/as, the 'bottom' shifts between a colorized category of racial oppression and a category of racial oppression involving language. Seen as an ethnic or racial category of oppression, language oppression structures a hierarchy with English on the top Spanish on the bottom. In this hierarchy, blacks who spoke

black English could be described as one notch above Latinos because they 'at least speak English,' even though their manner of speaking is denigrated. However, the reality is more complicated.

I posit and further explore the possibility that language is just one of the marks of a racial system that oppresses Latino/as on the basis of a combination of culture, origin, lineage and color. It is a notion of hybridity, for lack of a better term, that characterizes this racial system.

For example, it appears White Power has subordinated and ***1211** oppressed Mexican Americans on the basis of a combination of lineage, color, cultural and national origin differences. Elements of colorized racial categorization and cultural difference were implicated in the justifications for the seizure of Mexican land [n.153](#) during "Anglo expansion westward across North America and the ideological rise of white supremacy and White Providentialism" [n.154](#) in the early nineteenth century. [n.155](#) Takaki, for example, notes that Austin viewed the war to seize Mexico as a conflict "between a 'mongrel Spanish-Indian and Negro race' and 'civilization and the Anglo- American race.'" [n.156](#) Describing the views of another American who had entered California, while still a part of Mexico, he states:

'[The Mexican people found themselves and their world criticized by [some Yankees']. For example, Richard Henry Dana complained that Mexicans were "idle, thriftless people." He disdainfully noticed that many Americans were marrying "natives" and bringing up their children as Catholics and Mexicans. If the "California fever" (laziness) spared the first generation, the younger Dana warned, it was likely to "attack" the second, for Mexicans lacked the enterprise and calculating mentality that characterized Americans. Inefficient in enterprise, they spent their time in pleasure-giving activities such as festive parties called fandangos. What distinguished Anglos from Mexicans, in Dana's opinion, was their Yankeeism: their industry, frugality, sobriety and enterprise. Impressed with California's natural resources, Dana exclaimed, "In the hands of an enterprising people, what a country this might be!" [n.157](#)

Here, the usual suspects of racial degradation are apparent, employing allusions both to innate and cultural inferiority as well as noting lineage. Dana's views can be characterized as a description of a mixed people who are inherently and culturally lazy, lacking a calculating mentality, and spend most of their time seeking pleasure. Moreover, Takaki notes Mexican Americans were viewed and also experienced themselves as foreigners. He explains the seizure of Mexican lands had the effect of turning Mexicans into "foreigners in their own land" , [n.158](#) and Mexican Americans suddenly found themselves subject to foreign laws. [n.159](#) This association of Mexican Americans and "foreignness" cemented with

successive waves of immigration. [n.160](#) Finally, with regard *1212 to language, Perea suggests that the United States repeatedly declined New Mexico admission as a state until the English-speaking population became the majority. [n.161](#)

Even so, it appears that different combinations of these categories of oppression - culture, origin, lineage and color - raised the ire of white obsession at different times. Nevertheless all four categories, and perhaps others, are always present to varying degrees as objects of White Power's obsession with regard to Mexican Americans and Latino/as in general. Together these categories or sites of oppression suggest that White Power sees Latino/as as a culturally inferior, partially foreign, and partially colored race. Further, as sites of oppression, these four categories (culture, national origin, lineage and color difference) are implicated in the issues of language for Mexican Americans and Latinos. Spanish is a reflection of cultural and national origin differences (meaning foreign) [n.162](#) linked to lineage and colorized differences (captured in the term 'Mestizo') [n.163](#). Thus, the Spanish language is the mark of a foreign culture colored by alien brown or mongrel inferiority in the minds of White Power.

In this context, the Spanish language marks or is perhaps part-and-parcel of a racial system characterized by a notion of 'hybridity'. This racial system combines culture, national origin, lineage, and color (and perhaps alienage which refers to citizenship) differences, the oppression of which presents a case of seeming permanence crucial to the 'bottom' metaphor where Latinos/as are often vanquished. Conceptualizing the notion of a 'hybridized' racial system would draw upon several traits and ideas.

Generally the idea is, as blacks are 'raced' as colored and Asians 'raced' as foreign, Latinos/as when they are not raced as black or white *1213 are 'raced' as hybrid (being 'raced' both as partially foreign and partially colored in a way that racializes their ethnicity and many of its components).

1) It captures, in part, the reality that because of the proximity of Latino/as countries of origin and the partial incorporation of these countries by the United States, [n.164](#) the label of 'foreign' is no longer clear, so much so that Latino/as are only partially foreign; and,

2) It includes the idea that Latino/as may be culturally different in such respects as language, religion, custom and dress.

b. The idea of being partially colored includes perceptions and practices around lineage and colorized differences in that:

1) The U.S. value system is informed by dualism, and it therefore handles complexity poorly, often turning the multi-faceted into something that is more bi-polar. [n.165](#) For example, a person born of a white and black parent has historically been considered black. In the Latino context, the African, Native American and European mixed lineage gets flattened and translated into half-

breed as does the fact that Latinos originate from many countries

2) It captures the idea that purity is valued at the expense of hybridity or mixture, which is seen as the pollution of purity. [n.166](#)

Here the standard is a facetious notion of white purity with Latinos being considered something less than pure white due to their lineage. In addition having black and Native American ancestry results in Latinos being seen as potentially colored. Thereby occupying a middle tier group between white and black. Elizabeth Martinez captures these first two points in discussing the devils of dualism in the lengthy passage quoted below.

The issue of color, and the entire Black/White definition, feed on a dualism that shaped the U.S. value system as it developed from the time of this nation's birth. The dread of 'race-mixing' as a threat to White supremacy enshrined dualism. Today we see that a disdain for mixture haunts and inhibits U.S. culture. Because it does not recognize hybridism, this country's racial framework emphasizes separateness and offers no ground for mutual inclusion. I, for one, remember *1214 growing up haunted by that crushing word "half- breed" meaning me. It was years before Mestizaje--mixing--- began to suggest to me a cultural wealth rather than a polluted bloodline. U.S. society, the Dean of Denial, still has no use for that idea, still scorns the hybrid as mysteriously "un-American"

Such disdain helps to explain why the nature of Latino/a identity seems to baffle and frustrate so many in this country. The dominant culture doesn't easily accept complex ideas or people, or dialectics of any sort, and the Latino/a must be among the most complex creatures walking this earth, biologically as well as culturally. [n.167](#) All this means [in the context of all the mixing in different places is that Latino/as are and are not an immigrant population. On the one hand, they are a colonized people displaced from their ancestral homeland. On the other, many come to the U.S. as recent economic and political refugees. [n.168](#) The proximity of Latinos/as' countries of origin coupled with the presence of substantial immigrant populations makes them appear, at a minimum, bi-national individually as well as multinational as a group. [n.169](#)

Martinez captures the essential components of a racial system of hybridity. Although she states that hybridity, is not recognized in the U.S. culture, it seems more accurate to say it is not valued. The foreign and colorized aspects of a hybridized system are the basis for exclusion and oppression within the U.S. context and form the categorizes of a hybridized racial system. These categories are present simultaneously in Latino/as, but one aspect may be the focused site of oppression at one time and a different aspect at another time. Further, individual Latino/as may experience different combinations of these categories of oppression *1215 depending on how the individual looks, behaves, dresses or speaks. [n.170](#) Speaking spanish may be one mark of this hybridized racial system.

These ideas and observations reflect my initial thoughts about the notion of 'hybridity' characterizing a racial system different from a colorized racial

system, while still mutually reinforcing it and other systems. Although it draws on the Latino/a experience, and particularly the Mexican American experience, it may have some analytical value for other groups and issues. For instance, a notion of 'hybridity' might suggest that other groups and issues are 'hybridized' in the same way that groups in addition to Blacks are colorized. The operation of multiple systems therefore includes the idea that the various systems and issues have differential impacts on different groups. For example, the oppression of black English could be analyzed from the perspective of colorized racial hierarchy, but might better be analyzed from the perspective of hybridized racial hierarchy. Here, the problem for White Power is not that the language is foreign, per se, but rather a deviation from pure English. The difference posited by the 'bottom' metaphor in the context of a racial system of hybridity, is the language, encompasses both "foreign" and colorized categories, as does Spanish. [n.171](#) A hybridized racial hierarchy may also further explain the conditions of Mexican Americans in the 1950's. It might suggest that although Mexican Americans were perceived as one notch above blacks in a colorized racial system, their actual conditions were the results of the operation of a 'hybridized' racial system where they were on the bottom. As such, both systems were operating to keep both groups oppressed in different and similar ways, resulting in the sharing of the 'bottom'. These ideas require further development. However, I suggest, when examining language and language hierarchy, whether it be analyzed as an ethnic or racial category or as a part of a specific system of oppression, Latino/as are on the metaphorical 'bottom'. **1216** IV. CONCLUSION

I have attempted to demonstrate that the 'Black Over White' paradigm still provides valuable insights into the workings of racial oppression in the United States, while conceding its limitations and attempting to move beyond them. The insights are fundamental. They are about White Power and its obsessions. These obsessions are many, varied and constantly changing. However, they continuously revolve around White Power's core culture and its perceptions and goals of the culture's homogeneity and its perception of itself as white, privileged, and superior. This is the key to the 'bottom' metaphor, and it must remain our focus as we struggle for social justice and define, and redefine, ourselves in the face of oppression. [n.172](#)

What relevance, if any, do these ideas have to the LatCrit practice of 'rotating centers' at the Latcrit conference? I believe the 'bottom' metaphor leads us to the idea that the groups represented at the 'bottom' shift, depending on the issue and circumstance. The shifting 'bottom' directs us to shift our focus, shift our thinking, and perhaps shift our analytical tools when we are trying to understand the experiences of different groups. It instructs us to look specifically at how different groups and issues are constructed and experienced both in similar and dissimilar ways. This essay suggests that although Blacks are at the bottom of a colorized racial hierarchy, Latino/as are at the bottom of a racialized language hierarchy, at a minimum, and perhaps at the bottom of a racial system marked by

the Spanish language, among other things. The 'bottom' has indeed shifted.

If we agree that the 'bottom' shifts depending on the issue or group, for example, then shifting 'bottoms', similar to an antistatutory position, provides an intellectual basis for 'rotating centers'. This basis provides the intellectual space necessary to focus on an array of experiences, and it justifies institutional space in the center for the elaboration of those experiences, while leaving the primary focus of the conference on the Latino/a condition. [n.173](#) In doing so, different groups and *1217 individual experiences are brought to bear either on Latino/a issues specifically, or on issues that relate to our similarities and differences.

While 'rotating centers' invite various groups to periodically take the center, to inform, and be critically informed about their theory and experience as it relates to others, the 'shifting bottoms' theory allows us to be intellectually honest about those experiences and the conflicts they pose. Our thinking, one hopes, can be a 'take no prisoners' kind of thinking, delivered with caring and sensitivity in an environment that will be mutually beneficial. Hopefully, we can map out our similarities and differences while building the theory and coalitions necessary to articulate a different, more fair future.

Ultimately, therefore, one of the best justifications for 'rotating centers' is this: the center should rotate so can both identify shared experiences and become informed of those experiences unique to particular groups.

NOTES:

[n.1.](#) The 'center' idea encompasses struggles about which issue, group and idea should be the focus of attention in a given space, research project, conference, etc. See [Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism \(or Other-Isms\)*, 1991 Duke L.J. 397, 402 \(1991\)](#) (describing the process whereby whites, in workshops designed to discuss racial issues, re-center the discussion around themselves and issues of primary concern to them, in this context, sexism.)

[n.2.](#) See Derrick Bell, *Faces At The Bottom Of The Well* (1992). Bell uses this term however, to contrast the power and wealth of the ruling elite with the larger group of the economically and socially disadvantaged. See also [Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 \(1987\)](#) (arguing the people at the bottom, those who experience discrimination, should be the source of normative law); Jack Miles, *The Struggle for the Bottom Rung: Blacks vs. Brown*, 270 *The Atlantic Monthly* 41 (1992) (discussing the Los Angeles riots and economic competition between Latinos and African-Americans, as well as attitudes about immigration).

I use the 'bottom' metaphor to suggest there are many groups that suffer from oppression and that they suffer differently. Specifically, Blacks are at the bottom (the most disadvantaged) of a colorized racial category, although there are other racial categories and perhaps, multiple racial systems. The bottom shifts among these categories and systems, often in relation to particular issues. See discussion *infra*.

I use this metaphor with some trepidation because it may suggest I am talking simply about victimhood and implying all that binds the various groups is this victimhood and oppression. See generally [Leslie Espinoza & Angela Harris, Afterword: Embracing the Tar-Baby, LatCrit Theory and the Sticky Mess of Race](#), 85 Cal. L. Rev. 1585, 1641-44 (1997), [10 La Raza L.J. 499, 555- 58](#) (1997)(discussing the politics of victimization). However, I think our various group experiences of oppression mark us not as victims but as survivors and the progeny of survivors! We are people who have survived. Often, we have thrived despite tremendous efforts to dehumanize us. These stories of heroism should not be abandoned, forgotten, or traded away like pieces in a coalitional chess match. Rather, our survival is the source of our strength. This strength, combined with our experiences, are the basis for both our empathy with, and understanding of, others' oppression and survival. From this perspective, we come together on the foundation of our strength and commitment to social justice for all. Together, these things permit us to commit time and resources to each other's different struggles as well as our common struggles. This seems particularly important in the current climate, where debates on immigration, affirmative action, and bilingualism constitute a multi-pronged attack against racialized others. Here, we have a common enemy attacking us on issues that often appear irrelevant to our own individual struggles, but which are nonetheless linked. At the same time, I do not think survival or victimhood is all that binds, or should bind, these various groups. I believe these groups have similarities that transcend oppression. See, e.g., [Elizabeth M. Iglesias, Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality](#), 49 Vand. L. Rev. 869 (1996) (discussing African-American and Latina visions of motherhood).

n.3. See [Francisco Valdes, Under Construction: LatCrit Consciousness, Community and Theory](#) 85 Cal. L. Rev. 1089, 1108-11 (1997) (discussing the 'race' vs. 'ethnicity' debate in LatCrit).

n.4. See [Ian F. Haney-Lopez, Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory](#), 85 Cal. L. Rev. 1143 (1997), [10 La Raza L.J. 57](#) (1998) (advocating that LatCrit retain racial analysis as a tool for understanding the experiences and conditions of Latino/a existence in relation to the law in the United States). Cf. Juan Perea, Five Axioms in Search of Equality, 2 Harv. Latino L. Rev. 231 (1997) (suggesting the ethnicity model might be a tool for better understanding Latinos/as' histories and lives). For a discussion about the debate, see Valdes, *supra* note 3.

n.5. This sentiment exists. A colleague and I discussed it during one of the many conversations in which I was involved at the conference. The BlackCrit forum panelists' comments also alluded to this sentiment.

n.6. [85 Cal. L. Rev. 1213](#) (1997). The 'Black/White' paradigm has come under persistent attack over the last few years for its binary aspects and for not accurately reflecting the complexity of racial relations and reality. See, e.g., [Richard Delgado, Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary](#), 75 Tex. L. Rev. 1181 (1997)(discussing how the Black-White binary works); Eric K. Yamamoto, Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America, [95 Mich. L. Rev. 821](#) (1997) (describing the two flaws of a binary conception of race relations as limiting inquiry to only two "races" and producing an 'either-or' view of racial justice); Adrienne D. Davis, Identity Notes, Part One: Playing in the Light, [45 Am.U. L. Rev. 695, 696](#) (1996) (describing the Black/White paradigm as inaccurate and unhelpful in mediating various communities of color claims to justice); Deborah A. Ramirez, Multicultural Empowerment: It's Not Just Black and White Anymore, [47 Stan. L. Rev. 957](#) (1995); Elizabeth Martinez, Beyond Black/White: The

Racisms of Our Time, 20 Soc. Just. 22 (1994), reprinted in *The Latino/A Condition: A Critical Reader* 455 (Richard Delgado & Jean Stefancic eds., 1998) [hereinafter Martinez, *Beyond Black/White* (suggesting that race and race relations are more complicated today)]; Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, [81 Cal. L. Rev. 1243](#) (discussing the complexity of racial relations in the United States).

[n.7.](#) I thank Lisa Iglesias for this insight. Although I have heard this formulation over the years, Lisa empathetically made this point, citing Neil Gotanda, to counter the binary conceptualization of the Black/White paradigm at the LatCrit conference. See also Wintrop Jordon, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (1973) (providing insight on white America's early perceptions of blacks); Yamamoto, *supra* note 6 (discussing in part, the limits of the white-on-black paradigm as it relates to multiracial interracial justice and the term 'white on black,' a phrase that captures the parasitic nature of white and black relations).

[n.8.](#) Meaning the 'white over black' paradigm refers to blacks being at the 'bottom' of the American (colorized) racial hierarchy.

[n.9.](#) These particularities are supported by the dominant core culture of American society (See *infra* notes 69-74 and accompanying text), and are in some ways captured in the rhetoric of 'White Over Black,' 'White Over Non-white,' 'American over Indian,' 'English over Spanish,' and 'English over non-English speakers.' Each rhetorical move has its strengths and limitations. For instance, 'White Over Black,' explains a colorized racial hierarchy and may suggest that the alienation among non-white groups is due to that hierarchy. But its limitation is, as Perea in his article points out, that it may limit our discussion to the black and white "races." The 'White Over Non-white' rhetorical move informs us about the domination of all non-whites by whites and suggests something about the competition among Non-whites, but it fails to convey the hierarchical relations among those groups. 'American over Indian' is a loaded rhetorical move, but I believe it suggests the subjugation of Native Americans by Americans and includes something about their competing social visions centered on land.

[n.10.](#) See *supra* text accompanying note 9. The idea is that the different categories that groups inhabit have been created historically as sites of oppression. Some of these categories are more ethnic or cultural as opposed to racial, and perhaps more readily assimilated into the dominant culture. These categories are captured in concepts of lineage, national origin, religion, language and what I call colorized.

Color, lineage and national origin are embodied traits and therefore seem more suited to a racial analysis. However, cultural traits are indispensable to our ability to both identify and act on preconceived notions about who an individual or group is. See Yamamoto, *supra* note 6, at 848 (noting that color and culture are inextricably intertwined).

I suggest later that the combination of different categories, including categories marking ethnic or cultural differences as experienced by Latinos/as, constitutes a racial system different from, but overlapping and reinforcing, a colorized racial system. In considering whether to use the terms 'category' or 'systems of oppression,' one must look at the two different ways of analyzing them. For instance, with regard to a colorized category, the 'category' could be seen as including notions of blackness, redness, or brownness, of which blackness is on the bottom. Or could see blackness as a single category of a colorized

system encompassing other colorized categories.

This separate way of analyzing categories and systems becomes more complicated when you think about groups that occupy multiple categories, some of which are not typically thought of as racial, such as Latinos/as. Of course, all groups occupy multiple categories. For instance, blacks are both a "race" and an "ethnicity," but many of their cultural practices are identified in a colorized way, e.g., the black church, black music, Black English. Latinos can be said to be partially colorized, partially foreignized and partially ethnicized. Here it can be argued that the first two of these categories are racial while the latter refers to Latino ethnicity. See, e.g., [Natsu Taylor Saito, Alien and Non-Alien Alike: Citizenship, 'Foreignness,' and Racial Hierarchy in American Law, 76 Ore. L. Rev. 261 \(1997\)](#) (discussing 'foreignness' as a racial category and suggesting Asian-Americans are raced as foreign). Taken together however, it seems to me that these various categories constitute a racial system, as opposed to another racial category. This makes little difference from the standpoint of an anti-subordination perspective, which views all subordination, ethnic or racial, as problematic. But in analyzing the institutionalization of oppression with regard to Spanish language use, I suggest that Spanish has been racialized. See *infra* notes 166-73 and accompanying text. That is, Spanish, an ethnic trait, is so associated with a racialized group that it has become a mark of a racial system or category.

Ultimately, all of these categories are made more complicated by the intersection of class, gender, and sexual orientation categories of oppression.

[n.11.](#) Nonetheless, it does involve ideas about which groups are most vulnerable to the harms inflicted by a particular type of oppression. See **Elizabeth M. Iglesias &** Francisco Valdes, Religion, Gender, Sexuality, Race and Class Coalition Theory: A Critical and Self-Critical Analysis of Lat-Crit Social Justice Agendas, [19 Chicano L. Rev. 503](#) (1998) (discussing this characterization of the bottom metaphor).

[n.12.](#) Many commentators have discussed white obsession with blackness. See *infra* notes 69-104 and accompanying text. See also Espinoza & Harris, *supra* note 2, and *infra* text accompanying notes 39-59. But 'white power' has always had other obsessions. See *infra* notes 44-62 and accompanying text.

[n.13.](#) These elements are meant to reflect and provide substance to the rhetorical moves of White Over Black, English over Spanish, etc. See discussion *supra* note 9. However, they also draw on the black experience of oppression and as such may be inappropriate for application to other groups or issues.

[n.14.](#) See generally Wintrop Jordan, *supra* note 7; see also [Anthony P. Farley, The Black Body as Fetish Object, 76 Or. L. Rev. 457 \(1997\)](#) (discussing the black body as an object of race pleasure for whites gained through the physical humiliation of blacks); Harris and Espinoza *supra* note 2, at 510-516 (discussing the case for black exceptionalism - and ultimately rejecting it-and noting that whites' "obsession" with blackness and black people are central features of American culture).

[n.15.](#) Understanding this system is also important because it fosters in part some of the common misunderstandings we have about race. Because a colorized system of racial oppression organized loosely around skin color has been central to our understandings of race, skin

color is often used as a synonym for race. This leads to the faulty conclusion that because skin color is immutable, race or categories of colorized racial oppression are also immutable. At the same time, our understanding that skin color is neutral as an indication of innate ability when used as a synonym for race leads again to the faulty conclusion that colorized categories of race are neutral and bereft of meaning. In this way, skin color, as a synonym for race or colorized racial categories of oppression facilitates the disassociation of the racial category from its social and historical moorings including oppression. See [Neil Gotanda, *Failure of the Color-blind vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 Hastings Const. L. Q. 1135 \(1996\)](#) and Neil Gotanda, A Critique of "Our Constitution is Colorblind," [44 Stan. L. Rev. 1 \(1991\)](#) (arguing that "colorblindness" empties race from its historical and cultural content/meanings and thereby reinforces white supremacy and domination). See also [Susan Kiyomi Serrano, *Rethinking Race for Strict Scrutiny Purposes: Yniguez and the Racialization of English Only*, 19 U. Haw. L. Rev. 221, 239 \(1997\)](#) (arguing that socially constructed categories of racial classification are not immutable and noting that the immutable nature of skin color is transferred to the racial category to assert its immutability). This issue is made more complicated by the seeming permanence of the meanings associated with whiteness and blackness. See discussion *infra* notes 125-34 and accompanying text.

[n.16.](#) See Michael Omi & Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s* (1994).

[n.17.](#) See [Cheryl Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709 \(1993\)](#), reprinted in *Critical Race Theory: The Key Writings That Formed the Movement* 276 (Kimberle Crenshaw, et al. eds., 1995).

[n.18.](#) See [William Wiecek, *The Origins of the Law of Slavery in British North America*, 17 Cardozo L. Rev. 1711 \(1996\)](#).

[n.19.](#) See Haney-Lopez, *supra* note 4.

[n.20.](#) See *id.* at 106 (noting two risks to using the ethnicity model; the first being that the model may obscure experiences and conditions of racialized groups; the other involving hiding or denying the extent to which the group is racialized as non-white).

[n.21.](#) See Serrano, *supra* note 15.

[n.22.](#) Those who organized the Critical Race Theory Workshops did so because they experienced exclusion from Critical Legal Studies: their issues of concern were excluded. Latcrit was organized in part because the issues of concern Latinos were excluded in the Critical Race Theory Workshop. Those scholars later became the organizers of LatCrit, and 'rotating centers' is, in part, an attempt to correct these past exclusionary mistakes.

[n.23.](#) For examples of Critical Race Theory scholarship see generally, *Critical Race Theory: The*

Key Writings that Formed the Movement (Kimberle Crenshaw, et al. eds., 1995). Many of the scholars in this reader write about the African-American condition and/or from an African-American perspective. Several of the articles also discuss the relationship between Critical Race Theory and Critical Legal Studies. For an overview of legal scholarship written on the Latino/a condition see generally, *The Latino Condition: a Critical Reader* (Richard Delgado & Jean Stefancic eds., 1998). For readings discussing law as it relates to the Native American experience from a Native American perspective see *Readings in American Indian Law: Recalling the Rhythm of Survival* (Jo Carrillo ed. 1998). There is no one place to get an overview of the developing legal scholarship from an Asian American perspective. But see, e.g., Saito, *supra* note 10; Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, [81 Iowa L. Rev. 1467 \(1996\)](#) (introducing a symposium on Asian American scholarship); Robert Chang, *supra* note 6.

[n.24.](#) The fact that the overall focus of LatCrit conferences is upon Latinas and Latinos suggests that the 'rotating centers' idea does not accurately capture LatCrit dynamics, but rather captures efforts to build and maintain coalitions as well as advance theory.

[n.25.](#) While it was unclear to most if not all of the invitees what the organizers had in mind for that panel, it turned out to be a discussion of how the critique of the 'Black/White paradigm' must not be permitted to delegitimize consideration of the particularities of the African-American experience, together with consideration of the particularities of the experiences of other racial/ethnic groups.

[n.26.](#) See Valdes, *supra* note 3 (describing the LatCrit project as functioning to produce knowledge, advance theory, expand and connect struggles and cultivate community and coalition). These functions, he argues, direct LatCrit theorists to reject essentialism, apply concepts of intersectionality, multiplicity, multidimensionality and interconnectivity, ideas that are linked to outside jurisprudence. See also Yamamoto, *supra* note 6 at 867-73 (describing Critical Race Theory scholarship as encompassing and ranging from the liberatory aspects and tools of modernist theory to post-modernist theory and method). Some have argued that within the tension of these theories lie the seeds of a reconstructive jurisprudence. *Id.* Another set of theories embraces ideas around multiple consciousness. *Id.* Eric Yamamoto embraces this notion of reconstructive justice and notions of multiple consciousness in his articulation of a critical race praxis. *Id.* See also Kim Crenshaw, *Critical Race Theory: The Key Writings That Formed the Movement* xix-xxvii (Kimberle Crenshaw, et al. eds., 1995).

[n.27.](#) See e.g., Ronald Takaki, *Emigrants from Erin: Ethnicity and Class within White America*, in *A Different Mirror* 139-65 (1993). Takaki describes the Irish immigrant experience and the low place they occupied in the economic and social hierarchy. *Id.* He explains Irish debasement of blacks and opposition to suffrage in pursuit of assimilation as follows:

Targets of nativist hatred toward them as outsiders, or foreigners, they sought to become insiders, or Americans, by claiming their membership as whites. A powerful way to transform their own identity from 'Irish' to 'American' was to attack blacks. Thus, blacks as the 'other' served to facilitate the assimilation of Irish foreigners.

Id. at 151. See also Perea, *supra* note 6, at 1230 (discussing immigrant debasement of Blacks in efforts to distance themselves from Blacks and attain 'whiteness').

[n.28](#). See Frank Valdes, Foreword: Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities, [9 La Raza L.J. 1, 24-30](#) (1996) (discussing the possibility and project of elevating ethnicity and Latino pan-ethnicity).

[n.29](#). In fact there are multiple facets of my identity. I see myself as a black, female, heterosexual, professional who teaches race law (among other things), a mother, and a spouse to an East African man. I move in and out of various communities such as mothers' play groups, LatCrit conferences and church, in which the racial, sexual, class and other attributes of the participants may or may not be diverse. All of these things define who I am in some indeterminate yet concrete way.

[n.30](#). See Perea, Black/White Binary, *supra* note 6.

[n.31](#). The 'Black/White' paradigm, as it is commonly called, is designed to suggest a theory about racial dynamics. As far as I know, Perea is the first person to explore whether the theory conforms to some commonly understood definition of a paradigm. However, it is not clear whether his critique of the paradigm is that it is only a binary theory, or only the binary aspect of the theory is paradigmatic. In my opinion, the insights of the paradigm go well beyond these criticisms. Perea never argues specifically that the 'Black/White' paradigm is a binary paradigm of race relations although others do. See *supra* note 6 and accompanying text. Instead, he contends that a 'Black/White' paradigm exists and that it structures racial discourse. See Perea, Black/White Binary, *supra* note 6, at 128. He then proceeds to analyze how the Black/White binary paradigm structures racial discourse around the black and white races. As such, he appears to suggest that the Black/White paradigm is a binary paradigm of race relations. His article, taken as a whole, supports this interpretation. See *id.*

[n.32](#). See *id.* at 129 (I intend to show how the Black/White binary paradigm operates to exclude Latinos/as from full membership and participation in racial discourse....My critique of the Black/White binary paradigm of race shows this commonly held binary understanding of race to be one of the major impediments to learning about and understanding Latinos/as and their history).

[n.33](#). See *id.* at 169-72. Perea views paradigms as problematic because they limit the boundaries of research, suppress anomalies, and, as reproduced in textbooks, tend to present linear and distorting pictures of history. He cites Kuhn in explaining paradigms are a 'set of shared understandings that permit us to distinguish those facts that matter in the solution of a problem from those facts that do not.' *Id.* at 130. As such, they define relevancy. See *id.* Normal Science describes the practice of elaborating on the problems that the paradigm allows us to see. Textbooks and popular readings play a role in producing and reproducing paradigms, however, they often truncate the history of the science or subject matter in order to present the discipline in a linear and shortened matter. See *id.* at 131-32.

As applied to the discussion about race, Perea also argues our shared understanding of race is limited primarily to the Black/White binary paradigm; that most race research and

literature have elaborated on the relationship between the two races, and, that the history of Latinos and others has been unseen and marginalized as a consequence. See *id.* at 133-34.

[n.34.](#) Perea examines five works on race by prominent scholars spanning twenty-five years to demonstrate a binary theory of race relations exists which primarily contemplates blacks and whites. See *id.* at 134-35. He also examines a constitutional law book. He correctly argues that all of these marginalize Latinos/as and other groups in part by suggesting they are writing on race relations in the United States, when in actuality, they are exploring Black/White race relations in the United States. He states:

My objection to the state of most current scholarship on race is simply that most of this scholarship claims universality of treatment while actually describing only part of its subject, the relationship between Blacks and Whites. Race in the United States means more than just Black and White. It also refers to Latino/a, Asian, Native American, and other racialized groups.

Id. at 168.

[n.35.](#) *Id.* at 166.

[n.36.](#) *Id.* at 155.

[n.37.](#) This 'equality-of-blame' tone is bolstered by the way Perea structures his article. Consistent with Kuhn's insight that books, particularly textbooks, are crucial to the development and maintenance of paradigms, Perea analyzes the texts of several leading scholars on race to demonstrate widespread use of the paradigm. Although most of the writers are white, Perea starts his article by analyzing the writings of a prominent White scholar, Andrew Hackers' *Two Nations: Black and White, Separate, Hostile, Unequal*, and a prominent Black scholar, Cornel West's *Race Matters*. He states: 'These books, by leading scholars on race, both illustrate the existence and use of the Black/White binary paradigm. They show how the paradigm results in an exclusive focus on Blacks and Whites, both from the point of view of a White writer and a Black writer.' *Id.* at 134. These authors are then figuratively presented side by side, as if their perspectives have equal weight in society, and as if they are joint creators of the same phenomena. This comparison seems fair in that both are prominent authors on race issues, both, in substance, discuss only the two races, and thereby both contribute to the marginalization of Latinos/as and others. However, neither West (nor Hacker, for that matter) nor the black community created the Black/White paradigm or the power relations it seeks to explain.

[n.38.](#) See Espinoza and Harris, *supra* note 2, at 529 (noting "African- Americans did not create the binary color line").

[n.39.](#) See also Tanya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building* (relying on Eric Yamamoto's work and calling the uncomplimentary racial opinions that groups of color entertain for each other 'simultaneous racism').

[n.40](#). See Jordon, *supra* note 7, at 1550 for the origin of this idea.

[n.41](#). See Perea, *supra* note 6, at 136 (suggesting that writers who focus only on the black and white races implicitly reduce Latinos/as and others to voluntary spectators). Perea forgets, however, that one implication of the tendency to reduce race to white and black is that the question is perennially posed whether some other group should be considered black or white. Latinos/as, for instance, have sometimes been treated as 'white' and sometimes as 'black,' as discussed below. Their current position in the overall racial hierarchy is somewhere lower than white and higher than black.

[n.42](#). Voting Rights Act of 1965, [42 U.S.C. § § 1973-1973bb \(1965\)](#).

[n.43](#). See Omi & Winant, *supra* note 16, at 61-63 (discussing the rise of modern racial awareness and racial dictatorship). They state: "It was only when European explorers reached the Western Hemisphere...that the distinctions and categorizations fundamental to a racialized social structure, and to a discourse of race, began to appear." *Id.* at 61. However, slavery, the removal of the Native Americans, and expansion became more difficult to justify once the goals had changed to nation-building. This was done through science. The inferiority of these people justified their conditions. See *id.* at 63.

[n.44](#). See *id.* at 61-69 (discussing the evolution of modern racial awareness and racial dictatorship).

[n.45](#). See *id.* at 65-69 (discussing dictatorship, democracy and hegemony).

[n.46](#). See [Juan Perea, Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English, 77 Minn. L. Rev. 269, 276 \(1992\)](#).

[n.47](#). *Id.*

[n.48](#). See *id.* at 276-77.

[n.49](#). I first heard this term in discussions leading up to the LatCrit III conference. Although I discuss the relationship between blackness and subjugation throughout this paper, I use this phrase to encompass the idea that those with dark skin are stigmatized, and the darker the skin, the more derogatory the stigmatization. The firm, therefore, includes Latinos, Blacks, and others with dark skin, suggesting people with darker skin are more likely to face discrimination than those of the same race or ethnicity with lighter skin. See also, Leonard M. Baynes, If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy, [75 Denv. U. L. Rev. 131](#) (1997) (making a similar point); Kevin Johnson, "Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience, [85 Cal. L. Rev. 1259](#) (1997). Although I am aware that economic necessity and political compromise play a significant role in defining and maintaining blackness as

subordinate, these ideas are not developed in the text, but rather, are simply noted. See infra notes 62, 76 and accompanying text. Further, I am aware of, but again simply note, the idea that blackness also represents, in a very different way, black culture and ethnicity. See infra note 51 and accompanying text.

[n.50](#). Most recently, students in my Critical Race Theory class have vigorously argued this point.

[n.51](#). See Espinoza & Harris, *supra* note 2, at 514-15 (discussing white America's obsession with the black body). See also Farley, *supra* note 14.

[n.52](#). See *id.*

[n.53](#). Angela Harris may well interpret this statement and the following text rendition of African American history as a claim to exceptionalism. See Espinoza and Harris, *supra* note 2. In fact, it is. The difference, however, between what Harris sees as a negative, competitive claim of exceptionalism, and my view of exceptionalism is that I, like Espinoza, also believe in and celebrate Latino/a Native American, and Asian-American exceptionalism. *Id.* at 549. The profanity is not in our claim of exceptionalism; rather it is in the experiences our groups endured in order to claim this exceptionalism; the encouragement we receive now to bury our stories of courage in order to build coalitions or assimilate into the larger minority group; and finally, in the chance that we would allow these tributes to our strength to hinder the possibility of our unity. With regard to the last idea, I would prefer to see us come together helping to heal one another by sharing our stories ... some humor and tall tales in a positive version of the game the Dozens. Espinoza and Harris might call this "therapeutic critical theory." *Id.* at 557.

[n.54](#). This cohesion, I suspect, results not only from essentialist notions, but also from what Omi and Winant term "strategic essentialism." See Omi & Winant, *supra* note 16, at 72. They explain racialized groups are often forced to act together to defend their interests, and sometimes even their lives. *Id.*

[n.55](#). Here, I suggest black humanity challenges power's self-conception more than ideas about, black spirituality or black musical acumen. In other words, this point is meant to primarily reference different aspects of a single group's identity.

[n.56](#). The mark of blackness presumably denotes African ancestry, although, in some contexts, it identifies indigenous ancestry. The darker the mark is, the deeper the stigma. See *supra* note 49 and accompanying text.

[n.57](#). See Jordan, *supra* note 7, at 8-9.

[n.58](#). See *id.*

[n.59](#). See Wiecek, *supra* note 18, at 1729.

[n.60](#). Wiecek suggests, however, the notions and valuations about these differences more likely approximated ethno-centrism rather than racism or race prejudice. He explains the Europeans brought to their initial encounters with Africans, a culture that gave them "only weak and conflicting guidance about how to think about these startlingly alien people." *Id.* at 1735. These were "a people visibly and radically different from themselves". *Id.* But he agrees their most salient feature was blackness. See *id.* at 1730.

[n.61](#). See *id.* at 1730-31.

[n.62](#). See *id.* at 1731-32.

[n.63](#). Although I do not argue this point, I believe cultural oppression of African Americans has always been a dimension of the colorized racial system in which Blacks operate. As such, the distinctive elements of African American culture have also been interpreted as inferior. For example, references to black family life as matrilineal, irrespective of its truth, are criticized as the source of dysfunction in the community. Black English is seen as substandard. Black music, though often viewed as infinitely creative, is credited sometimes as the source of violence among its youth. In addition, I see, but do not discuss here, black culture as a reflection of black ethnicity, constructed over time and representing valued wealth and distinctiveness. In my opinion, the distinctions correspond, to Neal Gotanda's distinctions between status and historical race versus cultural race. See Gotanda, *supra* note 15 and accompanying text. The former two represent a relationship between Blacks and subordination, while the latter represents the positive and/or distinctive elements of black culture such as black music and black religion.

[n.64](#). See Wiecek, *supra* note 18. The importation of slaves was driven by the economic need for labor. See *id.* at 1712. (Economic necessity, however, does not explain why the English selected Africans for slaves. The answer lies in part in the fact that Spain's trade in African slaves pre-dated North American African slavery by more than a hundred years. See *id.* at 1736). In addition, it is economics that in many ways, drive the ongoing subordination of Blacks even after the demise of slavery. For instance, the need to rebuild the South after the Civil War required massive labor. Former slaves, the labor force of the South, were forced into this role which explains in part the continuity of blacks as subordinate after the war.

[n.65](#). Wiecek states his thesis most concretely in his discussion of the development of slavery in Virginia. He says:

Just as the status of Africans began with some unspecific state of unfreedom early in the century and hardened into explicit slavery toward its end, so Englishmen's racial attitudes evolved--"degenerated" would be the better term--from ethno-centrism at the outset to racism later. As slavery emerged as a legal institution, so did "institutionalized" racism: formal legal discrimination by law based on race.

Id. at 1756-57. As servitude branched into slavery, ethno-centrism hardened into racism. These parallel trends confirmed the fundamental basis of Virginia society (and derivatively, the

rest of America).

[n.66](#). See *id.* at 1748 (commenting on the state of Virginia's race relations when it was a slave-holding society as opposed to a slave society). Wiecek describes Philip Morgan's distinction between a slave-holding society and a slave society as "the former becom[ing] the latter when black slaves constituted twenty percent [or more of the total population]." *Id.*

[n.67](#). *Id.* at 1754.

[n.68](#). See *id.* at 1713. Wiecek asserts that with the fusion of slavery and race came the fusion of the two objectives of slavery--labor coercion and race control. The race control objective lingered even after the abolition of slavery. See *id.*

[n.69](#). See generally Wiecek, *supra* note 18. (discussing the development of the law of slavery, racial slavery, in the United States. See also Harris, *supra* note 17, at 278 (noting the fusion of race and economic domination).

[n.70](#). See Harris, *supra* note 17, at 278-79.

[n.71](#). This process of consolidation continued after slavery as well. See Harris, *supra* note 17, at 284-85 (discussing how the development of whiteness stifled class tensions). See also, Espinoza and Harris, *supra* note 2, at 511, n.40 (discussing how the struggle for wages and the concept of 'free labor' became identified with whiteness).

[n.72](#). See *id.*; Wiecek, *supra* note 18, at 1757-59 (discussing the 1676 Bacon's Rebellion in Virginia and summarizing and "oversimplif[ing]" Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (1975)).

[n.73](#). See *id.*

[n.74](#). See *id.* at 1759. Further, such political compromises, as the Compromise of 1877, continued to operate to maintain blacks as subordinate. It has been argued these political considerations together with various economic needs function to maintain black as subordinate. See, e.g., Derrick A. Bell, Jr. *Race, Racism and American law* (1980).

[n.75](#). See Harris, *supra* note 17.

[n.76](#). See *id.* at 278 (noting "black" and "white" were polar constructs). See also Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, in *Critical Race Theory: The Key Writings that Formed the Movement* 103, 113 (Kimberle Crenshaw et al. eds., (1995) (explaining the historical

oppositional dualities that characterize the racial ideology in the context of Western thought); Jordan, *supra* note 17, at 252-59 and 436-40 (discussing the valuation of color and Jefferson's views that blacks possess an inferior intellect respectively); Baynes, *supra* note 49, at 154-55 (quoting Jefferson as justifying exclusion of Blacks from America because they were ugly); Espinoza & Harris, *supra* note 2, at 511 (describing how blacks' ugliness reflected whites' beauty).

[n.77](#). See Harris, *supra* note 17, at 283 (discussing the element of exclusivity in property law, and noting white identity was shaped and privileged by black subordination).

[n.78](#). See Jordan, *supra* note 7, at 40-43 (discussing whites' own struggles and human failings as projected onto blacks).

[n.79](#). See U.S. Const. art. I, § 2, C1. 3.

[n.80](#). Although it is generally understood that slavery was a dehumanizing experience and Wiecek consistently makes the point that slave laws were meant to suppress the slaves' human spirit, this particular formulation was taken from Anthony P. Farley's article, *The Black Body as Fetish Object*, [76 Or. L. Rev. 457, 462 \(1997\)](#). Farley describes a scene in a Tarzan film whereafter a "native" falls to his death in an abyss, the white explorer yells "[The supplies!]" Farley continues: 'Living in a colorlined society, one experiences this moment of rebirth a million times--the colorline which cuts us loose from our humanity with the cry "the supplies!" is an umbilical cord for white America.'

[n.81](#). See Wiecek, *supra* note 18, at 1781-88 (discussing race control laws as intended to prohibit insurrection and distance Whites from Blacks).

[n.82](#). See Omi & Winant, *supra* note 16, at 66.

[n.83](#). See *id.* at 81-82.

[n.84](#). See Wiecek, *supra* note 18, at 1748 (summarizing Philip Morgan's theory).

[n.85](#). Wiecek discusses the relationship between the numbers of slaves and the legal emergence of slaves in Virginia, New York, and Carolina, (noting that Carolina had a majority black population from its earliest days and full-blown slavery). See *id.* at 1752-53, 1766-67, 1768.

[n.86](#). See Wiecek, *supra* note 18, at 1782.

[n.87](#). See *id.* at 1759. (Explaining that with increasing numbers of slaves and after Bacon's rebellion and the Negro Plott, of 1680, in Virginia "[w]hites "ratcheted down the social

station of blacks, demonstrating by the violence of their domination, both through statute and in its enforcement, that white safety and black degradation were the absolute values, the sine qua non, of the maturing slave society of Virginia). See also *id.* at 1767 (explaining that after the 1712 insurrection scare in New York, New Yorkers enacted the most stringent race-control statutes on the continent).

[n.88](#). See *id.* at 1755-59 (explaining that free Blacks had some measure of freedom in the early seventeenth century in Virginia, but after Bacon's rebellion this freedom was even more limited. See also *id.* at 1781-89 (discussing the details of race control which included attempts to define race and to prevent and punish insurrection by obsessively regulating a 'long catalogue of petty offenses or simple behaviors'). These laws also prohibited arms possession by blacks generally and detailed rules for apprehending and punishing runaways. See *id.* They also provided mechanisms for compensating masters for harms done to slaves by states, and ultimately prohibited slaves from learning to read and write. Wiecek states that the law regarding race control, unlike labor coercion, 'intervened constantly and pervasively to deny freedom to African-Americans. The laws were meant to stifle the human spirit's irrepressible impulse to freedom and to deny individual dignity, and autonomy.' *Id.*

[n.89](#). See *id.* at 1766 (noting that no detail of black life was too petty for New York's legislature to notice).

[n.90](#). See *id.* at 1767 (discussing New York in the early eighteenth century as growing to have one of the largest black populations both enslaved and free: "White New Yorkers behaved accordingly: ...[they reacted with ever- greater ferocity to perceived threats to their control of the subordinated black population.>"). See also Jordan, *supra* note 7, at 406-14 (discussing the social and legal restraints placed on free Blacks after the revolutionary war. Jordan explains there had been a spat of manumissions after the war and notes that Southerners in particular found free Blacks far more irritating than enslaved blacks). See *id.* He suggests that this irritation was due in part because free Blacks were "outside the range of the white man's 'unfettered power...' " *Id.* at 410.

[n.91](#). See *id.* at 1780-81.

[n.92](#). See *id.* at 1781.

[n.93](#). See *id.*

[n.94](#). See *id.* at 1757 (explaining that as slavery expanded, institutionalized racism expanded as legal race discrimination against free Blacks in the Chesapeake colonies).

[n.95](#). See *id.* at 1713.

[n.96](#). Again, the economic and political needs driving the maintenance of this subordination

should not be underestimated.

[n.97.](#) That the meanings remained substantially the same has suggested to some that white interests and needs primarily drove events such as the Emancipation and Civil War, as opposed to the needs of blacks. See, e.g., Derrick Bell, *Race, Racism and American Law* and *Brown v. Board of Education and the Interest Convergence Dilemma*, in *Critical Race Theory: The Key Writings That Formed the Movement* (Kimberle Crenshaw, et al. eds., 1995).

[n.98.](#) One might argue here that White Power did re-create and redefine itself in relation to blackness and that the changes in society were significant. I would agree. Power changes over time as 'Whites' and 'White Power' are two social constructs. However, the core racial and cultural make-up of White Power and its goals have remained fairly consistent throughout the history of the United States.

[n.99.](#) See Crenshaw, *supra* note 78, at 112-116 (discussing the accomplishments of the civil rights movement as the removal of formal barriers and symbolic (white only signs) manifestations of subordination and arguing that these changes were significant but suggesting that structural barriers remain in place).

[n.100.](#) See, e.g., Bell, *supra* note 2 (suggesting that race and racism are integral and central components of U.S. society and are therefore permanent).

[n.101.](#) See *id.*

[n.102.](#) See, [Anthony Farley, The Black Body as Fetish Object, 76 Or. L. Rev. 457 \(1997\)](#) (explaining how whites need blacks and black bodies in order to enjoy their whiteness, in order to feel and be privileged, in order to experience race pleasure).

[For white Americans, the "Negro" eventually became "a human 'natural' resource who, so that white men could become more human, was elected to undergo a process of institutionalized dehumanization. In these and other ways, American culture--- to the very great extent that it is coextensive with "whiteness"--- is founded upon the image of "blackness." Espinoza and Harris, *supra* note 2, at 512.

[n.103.](#) *Race and Erasure: The Salience of Race*, [85 Cal. L. Rev. 1143 \(1997\)](#), [10 La Raza L. J. 57 \(1997\)](#).

[n.104.](#) See generally *id.*

[n.105.](#) See *id.* at 78-86 (discussing LULAC's argument that Mexicans were white on the one hand, and a race a notch above Negroes on the other). See also Takaki, *supra* note 27, at 173 (noting that Mexicans also practiced black slavery, but abolished it in 1830 even though Mexicans living in what is now Texas opposed this); Baynes, *supra* note 49, at 150 (discussing what he calls Mexico's "colorism," which places darker people, mostly

Indians, at the bottom of the social hierarchy).

[n.106](#). Takaki, *supra* note 27, at 326-27.

[n.107](#). Haney-Lopez, *supra* note 4, at 1148.

[n.108](#). See *id.* at 1170-72.

[n.109](#). At a minimum, Blacks and Latinos were sharing segregated facilities during this historical period.

[n.110](#). Haney-Lopez makes a similar point with regard to ethnic characterizations of these types of experiences.

[n.111](#). Asians are also a target of white obsession with subduing non- English languages.

[n.112](#). This is debatable. The issue of black English has been subject to derision and perhaps institutionalized oppression (particularly in educational settings) for a very long time. It arose most recently in the Ebonics debate. However, the typical response in the debate between black English and Spanish is that black English is at least a form of English.

[n.113](#). See Perea, *Demography and Distrust*, *supra* note 46, at 356; Christopher David Ruiz Cameron, *How the Garcia 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, 1366 \(1997\)](#).

[n.114](#). See *id.* at 280.

[n.115](#). See *id.*

[n.116](#). See *id.* at 278.

[n.117](#). See *id.* at 279.

[n.118](#). See *id.*

[n.119](#). See *id.*

[n.120](#). Or rather, Latino/as often speak both Spanish and English.

[n.121](#). See Perea, *supra* note 46, at 271 (describing the myth and arguing that multiple languages have always existed in the United States).

[n.122](#). See *infra* text accompanying notes 134-45.

[n.123](#). See Perea, *supra* note 46, at 345.

[n.124](#). The underlying assumption is that Spanish speakers are also Latino/as. The number of Latino/as in the United States increased by 141 percent between 1970 and 1990. See Serrano, *supra* note 15, at 227 n.43 (citations omitted). By the year 2000, they will comprise the largest minority with 24.5 percent of the population, up from 10.2 percent today. *Id.* However, it remains to be seen whether Spanish will remain a central feature of the Latino identity in the future. It is also important to note that Asians and Asian-Americans are targeted by language suppression, and this population grew by 384.9 percent during the period. *Id.* However, Asian immigrants come from a variety of Asian countries and speak different languages. A common "Asian" language does not unite them. It is also not clear that any one of the languages they speak has sustained prolonged denigrating attack.

[n.125](#). Although numerical strength does not equate power, it does portend power. But see Perea, *supra* note 46, at 327 (noting that historically, where language minorities have possessed numerical strength and political power, their languages were provided official status under state laws).

[n.126](#). See Perea, *supra* note 46, at 278, 347 (arguing that the dominance of English nationally and internationally is unchallenged).

[n.127](#). See generally *id.* at 309-28 (discussing German, French and Spanish as languages spoken in different states during the early part of the union).

[n.128](#). See Perea, *supra* note 46, at 340-41.

[n.129](#). *Id.* at 276. See also *infra* note 135 (discussing Serrano's argument that 'English Only' is meant to counteract the perceived threat to mainstream culture).

[n.130](#). Susan Kiyomi Serrano, Rethinking Race for Strict Scrutiny Purposes: Yniguez and the Racialization of English Only, [19 U. Haw. L. Rev. 221, 249- 62 \(1997\)](#). Serrano states: 'Article 28 has both racial meaning and impact: it determines along racial lines who is allowed or not allowed to participate in the American polity by excluding those deemed less than "American." In effect, 'English Only' laws enacted to counteract the perceived threat to mainstream culture operate to exclude nonwhites from it' (citations omitted).

[n.131](#). See *id.* at 255 (concluding that by "[linking language and exclusion, supporters of Arizona's 'English Only' legislation characterized non-English speaking minorities as social threats to the American landscape... In this fashion, [they attached cultural images to generally recognized racial groups, thereby imbuing Article 28 with racial meaning]").

[n.132](#). See *id.* at 247.

[n.133](#). *Id.* at 253.

[n.134](#). See *id.*

[n.135](#). *Id.* at 251.

[n.136](#). *Id.* at 252 (citing [Anthony Califa, Declaring English the Official Language: Prejudice Spoken Here](#), 24 *Harv. C.R.-C.L. L. Rev.* 293, 321 n.183 (1989)).

[n.137](#). See *id.* at 250 n.236.

[n.138](#). See *id.* at 228.

[n.139](#). See *id.* at 227 n.52.

[n.140](#). See *id.* at 259 n.291 (citing Human Rights Watch which argued that "repression of minority languages is usually motivated by the desire to repress, marginalize or forcibly assimilate the speakers of those languages, who are often perceived as threats to the political unity").

[n.141](#). See Perea, *supra* note 46, at 347-50 (arguing English only laws are meant to disenfranchise Latinos/as).

[n.142](#). See generally Serrano, *supra* note 15, at 251 (arguing that the effect of the amendment is exclusion but suggesting that exclusion is also its goal as proponents carry anti-immigration sentiments). See also, Perea, *supra* note 46, at 345-46.

[n.143](#). See Serrano, *supra* note 15, at 227; Perea, *supra* note 46, at 345- 46.

[n.144](#). See generally Perea, *supra* note 46 (explaining the different federal and state policies regarding the many languages spoken in the United States during the early years of the

Union).

[n.145](#). See, e.g., [Yniguez v. Arizonans for Official English, 69 F.3d 920 \(9th Cir. 1995\)](#) (en banc), vacated, [Arizonans for Official English v. Arizona, 117 S. Ct. 1055 \(1997\)](#).

[n.146](#). See *id.*

[n.147](#). On the racial character of English Only laws see, e.g., Serrano, *supra* note 15; Perea, *supra* note 46; Andrew Averbach, Language Classifications and the Equal Protection Clause: When is Language a Pretext for Race or Ethnicity?, [74 B.U. L. Rev. 481 \(1994\)](#). On language and accent discrimination, see, e.g., [Mari Matsuda, Voices of American: Accent Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 Yale L.J. 1329 \(1991\)](#); Ruiz Cameron, *supra* note 113. For a description of other legal battles, see, e.g., Perea, *supra* note 6, at 157-64 (describing the legal battles of Mexican Americans against segregation).

[n.148](#). See Perea, *supra* note 6, at 157-64.

[n.149](#). See, e.g., Averbach, *supra* note 147.

[n.150](#). See, e.g., Ruiz Cameron *supra* note 113.

[n.151](#). Elizabeth Martinez notes that "[a rigid line cannot be drawn between racial and national oppression when all victims are people of color." Martinez, *Beyond Black/White*, *supra* note 6, at 475.

[n.152](#). One could argue that the experience is different because Latinos reject assimilation as a basis for integrating into the American mainstream. However this idea conforms to the traditional ethnicity model, which presumes that Latinos can assimilate. The argument becomes, they have simply chosen not to. This line of thinking does not contemplate that Latino/as may not be able to assimilate.

[n.153](#). See Takaki, *supra* note 27, at 166-84.

[n.154](#). Haney-Lopez, *supra* note 4, at 89.

[n.155](#). See *id.* See also, Takaki, *supra* note 27, at 166-84.

[n.156](#). Takaki, *supra* note 27, at 174.

[n.157](#). *Id.* at 171.

[n.158](#). *Id.* at 166-84.

[n.159](#). See *id.*

[n.160](#). See Takaki, *supra* note 27, at 311-26. The immigrant population found work, predominately as farm and menial labors. This reinforced in white minds Mexican Americans' innate suitability to unskilled work, even though occupancy of this stratum within the labor economy had been imposed on them and institutionalized since the years of their incorporation. *Id.* at 184-190. Takaki notes that Mexican farm workers were viewed as docile and uniquely suited to field tasks. He comments that three-fourths of California's farm laborers were Mexican, while 85% of the agricultural labor in Texas were Mexican migrant workers. *Id.* at 321.

[n.161](#). See Perea, *supra* note 46, at 321.

[n.162](#). See Saito, *supra* note 10, at 261 (characterizing foreignness as a combination of national origin difference and non-citizenship or alienage in the Asian-American context). But see Kevin R. Johnson, Citizens as "Foreigners," in *The latino/a Condition; a Critical Reader* 198-99, (Richard Delgado and Jean Stefancic eds., 1998) (identifying ethnicity, language, religious and family structure differences as sources for the dominant society's views of Latino/as as "foreign").

[n.163](#). 'Mestizo' means those of Indian, Spanish and African "mixed" descent. See Takaki, *supra* note 27, at 168. I am suggesting that Mexican American and Latino/a lineage encompasses in part a racialized or colorized groups that have suffered oppression based upon colorized categories. The notion by Whites that Latinos are "mongrels" denigrates but captures this idea. *Id.* at 174.

[n.164](#). See Max Castro, Making "Pan Latino": Latino Pan-Ethnicity and the Controversial Case of the Cubans, 2 *Harv. Latino L. Rev.* 179 (1997)(discussing the incorporation and partial incorporation of many Latin American countries as a shared ingredient of Latino/a identity).

[n.165](#). See Martinez, *Beyond Black/White*, *supra* note 6.

[n.166](#). See Gotanda, *supra* note 15, at 23-28 (describing the myth of racial purity on which white supremacy and the hypo-descent rule is based).

[n.167](#). Martinez explains this complexity as follows: In the sixteenth century they moved north, and a new mestizaje took place with the Native Americans. The Raza took on still more dimensions with the 1846 U.S. occupation of Mexico and some intermarriage with

Anglos. Then in the early twentieth century, newly arrived Mexicans began to join those descendants of Mexicans already here. The mix continues today with notable difference between first-, second-, third- and twentieth-generation people of Mexican descent. Martinez, *Beyond Black/White*, supra note 6, at 473.

[n.168](#). See id. at 472-73. Martinez continues:

[In addition we must also remember that the very word "Latino" is a monumental simplification. Chicanos/as, already multifaceted, are only one Latino people. Yet dualism prefers a Black/White view in all matters, leaving no room for an in-between color like brown--much less a wildly multi-colored, multi-lingual presence called "Latino." And so, along with being 'invisibilized' by the dominant society, Latino/as are homogenized.

[n.169](#). See id. This proximity, as well as the significant presence of Latino/a immigration populations, not only makes Latino/as appear bi- or multi-national, but also makes them feel that way. Substantial literature on the border metaphor seems to support this. See generally *The Latino/a Condition: A Critical Reader* (Richard Delgado & Jean Stefancic eds., 1998)(providing several excerpts from articles about the border as metaphor). See also supra text accompanying note 173 (quoting Martinez on the multinational nature of Latino/as).

[n.170](#). See, e.g., Johnson, supra note 49 (discussing how darker Latino/as experience racial oppression different than lighter Latino/as); Baynes, supra note 49.

[n.171](#). One might think of black English as being 'raced' as colored and Asian languages as being seen as foreign but Spanish being 'raced' as colored and foreign. In this way, the bottom metaphor in the context of a hybridized racial system manifest what Haney-Lopez has called the most significant difference between the ethnicity and racial models. That is, that racial models mark a group as "twice removed from normalcy:" twice removed from whiteness and Anglo-Saxon norms. The different racial systems capture the differential impact of a certain type of racial system on different groups. For instance, although Latino/as may be on the bottom of a 'hybridized' racial system, all racialized groups are 'hybridized.' Blacks are colorized but they are perceived as American in the context of a hybridized racial system. Asian-Americans are foreignized, but in the context of American psychosis and the model minority myth, are seen as having conformed to Anglo-Saxon cultural norms and thus both are 'hybridized.' Blacks and Asian-Americans therefore suffer the impact of racial hybridity to a lesser degree than Latinos.

[n.172](#). Although oppression itself should not be the focus of our identities, freeing ourselves from oppression will provide us more room to re-imagine ourselves in vastly different ways.

[n.173](#). One might argue that the 'shifting bottom' idea requires that the entire conference relate to all the issues different groups suffer from oppression. Given the diversity of the Latino/a category the conference already does this in many ways. However, there are other forums where the primary focus is sharing the multiple experiences of oppressed groups. The Critical Race conference has developed into such a forum.

Further, as the existence of Latcrit can attest and many commentators, including Perea, suggest, there has been insufficient attention given to understanding and deciphering the Latino

condition. I hope 'rotating centers' in the context of a conference focused on "Latino-ness", will center on that condition by bringing other experiences to bear as points of departure or similarity. Further, the information about those other experiences may act as a deterrent against parochial thinking and the development of negative nationalism as that experienced in the Critical Race Theory Workshop.

The disadvantage to the idea of 'rotating centers' is that the presence of diverse groups may in some ways diminish the sense that the LatCit conference is a safe space for Latino/as to thrash out their issues and agendas. It is unclear how this can be resolved institutionally without creating the tension involved in establishing exclusive space. However, if other groups understood the need for safe space by Latino/as perhaps 'only Latino/a' space could be established with the conference and the tension, that tension could be minimized.

13. Francisco Valdes, * *Theorizing 'OutCrit' Theories: Coalitional Method and Comparative Jurisprudential Experience – RaceCrits, QueerCrits and LatCrits*, 53 MIAMI L. REV. 1265 (1999)

INTRODUCTION

Maybe there's something magical about the number three. Or maybe we're just acculturated to think and act so. Whatever the reason, the Third Annual LatCrit Conference, as this symposium illustrates, occasioned rich and varied thoughts about the origins, structures and trajectories of LatCrit theory. In this symposium, several authors writing from various perspectives have located LatCrit theory in--or vis a vis--several different precursors, ranging from legal realism and pragmatism to Chicana/o studies to critical race theory ("CRT"). [n.1](#) Others have posed questions of future form and direction. [n.2](#) Though LatCrit remains an embryonic formation--and maybe most of all because of it--this tendency toward self-reflection suggests that multiply diverse LatCrit scholars take this collective project of antistatutory discourse and community as a serious, personal, self-critical and long-term commitment. [n.3](#) These levels of commitment, as discussed below, are crucial *1267 to LatCrit theory, and make this self-reflective stance a welcome sign of growing critical vibrancy as LatCrit theory turns three.

This diverse effort to locate LatCrit in the broader landscape of critical theory can help elucidate and advance LatCrit theorists' original sense of collective and self-aware situatedness within the larger world of legal and outsider discourses. [n.4](#) In fact, the self-reflection evidenced in this symposium may be viewed as an extension of the ongoing LatCrit effort to learn from the lessons

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embedded in past jurisprudential experience with antisubordination discourse and struggle. [n.5](#) This self-reflection confirms the belief that LatCrit theory can and must learn from the insights and shortcomings of the intellectual and political antisubordination experiments that precede or continue alongside this one.

This year, as in the past, LatCrits (like other outsider scholars before and around us) have encountered and aired difference and dissonance, discovering in this process unspoken - and perhaps conflicting - premises and purposes. As recounted below, each LatCrit event or gathering incrementally has uncovered in ever-greater variety or detail the social justice agendas of multiply diverse outsider scholars. [n.6](#) The LatCrit balancing act, both substantively and structurally, clearly has not always been a pretty sight - though it always has been worthwhile. As with other outsider efforts in critical legal theory, this movement's brief experience already displays in many ways both the fragility and the utility of voluntary antisubordination collectivity.

Given this society's troubled record of race and ethnic relations, much of our collective learning process and tendency to self reflection has been concerned with intergroup issues or, more concretely, with improving intergroup collaboration among outgroup scholars and communities as a form of antisubordination praxis. [n.7](#) It must of course be so, for the issues that LatCrit and allied scholars seek to negotiate internally are reflective of those that divide larger outgroup communities, [n.8](#) and which can impede our antisubordination struggles more generally. [n.9](#) We *1268 must understand that, in effect, our work represents the current stage of struggle by our communities, through and with outsider jurisprudence, inside the legal culture and discourse of this country. [n.10](#) The importance of the legal academy and public discourse as sites of antisubordination contestation in this legalistic and cyberbolic society is unquestionable, and our work in both arenas has been a form of contestation seeking to enjoin subordination both within and beyond the academy. [n.11](#)

The importance of outsider efforts to transform, or at least reform, the academy and its work product similarly is unquestionable--though questioned nonetheless. [n.12](#) And because our own immediate efforts and struggles are crucibles of antisubordination insight and potential, LatCrit and allied scholars must employ not only "rotating centers" and "shifting bottoms" for normative insight and theoretical grounding; [n.13](#) we also must look expansively and critically to our own jurisprudential experiments and experiences as outsider scholars in legal culture. [n.14](#) It is both important and right for LatCrits, and for all likeminded scholars, to conceptualize and deploy the critical insights to be drawn from the overall experiential record of outsider jurisprudence as part of this larger, and ongoing, social justice contestation that we have inherited and seek to *1269 advance. [n.15](#)

Thus, our antisubordination analyses and interventions must be trained not only on society, the academy, its institutions and our various communities, but also on our selves and our work. To succeed in antisubordination solidarity,

outsider scholars must practice internally the lessons and insights that we apply to others structures, and we must learn continually from this internal focus to help us unpack and tranquilize cycles or patterns of subordinating behaviors that recur both within and beyond our immediate vicinity. This inward moment of self-reflection, is part and parcel of our antisubordination work. [n.16](#)

This multi-tiered concern for intergroup relations as antisubordination praxis is not surprising, especially from a LatCrit perspective, because the ongoing effort to link current practices and prospective projects to social and jurisprudential experience is part of a foundational LatCrit commitment to coalitional method and critical coalitions. [n.17](#) *1270 Indeed, and in retrospect, the threshold decision, taken during the early planning of the First Annual LatCrit conference in 1996, [n.18](#) to configure LatCrit as a critical coalition of multiply diverse Latinas/os and nonLatinas/os has turned out to be a defining choice. [n.19](#) Ideally, LatCrit brings us together to construct and promote via multilateral exchanges an ethical vision of a postsubordination society. [n.20](#) At their best, LatCrit theory and its conferences represent coalitional method toward critical coalitions dedicated to antisubordination principles and formed by scholars (and activists) from various backgrounds and disciplines.

It follows that the involvement in LatCrit of multiply diverse and overlapping outsider scholars from various genres of critical theory has been and is integral to this effort at coalitional method. Multiply diverse "OutCrits," [n.21](#) including LatCrits, have arisen from within the legal academy *1271 in recent years to articulate the social justice claims of traditionally marginalized groups, and we have proceeded from that point of entry to bring into existence the jurisprudential formations, communities and experiments that today constitute "outsider jurisprudence" [n.22](#) in the United States. It therefore is important to stress at the outset that LatCrit theory, as presently conceived, can succeed only to the extent that both Latina/o and nonLatina/o outsider scholars, such as those whose self-reflective essays prompt this Afterword, continue to invest their time, energy and creativity in this project.

This foundational commitment to critical coalitions also is grounded in the conviction that coalitional exchange and analysis are better suited to a multicultural and postmodern condition, as is the contemporary case of "Latinas/os" and other outgroups in the United States and beyond. [n.23](#) This belief is rooted in the pathbreaking work of early CRT scholars, including insights like intersectionality, multiplicity and antiessentialism. [n.24](#) Thus, at least from my perspective, it also bears emphasis at the outset that LatCrit theory owes a great and direct debt not only to CRT and other jurisprudential precursors, [n.25](#) but also specifically *1272 to the individual RaceCrit, FemCrit, RaceFemCrit and other allied scholars whom now nurture LatCrit with their time, energy and creativity. [n.26](#) Today, this emphasis on antiessentialist communities, antisubordination principles and critical coalitions is counseled by more recent conceptions from CRT and LatCrit-identified scholars--including the likes of cosynthesis, wholism,

interconnectivity and multidimensionality [n.27](#)--which evince the same ethic or aspiration: egalitarian embrace of multiple diversities as a touchstone of social justice struggle to establish a postsubordination era for all. [n.28](#)

Because the LatCrit themes of intergroup relations, jurisprudential advancement and critical coalitions recur and converge in the writings presented above, this Afterword concludes the LatCrit III symposium *1273 with some notes on comparative jurisprudential experience as coalitional method and antistubordination praxis. More particularly, the Afterword considers the relationship of this ongoing LatCrit experiment to two other contemporary genres of outsider jurisprudence--principally critical race theory [n.29](#) and Queer legal theory. [n.30](#) In so doing, and as with other authors in this symposium, the Afterword reflects the vagaries and limitations of authorial positioning within legal culture and outsider jurisprudence: as will become clear below, my contribution to this reflection on LatCrit theory's precursors, origins and trajectories is informed principally by the lessons I have gleaned from my participation in CRT and Queer jurisprudential experiments. Ideally, however, this Afterword's triangular framing and focus can help synthesize comparative experience across various contemporary genres of critical legal scholarship to help promote a culture of antistubordination community and coalition among OutCrit legal theorists. [n.31](#)

To help contextualize the analysis that follows, a prologue that situates my position and perspective vis a vis outsider jurisprudence opens the Afterword. Part I of the Afterword then turns to CRT as the prime exemplar of outsider jurisprudence. After a brief historical critique of the causes and costs of CRT's earlier coalitional ambivalence, Part II of the Afterword compares the more recent experiences of Queer legal theory and LatCrit theory to assess the relevance of these movements to our collective development of a progressive jurisprudence of color. In Part *1274 III, the Afterword summarizes from a LatCrit perspective some basic lessons suggested by this sketch of our collective experience with outsider jurisprudence. With this backdrop and summary in place, the Afterword takes up in Part IV the theoretical, coalitional and institutional concerns raised by some of the symposium essays. Concluding with a call to OutCrit perspectivity in our collective re/commitment to a progressive outsider jurisprudence, the Afterword seeks and endorses LatCrit affirmation of coalitional method and critical coalitions as a form of outsider praxis, and in light of the lessons to be learned from comparative experience.

Prologue

Before LatCrit: Accounting for Positionality

My involvement with outsider jurisprudence began with feminist legal theory, sexual orientation scholarship and critical race theory. When these

discourses were first stirring, I had not yet even begun thinking about entering the legal academy. Once in, however, I located myself initially within sex/gender and sexual orientation studies, arguing for a feminist-Queer interconnection that made race-conscious analysis integral to antisubordination projects; this project grounded me in feminist perspectivity and Queer identification but inclined me toward race and ethnicity discourses. [n.32](#)

Since then, I have become increasingly involved in the race and ethnicity branches of outsider jurisprudence while continuing my original project in the development of Queer/feminist legal theory. This growing involvement in race/ethnicity outsider jurisprudence began with CRT and participation in its annual workshops, [n.33](#) for CRT was and is the original race/ethnicity branch of outsider legal scholarship. [n.34](#) During *1275 those mid-to-latter years of its first decade, CRT collectively was confronting the repercussions of its earliest successes, which were prompting shifts in career, location and family for some key founders. [n.35](#) This process of professional and personal change altered the original patterns of CRT's organization and community, both in individual and collective terms, creating voids and dislocations especially in the smooth and progressive continuation of the workshop series originated to provide a locus for CRT both as discourse and community.

I thus 'joined' CRT at a phase in its history wherein it was reckoning with the consequences of its initial triumphs, crafted chiefly by the hard and brave work of a diverse 'first generation' CRT core. [n.36](#) For a new movement set against a skeptical (if not hostile) background, the internal shifts of those times caused great uncertainty about our collective capacity to carry forward the sharp criticality and social ambition that conceived CRT. This period in CRT's development--roughly equivalent to LatCrit's immediate future-- thereby witnessed both the attenuation of some key founders as well as the gradual and fitful emergence of an increasingly diverse 'second generation' in the workshops. [n.37](#) This second generation, like the first, was a loose assemblage of nonwhite but otherwise richly diverse scholars.

For better or worse, we found ourselves adjusting continually to the gaps and opportunities of those years while searching for effective means of coalescing around, and advancing, the original insights, methods and structures that encapsulated the expansive antisubordination promise of the first generation's work. At that time, we were also, in effect, wrestling with the larger set of historical, experiential, circumstantial and other issues discussed further below. These issues, as elaborated below, spanned the entire nine-workshop series and ranged from structural to substantive questions of theory, discourse, community and coalition. Given the historical, experiential, circumstantial and other factors noted below, it now seems plain that consensus was bound to elude us on the difficult questions of structure, scope and direction with *1276 which we grappled annually at the workshops in order to advance both the insights of theory and the sense of community.

It now seems plain to me that those discussions constituted not only the first generational transition within CRT but also a difficult, inevitable and ongoing collective learning process that presently should counsel all OutCrit formations, including LatCrit theory. In retrospect, those transitional years represented a key test of CRT's growth and of outsider capacity to sustain a nonwhite critical jurisprudence: the question then was whether RaceCrits would continue to develop as a diverse and egalitarian antisubordination movement of activist legal scholars, lively and sturdy enough to traverse beyond first-generation breakthroughs and, if so, how? [n.38](#) Embedded in the events and experience of those years are the lessons that I learned, and that I seek to share here, because LatCrit does and will face similar issues of consolidation, progression and sustainability--as do and will all other forms of outsider interventions in the construction of critical legal theory.

Indeed, that question is the challenge that the self-reflective essays in this symposium effectively assert vis a vis LatCrit. Framed more broadly, it is the question and challenge that we all face, today and every day: How do we, as legal scholars, collectively sustain and carry forward in a progressive way the outsider experiment in critical jurisprudence as a form of antisubordination struggle? It is a question and challenge that a collective and critical assessment of comparative jurisprudential experience can--and should--help to illuminate.

Thus, the account of outsider jurisprudential experience that I am positioned to convey necessarily begins with the period of time spanning roughly from the second half of CRT's first decade until now--a period of transition and evolution evidenced then and still mainly in the organization, composition and programs of the CRT workshops and the LatCrit conferences. This period of transition from CRT's growing pains to LatCrit theory's emergence and consolidation is neither linear nor neat--despite the efforts to the contrary that follow. But, it is crucial to LatCrit theory's wellbeing and sustainability that this period be mined for its lessons: because the CRT workshops gave tangibility to, and anchored, the nonwhite critical legal theory movement both as community and as theory, and because that experience now can and must serve as a rich well of OutCrit insight, the lessons of those times are invaluable. And as LatCrit enters the same period in its development, these lessons become increasingly timely.

***1277** Yet, as the symposium essays indicate, the tense internal dynamics of those transitional years--and most importantly, their lessons--are barely evident in the texts that our collective labors have yielded. Unlike CRT's earliest origins, [n.39](#) these freighted mid-to-late first-decade moments, and their relevance to outsiders' longer-term development and jurisprudential trajectory, until now had not been engaged--except, of course, in the immediate context of the actual CRT workshops. By unfolding their respective accounts of LatCrit's precursors, roots, origins and agendas, the self-reflective essays of this symposium have begun both to fill that void and to invite other OutCrits to help contextualize our present and

future, but always as part of our continuing, collective work toward a postsubordination time. What these essays tell us in no uncertain terms is that critical understanding of the tension and growth of those key transitional moments, and of their continuing ripple effects for outsider jurisprudence as a form of antisubordination praxis, no longer should remain obscure. [n.40](#)

By recounting from my particular position and experience how those moments may have affected and helped to advance the RaceCrit movement during the formative years of its first generational transition--and how the effects of that learning process perhaps continue to reverberate within LatCrit today--I hope to amplify and transmit to successive 'generations' of scholars a critical history of this particular period. Through this recounting I aim to convey the tremendous progress achieved during and since those times, as well as to acknowledge and learn from the difficulties that we have overcome--but which nonetheless continue to endanger our collective ability to articulate a progressive vision of a postsubordination society. By theorizing those key moments, I hope in particular to aid LatCrit theory's continuing growth and vitality as part of a rich and diverse OutCrit community, and with the will and means to cultivate critical social justice coalitions among and across key axes of identity and community as antisubordination praxis.

***1278 I. The Emergence of a Nonwhite Outsider Jurisprudence: Critical
Race
Theory, Un/critical Coalitions, and Intersectional Ambivalences**

Original reports indicate that CRT was founded to struggle for racial justice. [n.41](#) During the past decade, CRT has gone about doing so in large part by advocating postmodern criticism and centering voices and positions that previously had been marginalized in social policy and legal discourse by prevailing essentializing tendencies. [n.42](#) This advocacy and centering have produced their own conceptual and political tensions--indeed the substantive and structural issues discussed below properly can be viewed as one aspect of CRT's larger modern/postmodern admixture. [n.43](#)

CRT's critiques of contemporary race relations undeniably have been powerful: they have unmasked a primary element of white supremacy's continuing sociolegal legacies--principally, the systematic subordination of African Americans within the United States despite the formal equality mandates of the Civil Rights reformation. In the course of such critiques, CRT's first decade also produced a pathbreaking body of work by critical race feminists that still resonates throughout outsider jurisprudence and critical legal theory. This work introduced methods and concepts now regarded as foundational to CRT, LatCrit and other OutCrit theorizing. [n.44](#) Indeed, the pioneering work of critical race feminists within CRT remains among the most important theoretical advances in legal discourse attributed generally to CRT: this work has changed

the way both minority and majority scholars conceptualize ***1279** and conduct racial discourse. Unfortunately, the spectacularly productive engagement of race and gender begun during the first half of the first decade did not become the exemplar for similar exchanges and gains at other times.

CRT's intersectional shortcomings--as a manifestation of coalitional ambivalences--perhaps may be explained by the interaction of at least five general sources or factors. The first is the pervasive heteronormativity of this country and its legal institutions, from which CRT arose. The second is the habit of racial binarism that characterizes American law and society, and which initially induced a similar approach in CRT's antiracist framework. As outlined below, both of these societal conditions were formative circumstances in contouring CRT as a fluid yet recognizable discourse and 'community' through the series of annual workshops.

A third formative factor is, perhaps, more specific to legal culture: the suppressive climate of skepticism, even suspicion, that surrounded CRT's initial emergence as a critical form of race-conscious legal scholarship. This formative circumstance also generated serious and unsettling concerns about CRT's legitimacy and capacity for survival at a time when the legal establishment increasingly hankered for conformance to colorblind imperatives. [n.45](#) These concerns, as described below in further detail, in turn fueled coalitional caution and (at times) community frictions that, at bottom, were incompatible with a programmatic prioritization of coalitional or intersectional projects.

A fourth source of coalitional ambivalence is more historical and experiential. The memory of Civil Rights and Critical Legal Studies, which created histories and experiences of unfulfillment through coalitional enterprise, affected both the texts and workshops of the first decade. The limited and limiting results of those two recent experiences planted in CRT's early consciousness a sense of greatly lowered expectation about antiracist reform through intergroup collaborations.

The fifth, and in this abbreviated account, final factor is the intense discursive and political demands that a postmodern, antisubordination jurisprudential movement elects to impose on itself not only intellectually but also socially. These self-imposed demands effectively called for ***1280** CRT's embrace and pursuit of multiplicitous and intersectional projects. Thus, these five distinct sources overlapped interactively, each contributing to ambivalence in its own ways: basically, the first four served to make CRT wary of coalitional risk-taking, while the fifth demanded it.

These five general sources, as elaborated below, have combined and interacted in myriad ways to produce over the course of CRT's first decade the complex record that, in my view, most proximately helped to set the stage for the emergence of LatCrit theory; in particular, and from my perspective, the fitful but hopeful CRT experience of grappling with these issues provides the most direct backdrop for LatCrit theory's original and current self-conception. Though not

susceptible to simple or linear recounting, this mix of historical, experiential, circumstantial and other factors has generated substantive and structural consequences that sometimes have confounded CRT's struggle to establish itself as an antistatist discourse and antistatist community. As the self-reflective essays of this symposium suggest, LatCrit now must learn from the CRT experience precisely because of its immediate proximity to CRT in time and in consciousness. With this aim in mind, and recognizing this complexity, I disaggregate these sources in somewhat linear fashion simply to facilitate summary presentation and comparative analysis in the context of this Afterword.

A. Formative Circumstances: Societal Heteronormativity, Racial Binarism and Color-Blind Culture

As the Phillips essay indicates, perhaps the most troubled instance of coalitional ambivalence and intersectional avoidance recorded during CRT's first-decade learning process has been the persistent reluctance to consider and interrogate the relationship of race to sexual orientation - or, more specifically, the reluctance to investigate critically how and why social or legal homophobia influence antiracist communities, strategies and discourses. [n.46](#) In consequence, CRT has at times appeared to assume that 'people of color' are congenitally heterosexual: Queers of color have been virtually invisible in the written record of CRT during its first decade, and issues we embody have been mostly marginal in, though not entirely absent from, the annual summer workshops. [n.47](#) The *1281 construction and articulation of CRT as outsider jurisprudence in the form of workshop programs and published texts thereby has been sanitized virtually of all traces of the Queer, including the Queer of color.

The marginalization of sexual orientation issues within CRT gatherings or texts for the better part of a decade etches important lessons onto our collective record: these acts of omission provide a startling example within a progressive antistatist movement of a failure by the relevant 'majority' to see and repudiate a mechanism of oppression operating both within and beyond the relevant or salient 'community.' This collective failure no doubt is due, at least in part, to the culture of constant homophobia that envelops us all, inducing uncritical (even if unintentional) replication of straight privilege within CRT and other outgroup venues at different times and places. [n.48](#) This formative circumstance prompted failures of nuance, will and engagement suggesting that CRT and other race/ethnicity-conscious projects at key junctures disabled their full potential, becoming forces striving to make the world safe for 'our' race (or ethnicity) instead of unsafe for oppression. [n.49](#)

As a result, critical coalitions that cross and combine minority colors and desires have been neglected or unrealized. To be sure, individual *1282 scholars of all sexual orientations have served as occasional bridges across these divided identities and communities. However, we have not collectively nurtured internal

as well as intergroup coalitions capable of uniting lesbians, bisexuals and gays of color programmatically and structurally to CRT and other race/ethnicity projects in antiessentialist, antisubordination purpose. In outsider jurisprudence, critical coalitions within and beyond CRT that pivot on sexual orientation and race/ethnicity have remained ad hoc or dormant until, perhaps, very recently, because whatever postsubordination vision we projected failed explicitly to redress the harms that homophobia visits on nonwhite (as well as white) peoples. [n.50](#)

Another instance of CRT's coalitional ambivalence is reflected in its general sense of comfort with the framing of antiracist struggles around the Black/white paradigm of American political thought. [n.51](#) Producing a mindset and discourse where 'of color' becomes the functional equivalent of 'Black' without much self-critical awareness, this paradigm reflects the broader and standard practices of this society in its regulation of race relations, which historically have emphasized Black/white binarism. Because CRT's first lens was 'race' and its racist deployment, this paradigm initially may have lent itself to the needs of CRT's antiracist counter-discourse. Yet, as recent works have noted, this paradigm's binarism ultimately truncates antiracist analysis because the paradigm does much more than valorize whiteness and demonize Blackness: it also occludes all other nonwhite/nonAnglo positions in the construction and operation of racial hierarchy within and across groups or cultures. [n.52](#) As an artifact of white supremacy, this paradigm reproduces ***1283** white domination, Black subordination and nonwhite/nonBlack erasure in intra- and intergroup levels.

As Mutua's essay emphasizes, critiques of the binary paradigm cannot suggest that 'Black' and 'white' represent equal positions within this paradigm [n.53](#) nor, as Roberts' essay shows, can they overlook the utility of a Black-specific analysis of white supremacy and intergroup issues. [n.54](#) Without doubt, white domination is organic to this traditional paradigm and its application, and analyses issued explicitly from Black perspectives are indispensable to antiracist discourse—especially when accompanied by a critical appreciation of this traditional paradigm and its sociolegal effects. Introducing criticality to all antisubordination uses or analyses of this paradigm may raise new issues, [n.55](#) yet continued uncritical acceptance of this paradigm to deconstruct 'race relations' from any perspective may end up essentializing "race" around the paradigm's bipolar hierarchy. This essentialism can help perpetuate atomized binarisms between whiteness and Blackness in a social order controlled firmly by whites. This atomization generates consequences at odds with antiracist ideals and objectives.

Uncritical applications of this paradigm in a racially plural but supremacist society pose the danger of distancing from each other Blacks and 'other' communities of color that also are disadvantaged by the social and legal preferences accorded to whiteness under this paradigm and its racist ideology. Uncritical acquiescence to this paradigm lends little inspiration for antiracist coalitions of color precisely because it obfuscates how white racism affects and

connects all nonwhite groups. Ultimately, uncritical outlooks on this binary framing affirmatively can impede antiracist projects capable of bringing 'different' nonwhite groups together in critical antistubordination communities and coalitions. Working within this binary framework in a majoritarian system controlled politically and economically by an ensconced white-identified elite and majority therefore has the potential to achieve less than is necessary for Black ambitions to dismantle white supremacy's continuing legacies, and even less for similar Asian, Native or Latina/o ambitions.

***1284** As in the case of sexual orientation, this paradigm's societal entrenchment and general internalization is one aspect of the formative circumstances that have helped to shape outsider jurisprudence: given the immediate conditions and larger background of race discourse during its emergence, CRT's ambivalent--or ephemeral--embrace of diversities based on ethnicity and trans/nationality as integral to antiracist struggle probably is best understood both as a reflection and projection of that paradigm's pull. [n.56](#) But incrementally, as this symposium displays, our collective learning process has prompted greater critical awareness of these issues-- specifically of the shortcomings that lurk in paradigmatic binarisms. As a result--and as this and prior LatCrit symposia aptly illustrate--CRT, LatCrit and other OutCrit scholars recently have begun to shift from uncritical recyclings of the traditional Black/white paradigm to multilateral interrogations of 'white-over-Black' norms that support white privilege within communities of color as well as beyond them. [n.57](#)

This quick tally is not to suggest that our collective failures of intersectional analyses regarding sexual orientation, and to a lesser extent ethnicity or trans/nationality, are the only or most important results of coalitional ambivalence based on the factors sketched above. Though ambivalence is implicated in both instances, this tally also does not imply that these failures are identical phenomena--the Phillips essay shows how the content and nature of those two moments in our collective articulation of nonwhite outsider jurisprudence were very different indeed. [n.58](#) Nor does this tally suggest that the explanations explored here are the only way to account for the variations that distinguish them. While reflecting a basically well-founded and complex, yet selective, ambivalence over coalitional projects, single-axis analyses that omit(ted) the position within antiracist politics and discourse of nonAfrican ***1285** American people of color, or of gay/Queer people of color, or of Black and other nonwhite immigrant communities, or of multiply diverse peoples of color around the globe, nonetheless entail(ed) both a critical lapse of intersectional analysis and a denial of sociolegally significant diversities among the racialized constituencies of outsider jurisprudence. [n.59](#)

Finally, and additionally, CRT arose as a 'minority' insurrection emanating from within the established legal culture but cast in opposition to it. From the outset, then, nonwhite outsider jurisprudence found itself subject to a

disconcerting range of initial establishment reactions, extending from indifference and skepticism to curiosity and, at times, even understanding and respect. Still, the palpable and strident hostility to CRT's explicit and critical race consciousness in the institutional and intellectual environment prevailing at CRT's inception must be recognized as another specific formative factor in early circumstances and ambivalence. Though CRT scholars gradually have been appointed and tenured at even the most exclusive institutions, CRT workshops annually forced us to confront in both formal and informal conversation the enervating hostility directed by "home" institutions at CRT scholars year-round in routine, structural, maybe even "unconscious" ways. [n.60](#) And, as CRT gained prominence, attack did not abate; emboldened in part by a larger onset of reactionary attitudes licensing majoritarian backlash, initial academic unease devolved into unabashed bashing during the second half of CRT's first decade. [n.61](#)

***1286** Ironically, and importantly, the suspect gaze of the early years came not only from dominant quarters of the legal academy. Reflecting the complexities of racialized politics in this society and profession, CRT has found itself especially vulnerable to the balking reception it received from some legal scholars of color. Questioning CRT claims about 'voice' in legal scholarship, the nonwhite critique of CRT was asserted by 'colorblind' scholars of color whose standing derived in part from nonwhite racial identity--even as they authored texts that dismissed or devalued the relevance of racialized identity to scholarly perspective and discourse. [n.62](#) The specific circumstances of CRT's formation thus raised grave additional doubts: whether the thick racial politics and set political preferences of a white and wishfully 'colorblind' legal culture would suffocate a nonwhite articulation of critical legal theory about race, race consciousness and racism.

The impact of these three formative circumstances--societal heteronormativity, entrenched Black/white binarisms and legal culture's suspicion of nonwhite race consciousness--in tandem go a long way toward explaining some of our early and collective failures in intersectional analysis and community-building. Yet the formative influence of social circumstance was not all that stood behind this coalitional ambivalence. In addition, historical and experiential factors helped set the stage not only for CRT's emergence but also for our collective conflicted relationship to antiessentialist communities and critical coalitions as vehicles of antisubordination praxis.

B. History and Experience: Equality and Ambivalence

Among the good historical or experiential reasons for CRT's early sense of ambivalence toward coalitional projects and intersectional politics is the national experience known as the Civil Rights Movement. The Civil Rights experience aligned modern, liberal segments of American political society with the antiracist struggle primarily of African American communities to overthrow

this nation's de jure apartheid regime. This 'coalition' succeeded at the basic level of formal desegregation.

***1287** As a result of that movement, an avalanche of curative statutes was enacted, amended, interpreted and sometimes enforced earnestly. But the predominant liberal conception of formal legal equality as a way station to social colorblindness did not include the vision or will to dismantle racial supremacy and subordination in systematic, material or fundamental terms. In retrospect, nonwhite scholars have learned that colorblindness, rather than social justice, was the objective of the Civil Rights push for formal racial equality.

The Civil Rights experience also taught people of color, and especially African Americans, that cooperation--coalition--with mainstream liberalism was possible only at the margin, or at the surface, for a related reason: because dominant versions of liberal policy view "discrimination" as isolated, temporary or atypical instances of individual wrongdoing rather than as manifestations of the enduring structures and patterns of power that permeate American society and are leveraged systemically through the institutions, processes and doctrines of the law. [n.63](#) This conception of sociolegal reality cramps law's ability to counteract racism, as many outsider scholars amply have shown. For these reasons, the Civil Rights experience has not inspired (specifically within CRT) much confidence in racial, much less intersectional, coalitions.

Also among the good historical reasons for early collective ambivalence toward coalitional possibilities may be the experience with Critical Legal Studies ('CLS'). Generally, CLS has expressed a postliberal and antiformalist political sensibility that signals solidarity with CRT, but CLS ineptitude on racial particularity and its lack of dedication to praxis or transformation made that movement ultimately ill-suited to the antistatist needs of nonwhite scholars and communities. Over time, these and related CLS characteristics helped to distance it from CRT despite the postmodern and progressive disposition they share(d). Though significant affinity always has existed between CLS and CRT, these two jurisprudential movements represent(ed) a combustible mix of racialized interests, intellectual stances and normative imperatives that produced years ago the rupture that helped spawn CRT and nonwhite outsider jurisprudence. Emanating from a direct confrontation over questions about nonwhite scholars' place within CLS, that rupture recalls in stark and subtle ways how white-controlled ventures--including coalitions--can delimit antiracist objectives. [n.64](#) The CLS/***1288** CRT experience consequently combines a basic sense of jurisprudential camaraderie with coalitional caution, which could have reinforced the early sense of ambivalence that Civil Rights history also has induced.

These promising and complicated but ultimately unfulfilling historical experiences suggested to early CRT adherents that white-identified forces espousing liberal and even postliberal viewpoints are likely to support antiracist reform vigorously only upon the perceived convergence of majority and 'minority'

interests. [n.65](#) More generally, these experiences suggested to CRT's founders and expositors that majoritarian forces are likely to constrict or compromise antiracist theory and action precisely when 'equality' seems about to threaten in fact the existing (mal)distributions of economic and social goods. These experiences therefore may be described as recent examples of 'uncritical' collaborations that have continued to influence the early outlook of outsider jurisprudence on race, law and justice. In addition to the impact of formative social circumstance and a suspicious legal culture, the disappointments of these recent historical experiences may help to explain further the early general wariness of dilution or deflection through uncritical or dysfunctional 'coalitions.'

C. CRT as Nonwhite Outsider Jurisprudence: A Vehicle of Theory, Community, Both?

Because CRT's original vision dedicated outsider scholars firmly to scholarship as well as to community, [n.66](#) this combination of developmental *1289 environment and historical experience was bound to influence outsider jurisprudence in both substantive and structural terms. Substantively, as just noted above, CRT workshops and texts during the first decade rarely have focused on critiques of sexual orientation and ethnicities or trans/nationality, and of their interaction with race, to produce hierarchies of power and networks of privilege both within the United States and abroad. Only in more recent years, as Phillips argues, has CRT begun to produce a body of literature reflecting this widened scope of critical inquiry and interconnection. [n.67](#) As a result, only now is the published record beginning to provide inspiration for critical coalitions across these (and other) identity categories within and through CRT specifically.

Structurally, this combination of factors or influences helped to inspire the original workshop design, which sought to carve out within the legal academy of this country a 'safe space' for the incubation of antiracist critical theory by creating an intimate and controlled venue. The workshops were designed to bring together scholars of color each summer to share and exchange insights based on our reading of pre-distributed texts, and without the draining omnipresence, or immediate interference, of white privilege. This structure was designed to provide opportunities for intellectual support to fertilize CRT as scholarship, as well as opportunities for personal interaction to foster a sense of community among the participants. The workshops, in short, would be CRT's means of re/production in both discursive and human terms.

During the nine-workshop series spanning from 1988 to 1997 based on this original model, the limited attendance of about 25-35 persons (including presenters) was determined each year by the workshop planning committees, which typically relied on attendance lists from prior years to mail invitations. [n.68](#) Consequently, access to the workshop has been 'closed' as well as limited, requiring both an initial invitation and then a prompt acceptance of subsequent

invitations. This design inevitably affected the scope and structure of CRT's purpose, discourse and community, especially because the workshop planning committees themselves were not structured to promote and balance continuity with expansion from year to year.

***1290** Yet, balancing continuity and expansion in the workshops, and in their planning committees, always was important precisely because outsider scholarship dedicated itself from the outset to the cultivation of community, and also because the annual workshops were key instruments in making possible any such cultivation. In addition, the changing demographics of the legal academy, including the growing diversity of the professorate of color, [n.69](#) made the need for this balancing more acute, as well as crucial to the mission of creating community. Unfortunately, however, planning committees emerged annually largely from happenstance, leaving each year's committee with accumulated folklore and the prior year's invitation list as its main organizational tool and resource.

With the composition and the consciousness of each year's planning committee left to the vagaries of individual agency or institutional exigency, no mechanism ever was created to ensure the balances and expansions necessary to CRT's continual and collective well-being as a vanguard discourse and community. This point, and its consequences, are captured by Phillips' account of the workshops' initial encounter with "ethnicity": though the initial lapse promptly was disclaimed and followed up with a programmatic intervention the next year, [n.70](#) this history and programming did not carry forward into the future years--causing successive workshops to relive, and have to recover from, the same experience with Black/white binarism inside nonwhite outsider jurisprudence. [n.71](#) In this and other instances, workshop programming, like workshop participation, lacked longterm charting and guidance to keep the workshop grounded to the original sense of community and transformation through critical legal theory and praxis. The need for multiple balances in the structure and staffing of CRT convocations, specifically to foster a multilateral sense of connection and growth among geographically dispersed and multiply diverse scholars, never was adequately theorized or institutionalized as part of the antistatist jurisprudent project that we commissioned for ourselves. [n.72](#)

***1291** Because the collective learning process taking place during those years was uneven and inevitably complex, each year pressure arose anew, and accumulated, over recurring gaps or skews in the programmatic and physical aspects of the workshop. As intersections became more like fault lines, opportunities for critical insight and antistatist allegiance among and across various overlapping outgroups became instead sources of semi-essentialized, and probably self-defeating, discord. Given these stresses, it might be a wonder that the workshops on the whole were as successful as they clearly have been, and that CRT has matured and prospered so much during this past decade as the exemplar of outsider jurisprudence: despite the above weaknesses,

the nine-workshop series of the first decade did in fact provide a relatively 'safe' space for CRT to unleash a discourse and congeal the beginnings of an OutCrit community.

LatCrit theory, and the "convergence chronicle" of CRT and LatCrit that the Phillips essay elaborates, provide testament to that progress, for in many ways LatCrit theory springs from the gains that CRT posted. [n.73](#) But to learn from this progress requires us to learn from our mistakes and to remain vigilant against their recurrence. To build on our early progress, and to account for other significant factors of ambivalence, requires us to practice antisubordination principles and antiessentialist community-building as central to the project of constructing a nonwhite outsider jurisprudence.

D. Principle Matters: Antiessentialist Essentialism and Social Transformation in Nonwhite Outsider Jurisprudence

Though CRT's 'race' literature in particular continued to thrive during those years of uncertain transition, the original dedication to community and cause became increasingly vexed during the second half of the first decade over an ironic 'antiessentialist essentialism' associated with CRT's ambivalent (non)management of increasingly diversified identities, demographics and intersections. [n.74](#) This internal(ized) form of essentialism includes the failures of intersectional bent or inquiry noted above. [n.75](#) But the early sense of ambivalence about coalitional theory and praxis juxtaposes another important factor against those historical, experiential and circumstantial stressors. This factor is a feature of CRT that no doubt is definitive of nonwhite outsider jurisprudence in both substantive and structural terms: CRT's postmodern ***1292** foundation in antiessentialist analysis and antisubordination struggle. [n.76](#) This factor, unlike the ones sketched above, insisted on principle that outsider scholars resolve our intersectional fears and form critical coalitions fueled by a respect for difference in the struggle toward a postsubordination era.

In contraposition to the developmental, historical and experiential factors discussed above, the antiessentialist commitment has inclined CRT (and outsider jurisprudence) most definitely toward coalitional projects because 'intersectionality' and 'multiplicity' require skepticism of categorical generalization, single-axis group formations and unidimensional units of critical analysis. [n.77](#) Multiplicity and intersectionality effectively demand approaches to "race" and racism that entail coalitional moments and intersectional mindsets. Thus, while history, experience and circumstance may have tilted us collectively away from coalitional opportunities, the inclination of our antiessentialist sensibilities toward intersectional (and multidimensional) endeavors demanded them.

Additionally, outsider scholars' foundational commitment to antisubordination praxis reinforced antiessentialism's call for serious, ***1293**

substantive consideration of the linkages between racial and other forms of injustice. Because material reform requires savvy decisions about the politics of change, the original ambition of substantive social transformation in pursuit of justice similarly inclines outsider jurisprudence toward cross- group alliances capable of producing concrete and lasting sociolegal progress. [n.78](#) CRT's very principles and intellectual architecture thus impel us toward intersectional analyses and coalitional practices despite the historical, experiential and circumstantial record that otherwise might counsel suspicion of jurisprudential (and other) forms of coalition.

In sum, the combined impact of historical experience and formative circumstance implanted within today's community of OutCrit scholars a rationale for circumspection about the value of (at least some) coalitional projects. Yet outsider nonwhite jurisprudence from inception has been conceived and staffed by a richly and multiply diverse group of critical legal scholars with an expansive sense of social justice--a richness of ambition enhanced by the changing demographics and expanding frontiers of the past decade. In turn, this confluence of history, experience, circumstance and diversity sets the stage for a comparative look at Queer and LatCrit experiments in critical legal theory. These experiments, as explained below, present significantly different approaches to, and experiences with, antistatutory discourse and community. These differences can translate into substantive alterations of postsubordination vision, and can have a profound impact, for better or worse, on the collective capacity to realize jurisprudential community and collaboration in antistatutory struggle.

II. Queer Legal Theory, LatCrit Theory and CRT: Diversifying Outsider Jurisprudence

Events since CRT's founding have witnessed the nascency of allied jurisprudential movements, particularly (from my perspective) QueerCrit [n.79](#) *1294 and LatCrit [n.80](#) discourses. In fact, Queer legal theory and LatCrit theory come onto the jurisprudential scene at roughly the same time-- during the second half of CRT's first decade--but in markedly different ways. Of these two, as recounted below, only LatCrit theory positions itself collectively and consciously as aligned with CRT under the rubric of nonwhite outsider jurisprudence. Due in part to their differences, these two developments have helped to further diversify and enrich outsider legal discourse--and to refine and elucidate the lessons that LatCrits and OutCrits might draw from comparative jurisprudential experience now and in the next several years.

A. The Queer Position and Nonwhite Outsider Jurisprudence: Contrasting Experiences, Mutual Lessons, Pending Connections

During the past few years the 'Queer' denomination has been crafted to

signify a self-consciously political and progressive subject position in scholarly and public discourse. The 'Queer' position professedly describes a broadly-conceived antistatist posture; the 'Queer' position, as initially articulated in New York, San Francisco and other early venues, explicitly stakes out antiracist, antisexist and anticlassist as well as antihomophobic commitments. Queer Nation flyers posted in New York, for instance, declared that 'Being queer . . . means everyday fighting oppression; homophobia, racism, misogyny, the bigotry of religious hypocrites and our own self-hatred.' [n.81](#) Thus, the distinction between 'Queer' and 'lesbian' or 'gay' is that the former signifies--and constantly searches for--a postmodern political identification while the latter at times amount to essentialized, single-axis ***1295** identities. [n.82](#)

However, with the relative (and limited) exception chiefly of lesbian and bisexual exchanges, [n.83](#) it remains sometimes difficult to ascertain whether 'Queer' legal theory actually has come into full existence specifically in legal culture. As the emergent internal critique of gay and lesbian legal scholarship argues, sexual orientation legal scholarship has elided race, ethnicity, class, and gender. Consequently, 'gay and lesbian' (as opposed to 'Queer') legal scholarship certainly does exist, and it has proliferated with impressive (and exciting) momentum, aided in part by the social consciousness and cultural activism of progressive Queer nationalists.

In the legal academy, this proliferation began in 1979, with the first-ever symposium on sexual orientation and the law. [n.84](#) It has grown since then, posting significant insights in fields ranging from constitutional to family law, and engaging issues of power and identity familiar to CRT, LatCrit and other lines of OutCrit inquiry. [n.85](#) This discourse undoubtedly is a useful and positive development because it attacks sexual orientation injustice and expands the body of work produced as outsider jurisprudence. But, as the emergent internal critique points out, [n.86](#) this mostly unmodified scholarship is limited by its simultaneous failure to tackle with vigor various issues opened by CRT and outsider inroads into intersectionality, multiplicity and multidimensionality.

***1296** As with CRT, this limitation no doubt is a function of multiple factors, including, again, historical experience and developmental circumstance. [n.87](#) In particular, this limitation reflects the impact of societal white supremacy on gay (and even Queer) consciousness or discourse, and on the agendas or projects thereby generated. Thus, gay and lesbian legal scholarship, like early inquiries of nonwhite outsider jurisprudence, on the whole has failed to enter, or linger at, the intersections of race, ethnicity and sexual orientation. [n.88](#) Though both discourses espouse resolute and egalitarian antidiscrimination ideals, both have generated a body of largely unmodified work for reasons that sometimes are shared and sometimes not.

Perhaps 'gay and lesbian legal scholarship' has not yet matured into 'Queer legal theory' in part because it lacks certain structural supports for the exchange and dissemination of ideas, as well as for the cultivation of communities

and coalitions. For instance, sexual minority scholars have not created venues like annual summer workshops or regular conferences of the sort that have helped to fuel the prior and current development of CRT and feminist legal theory and, most recently, LatCrit. [n.89](#) Of course, various law reviews have at times organized symposia devoted to sexual orientation and the law. [n.90](#) And the American Association of Law Schools ('AALS') in 1996 sponsored the first-ever national workshop on sexual orientation and the law. [n.91](#) However, apart from the programs and gatherings of the Section on Lesbian and Gay Legal Issues during the AALS annual meeting, [n.92](#) sexual minority legal scholars have *1297 instituted no regular form of convocation to introduce and advance critical, collective and multidimensional discussion of 'sexual orientation' issues. On the whole, we have not established autonomous structures or programmatic initiatives to affect positively the conditions of our work's production, nor, more specifically, to bring into existence a Queer consciousness and community within legal culture. [n.93](#)

This collective structural failure inevitably shapes the literature both in substance and sensibility--both as discourse and community. Gay and lesbian legal scholarship has produced a record of mostly single-axis analyses that reflect and replicate the atomized environments in which Queer scholars work due, in part, to the fact that sexual minority 'communities' or networks are incipient, if not still inchoate, formations; though many factors undoubtedly contribute to this status quo, it seems that those of us writing from a sexual minority subject position have failed to articulate an advanced conception of Queer legal theory at least in part because we have not substantially overcome the physical and cultural conditions of psychosocial isolation that structure sexual minorityhood in the legal academy, the United States and elsewhere. [n.94](#) As with nonwhite outsider jurisprudence, Queer positionality cannot help but to reflect the conditions preceding and surrounding its emergence.

Thus, like other discursive formations, both sexual orientation legal scholarship and current articulations toward Queerness in scholarship undoubtedly have exhibited racialized, ethnicized, gendered and classed tendencies that reflect larger cultural hierarchies of privilege and position. *1298[[FN95](#) Yet, in my view, Queer ideals and insights-- despite their flaws and even if not yet widely practiced in legal scholarship-- can aid outsider scholars' continuing learning process and jurisprudential advancement. [n.96](#) Queer values, if practiced consistently and honestly, counsel all OutCrit scholars--CRT and LatCrit included--promptly and earnestly to take up neglected or postponed intersectional issues of law, identity and opportunity.

Among these pending intersections, of course, is the interplay of white and straight supremacies in producing the specific subordination of lesbian, gay, bisexual and trans/bi-gendered persons of color within communities of color, including Latina/o communities, and throughout society generally. [n.97](#) But Queering nonwhite outsider jurisprudence demands more than the addition of

sexual orientation and sexual minorities to the current jurisprudential mix; the process of Queering retains yet builds on multiplicity and intersectionality because Queer positionality requires a multidimensional approach to all deployments of oppressive power and privilege. [n.98](#) Thus, even though Queerness remains a white, male and middle-class formation in many respects, the important, distinctive and (still) under-used contribution to critical theory of Queer positionality is its programmatic emphasis on expansive antisubordination stridency. Despite the limitations of current practices, Queer positionality provides a springboard from which to envision an egalitarian postsubordination society that CRT, LatCrit and other OutCrit scholars avidly should embrace and help to establish in accordance with our antiessentialist tenets and antisubordination imperatives.

***1299** In sum, the substantive advances in critical perspective attached to Queer positionality have been undermined by the lack of structures to foster interconnective discourse and community among sexual minority and allied scholars. Reflecting the afflictions of our larger social and legal environments, Queer theory--or, more accurately, sexual orientation legal scholarship--has been limited by collective failures of intersectional inquiry and convocation. The overall record of sexual orientation legal scholarship thereby underscores challenges and experiences paralleled, though not necessarily duplicated, in race/ethnicity-conscious outsider jurisprudence.

B. Building LatCrit Theory: Lessons and Practices, Knowledge and Community, Aspirations and Limitations

LatCrit theory, in some ways the most recent of these jurisprudential phenomena, offers a notably different record and model from both the RaceCrit and QueerCrit experiences. LatCrit theory is an infant discourse that responds primarily to the long historical presence and general sociolegal invisibility of Latinas/os in the lands now known as the United States. As with other traditionally subordinated communities in this country, the combination of longstanding occupancy and persistent marginality fueled an increasing sense of frustration among contemporary Latina/o legal scholars, some of whom already identified with CRT and participated in its gatherings. Like CRT, Queer and other genres of critical legal scholarship, LatCrit literature thus tends to reflect the conditions of its production as well as the conditioning of its early and vocal adherents.

Born most immediately from and during a 1995 colloquium on Latinas/os and CRT, LatCrit theory is an intervention designed to highlight Latina/o concerns and voices in legal discourse and social policy. [n.99](#) As its origins indicate, this Latina/o-identified genre of outsider jurisprudence was conceived as a movement closely related to CRT. And because it was born of the CRT experience, LatCrit theory views itself as a 'close cousin' to CRT, a cousin

that always welcomes CRT, both in spirit and in the flesh, to its gatherings. [n.100](#)

But these roots include a critical assessment of CRT--this birthing reflects both the strengths and shortcomings of CRT as revealed by a Latina/o-identified critique of antiracist public discourse and legal scholarship. Molded (in part) by a critical assessment of outsiders' substantive and structural record, LatCrit theory from its very inception has ***1300** been self-consciously devoted to practicing CRT's original commitments and pioneering techniques in self-critical ways. LatCrit theorists, in other words, have been determined to embrace CRT's original antisubordination insights and employ its first-decade learning curve as this project's point of departure. [n.101](#) Not surprisingly, then, LatCrit theory has devised a conscious and critical self- conception very similar though not identical to CRT's.

Not all the "differences" (or similarities) between CRT and LatCrit can be attributed to the lessons drawn from comparative jurisprudential experience, however. Other factors inevitably influence or enable LatCrit's make-up. For example, LatCrit emerges at a time in which the demographics of the legal professorate are much more diverse than a decade ago, during CRT's initial emergence. [n.102](#) Moreover, the effects of majoritarian racist/nativist backlash, and of the policy preference for formal color blindness, also have been legitimated and consolidated, both judicially and legislatively, mostly in the decade since CRT's inception. [n.103](#) And, as yet "another" nonwhite subject position, LatCrit also has been required to anticipate and navigate carefully the perennial charge of interjecting or aggravating a destructive "balkanization" within legal discourse. [n.104](#) These factors, in addition to the CRT experience and the various historical and other factors that affected it, [n.105](#) have helped to shape and give meaning to LatCrit theory today, both in substantive and in structural terms. Like CRT and Queer legal theory, LatCrit theory not only reflects but also must respond to the conflicts, circumstances and conditions that preceded and surrounded its emergence.

Also like CRT, LatCrit theory self-consciously endeavors both the creation of scholarship through community and the creation of community through scholarship. The idea of, and need for, regularized meetings***1301** accordingly have been integral to the constitution of LatCrit theory, and to the production of a LatCrit body of legal literature generated in connected, rather than atomized, conditions. Like CRT but unlike gay and lesbian scholarship, LatCrit theory has undertaken the construction of structural conditions conducive to these twin objectives. And also like CRT, LatCrit theory expresses this commitment to the production of both knowledge and community specifically as a means toward an end--the attainment social justice. [n.106](#) LatCrit theory thus seeks to combine elements of CRT's early and formal self-conception with lessons drawn from CRT's actual experience and practice to employ and develop its insights.

As crafted by its earliest proponents, LatCrit theory attempts to balance multiple factors that conjoin the production of knowledge and cultivation of

community, and this balancing serves as the theoretical frame for legal reform through LatCrit discourse and praxis. From the beginning, therefore, LatCrit theorists have theorized about the purpose(s) of legal theory, and about the role of structure and substance in light of such purpose(s). In my view, these preliminary LatCrit efforts have pointed to four basic aims or functions of critical legal theory: the production of critical and interdisciplinary knowledge; the promotion of substantive social transformation; the expansion and interconnection of antistatist struggles; and the cultivation of community and coalition among outsider scholars. [n.107](#) As these four aims or functions indicate, a dual and coequal commitment to expansive substantive programs and to community-building structures and events underpins LatCrit theory.

This dual and coequal commitment is applied (or not) mainly in the context of the annual LatCrit conferences. Instead of CRT's series of small workshops, the annual LatCrit conferences have been open and mid-sized gatherings of about 75- 135 attendees. As with CRT's workshops, these conferences meet in a different location each year, and have been the chief instrument that annually brings together multiply diverse legal scholars and friends for a critical and continuing engagement of social justice issues important, in this instance, to Latinas/os as well as to "other" outgroups. [n.108](#) Because these conferences are cosponsored by ***1302** law reviews, they also annually help to generate published texts that reflect this framing--this symposium being the latest case in point. [n.109](#) LatCrit theory therefore has been characterized by a self-instilled and self-critical sense of collectivity, situatedness and purpose, which is evidenced not only by the structuring of the annual LatCrit conferences but also by their substantive scope and focus.

The configuration of LatCrit interventions, both written and physical, thus far has been guided by a solid conviction that the social or legal position of multiply diversified Latina/o populations may be understood best--maybe only--when approached from multiple perspectives in collaborative but critical and self-critical fashion. LatCrit theory's substantive scope and focus therefore have been shaped by a firm resolve to center 'Latinas/os' in social and legal discourse, but to do so in a way that foregrounds the multiple diversities of Latina/o communities and that contextualizes these issues within a broad critique of intergroup relations and outgroup positions. The structural design--featuring a wide range of attendance and participation in LatCrit programs and projects--is related to and reinforces this interconnective substantive purview. In both structural design and substantive scope, the LatCrit approach to outsider jurisprudence is calculated to nurture cross-group communities and intergroup coalitions spurred by intersectional discussions and projects that broaden, deepen and contextualize self-empowerment quests both within and beyond "Latina/o" contexts.

Perhaps most notably, the annual LatCrit conferences have been employed consciously to elucidate intra- and intergroup diversities across multiple identity axes, including those based on perspective and discipline. This

expansive approach to the articulation of LatCrit theory is designed to ensure that African American, Asian American, Native American, feminist, Queer and other OutCrit subjectivities are brought to bear on Latinas/os' places and prospects under the Anglocentric and heteropatriarchal rule of the United States. [n.110](#) Though we obviously ***1303** cannot train our collective attention on all diversities, issues or contexts at once, LatCrit theorists have guided the creation of holistic programs and projects to search out and progressively map Latina/o diversities and their interrelationships, aiming via this process to unpack comprehensively and critically the complexities of Latina/o subordination.

This approach consciously is designed to center not only Latinas/os and our many diversities in a manner that minimizes privileging any one Latina/o interest over another, but also to ensure critical discussion of Latinas/os as part of the larger social schematics formed in part through law. This LatCrit drive for diversity and particularity ideally will help to create an intellectual and social culture enabling the LatCrit community collectively to overcome Latina/o and other essentialisms, which sometimes stand in the way of critical outgroup and OutCrit coalitions. [n.111](#) This incremental critical effort is intended to promote and ground intra- and intergroup antistubordination coalitions by ensuring the representation and investigation within the LatCrit community of various power hierarchies and their interplay.

As coalitional method, this constant and perpetual balancing of diversities and specificities produces a "rotation of centers" . [n.112](#) At each gathering thus far, LatCrit programs have allocated time and prominence to intersectional issues in a manner that in effect rotates 'the center' of LatCrit discourse among various, and sometimes overlapping, intra- and intergroup interests. This rotational practice effectively requires all participants to 'decenter' from time to time salient identities or preferred issues to juggle our collective limited resources. The joint objective every year, and also from year to year, remains constant, even while sites and centers rotate: to incorporate as fully as possible in all LatCrit programs, as well as in the overall LatCrit record, the manifold intraLatina/o diversities and intergroup issues that affect outgroup social justice quests, including those of Latinas/os. If assessed critically and pragmatically, and if managed responsibly, this process of continual and rotational analysis is the best--if not the only--route to balancing and expanding from year to year the programmatic attention given to these intricate issues and to their complex interrelationships in light of the discursive demands established by postmodern, intersectional ***1304** insights. [n.113](#)

This system of rotation, however, obviously depends on a collective yet individual commitment to continuity and progression; because rotation in part means that each year's events build on those of the prior year(s), LatCrit programs and projects place a premium on repeat attendance and participation in annual or special events. To engineer the continual advancement of this discourse, knowledge and community, rotation calls for a personal and annual

re/commitment to the LatCrit enterprise among an ever-fluid yet identifiable and self-selected group of scholars. The forms of commitment among the many individuals in the LatCrit community vary over time, of course. Generally, however, this commitment encompasses not only attendance and participation but also planning. Because the passage of time likely will make it progressively more difficult to sustain individual commitments across the board, the goal is to ensure a critical mass of continuity in attendance, participation and planning every year - and then to balance these levels of continuity and consolidation with incremental innovation, expansion and inclusion. [n.114](#)

Additionally, this balancing of continuity and development must anticipate and accommodate the varying levels of knowledge and experience that individual scholars bring with them to LatCrit events: inevitably, different individuals bring with them not only varied backgrounds but also varied levels of exposure to, or involvement in, outsider jurisprudence. This accommodation therefore contains both substantive and structural components, and both are reflected in LatCrit programs, which seek to blend the familiar with the novel and to represent newcomers as well as veterans. The perpetual task of the group is to create an environment where all present can access, participate and contribute to our collective act of learning and advancement through critical discourse and community. This task, of course, is never-ending, and necessarily becomes increasingly challenging with the passage of time and the expansion of the group. [n.115](#)

***1305** Given the diffused and nuanced nature of the decisions and considerations that underlie these group and personal commitments, only time - and effort - will determine how far LatCrit theory will (or won't) reach. In both substance and structure, LatCrit theory is an experiment-in-progress, and only time and effort will determine how far LatCrit theory actually reaches. The ultimate challenge, of course, is to persist for as long as the material conditions of subordination also persist. For the moment, it seems to be working because enough OutCrit scholars deem it worth it. The immediate and ongoing challenge, then, is to locate, excavate and rotate sites of theoretical contestation and political action to keep the LatCrit antirule project continuously on balance, and on the move. [n.116](#)

Finally, as this symposium shows, LatCrit theory from inception has sought collaboration with Latina/o and other law reviews. Each event to date has been co-sponsored by one or more law journal(s), which publish edited versions of conference proceedings. [n.117](#) This feature of the LatCrit enterprise seeks to support, and build coalition with, law reviews (especially those of color) while also creating collective projects and opportunities for all participants in LatCrit programs. This particular aspect of the LatCrit venture has been tailored to provide support and community both to scholars and to journals while igniting the creation of a new field in legal literature. By producing a similarly diversified printed record of our gatherings and exchanges, this final feature of LatCrit

projects advances the antiessentialist principles and antisubordination aims of this movement with respect both to community and to theory.

In some ways, then, LatCrit theory may be understood as an effort to practice Queer ideals while employing CRT insights and tools; while focusing on "Latinas/os," LatCrit theory also has embraced the Queer credo of interconnected struggle [n.118](#) as well as the CRT methods of antiessentialist community, antisubordination analysis and regular annual convocation. [n.119](#) Though somewhat simplified, LatCrit projects *1306 and texts fairly may be viewed as a Latina/o-oriented fusion of Queer and CRT ideals and innovations, a fusion always being tested through time, experimentation and practice. This experiment at fusion already suggests a few tentative lessons.

III. LatCrit Notes on Comparative Jurisprudential Experience: Critical Coalitions, Antiessentialist Community and Antisubordination Convocation

As this sketch indicates, LatCrit theorists both have embraced and critiqued the structures, experiences, methodologies and ambitions set out for outsider jurisprudence by CRT's earliest exponents. During its original moments, like LatCrit now, CRT conceived itself as a community of legal scholars mounting a discursive and political intervention on several fronts at once. [n.120](#) And like LatCrit now, this early sense of CRT's collectivity--its notion of scholarly engagement and community--also was grounded in annual group experiences. In CRT's case, this grounding has been the summer workshops that annually convened a small group of scholars of color, [n.121](#) and in LatCrit's case it has been the various colloquia and larger annual conferences of the past several years. [n.122](#) The point is that both CRT and LatCrit theory, unlike gay and lesbian scholarship, [n.123](#) have invested in the creation of structures to promote both knowledge and community, and to enable the sustainability of both. From my perspective, LatCrit theory is most like CRT, which conceived itself in ways now claimed by the LatCrit project.

But the LatCrit experiment also has embraced and pursued the same kind of expansive antsubordination sensibility that defines Queer ideals. [n.124](#) This sensibility of course is fully consistent with CRT's breakthroughs in intersectionality, multiplicity and antiessentialism as antsubordination insights. [n.125](#) It also is consistent with LatCrit's efforts to learn from CRT's record of intersectional selectivity and coalitional ambivalence. [n.126](#) LatCrit positionality thus reflects both CRT and Queer influences in substantive and in structural terms--as well as critical and self-critical reflections on those influences and their lessons.

Consequently, LatCrit theory's original determination to benefit from a critical understanding of comparative jurisprudential has produced significant

substantive and structural variations specifically *1307 between LatCrit theory and CRT. These variations help to map some of LatCrit's contributions to the development of nonwhite outsider jurisprudence. The above account points to four distinct yet overlapping areas of substantive or structural variance.

First, LatCrit gatherings have been aggressively 'open' to promote wide-ranging, self-selected and diverse participation, whereas CRT's workshops have been 'closed' to foster an intimate, intense and trained discursive climate. [n.127](#) Second, LatCrit discussions from the outset have included sexual orientation proactively both in the form of bodies and ideas, whereas CRT ambivalence has overlooked or resisted the implications raised for it by this particular intersection. [n.128](#) Third, LatCrit conferences have placed a high priority on programmatic diversity specifically along race, color, ethnicity and trans/nationality, whereas CRT has looked chiefly to 'domestic' domains of subordination and has practiced diversity along these lines in relatively haphazard or ephemeral ways. [n.129](#) Fourth, LatCrit programs and their advance planning consciously incorporate, and depend on, a group ethic of individual and collective continuity to ensure both memory and progress in the articulation of LatCrit theory as antisubordination praxis, whereas the annual workshop planning process was relatively ad hoc. [n.130](#)

However, at this early juncture, perhaps the fundamental difference between the CRT and LatCrit experiences is that LatCrit theory has placed a greater emphasis on, or has displayed less ambivalence toward, the role of coalitional endeavors as a core aspect of nonwhite outsider jurisprudence. [n.131](#) This LatCrit enthusiasm for coalition and inclusion in both substantive and structural terms may be due to LatCrit naivete about the Civil Rights and CLS experiences, [n.132](#) or to savvy recognition of political pragmatics, [n.133](#) or to a combination of these and other factors. *1308 Whichever it may be, the LatCrit experiment invites OutCrit scholars concerned with our collective progress to consider whether, and how, the success of outsider jurisprudence and community can be influenced, perhaps profoundly, by the design and operation of antisubordination interventions. In my view, a key lesson of the LatCrit experience thus far is that the balancing of diversity and continuity, expressed through individual and collective choices over structure and substance made and remade annually, may be a fundamental requisite to the long-term viability of nonwhite outsider jurisprudence as both discourse and as community.

To be sure, no one approach to the continuing development of outsider jurisprudence is necessarily or absolutely the most productive in all circumstances. But the substantive and structural variances noted throughout this Afterword in the RaceCrit, QueerCrit and LatCrit contexts cumulatively can generate significantly different experiences of discourse, community and coalition. For instance, having taken critical stock of the dangers signaled by CRT's avoidance of sexual orientation, [n.134](#) LatCrit theory's commitment to intersectional discourse and antiessentialist community has led it proactively and

programmatically to showcase issues stemming from known or discovered sources of difference. [n.135](#)

Each time thus far, LatCrit programs have featured with intentional prominence active sources of group tensions and/or the prior gathering's most contentious controversies: at the first colloquium in 1995 the point of contentious engagement was intraLatina/o ethnic and racial difference; at LatCrit I it was gender and patriarchy within Latina/o culture; at LatCrit II it was the significance of religious and sexual traditions in Latina/o lives; and, this year, at LatCrit III, it was Blackness in LatCrit theorizing and events. These critical incursions into intra- and intergroup sources of difference, whether spontaneous or programmatic, pose no automatic danger to knowledge and community--if guided by an overarching ethic of mutual care and responsibility. [n.136](#) *1309 On the contrary, such engagements are themeans through which multiply diverse OutCrit theorists join in the direction and evolution of LatCrit discourse and other genres of outsider scholarship. [n.137](#) At its best, this multilateral process of reciprocal and self- critical re/engagement re/invigorates the LatCrit community to craft antisubordination theory that reflects the synergies of our diverse positions, respective ideas and joint labors. However, these examples also illustrate how the issues that have afflicted outsider jurisprudence generally, and have caused coalitional ambivalence at key moments in our collective past, also can tend to surface now in LatCrit venues or contexts--despite the years of convocation and exchange that should yield an ever-improving, collective capacity to negotiate effectively and efficiently these increasingly familiar issues.

The race/ethnicity discussions at LatCrit conferences, for example, illustrate the power of white supremacy's dangerous legacies of division, as well as the danger of entrenched categorical racial/ethnic hierarchies, within and beyond Latina/o communities. [n.138](#) The gender discussions similarly illustrate the potential for LatCrit redeployment of oppressive structures unless confronted consciously and programmatically from year to year so that progress sticks. [n.139](#) The religion exchanges illustrate the potential or tendency within LatCrit gatherings and projects to essentialize identity along one axis or another in accordance with culturally *1310 prevalent hierarchies or personally familiar arrangements. [n.140](#) Clearly, these moments of contestation challenge the collective LatCrit enterprise in complex ways that affect antisubordination vision and purpose. [n.141](#) LatCrit theory, like CRT and other genres of outsider jurisprudence is not--and cannot be--immune to the forces and influences of our times. This lack of immunity is, again, precisely why all OutCrits must be alert to the lessons that we might be able to glean from CRT's groundbreaking work on antisubordination substance, structure and community. Ultimately, the recurrence of these issues in various outsider settings is why LatCrit and other OutCrit theorists must cognize, and confront collectively, the lessons embedded in comparative jurisprudential experience.

As this brief accounting suggests, LatCrit theory's embryonic process of

re/creation and re/development strains our collective capacity to operate at our best. And, as LatCrit III confirms yet again, every time we meet our exchanges progressively challenge our sense of commonality as well as our mutual commitment to critical knowledge and scholarly community in antisubordination struggle. Faced with the eruption of these structural and cultural issues during these formative and tentative times, the LatCrit community has elected to grapple both reactively and proactively, but always programmatically and always for the long term, with these and other compelling or competing claims on our time and energy. [n.142](#)

***1311** Time and experience increasingly will test LatCrit theory's collective ability and determination to make necessary adjustments and continual advances. For the moment, it seems to be working precisely because of the commitment to community--precisely because most LatCrit theorists individually are committed as a matter of group ethics to confronting and processing in a constructive and programmatic manner the substantively 'hard' moments that intersectional attention to diversity oftentimes tends to produce. Given the nascency of LatCrit theory, even a tentative prognosis about this movement's ability to travel increasingly intricate diversity terrains is difficult. But, as with CRT, the LatCrit commitment--and promise-- is to sustain this experiment for as long as our human, intellectual and other resources permit, and as part of our collective and continuing journey toward a postsubordination order.

IV. Toward a Postsubordination Order: LatCrit Thoughts on Race, Ethnicity and Experience

These comparative notes on antisubordination experience depict jurisprudential developments that have taken place both before and since the origination of LatCrit theory as a self-conscious subject position in the legal academy of the United States. As a set, these comparative experiences have much to teach us about the possibilities of an OutCrit [n.143](#) formation and agenda through critical coalitions and coalitional method. Our collective record to date can and should help to inform future OutCrit choices over substance, structure, community and coalition in the service of antisubordination struggle. But the LatCrit experience, in particular, does not beckon CRT (or any other formation) simply to mirror its substantive or structural designs. Nor does the LatCrit experience beckon LatCrit satisfaction or complacency. Instead, the variations between LatCrit, CRT and Queer experiments in outsider jurisprudence raise new possibilities--and perhaps tensions--for all OutCrit theorizing as a form of antisubordination praxis.

A. From Comparative Experience to OutCrit Praxis: RaceCrits, LatCrits and Reconstruction from Within

As the Mutua essay in particular shows, one set of OutCrit possibilities and tensions suggested by LatCrit's brief record revolves around the value of shifting away from uncritical replication of conventional Black/white binarisms and toward a 'white-over-Black' paradigm, which may be better suited to critical excavation of the interactive similarities and differences that situate varied nonwhite groups against, and *1312 under, white privilege. [n.144](#) From a LatCrit perspective, the difference between the two approaches is great: whereas the former ultimately represents a bipolar caricature of racial heterogeneity and subordination, the latter highlights how all racial hierarchies systematically valorize whiteness and demonize Blackness, both in intra- and intergroup settings. Nonetheless, the self-reflective essays of this symposium illustrate how this shift can backfire as antisubordination method if not conducted critically and self-critically, and in coalition with African American and other scholars. [n.145](#)

But, as those essays also indicate, these difficulties relate more to manner and tone than to substance, for the shift (or expansion) and its substantive value to nonwhite outsider jurisprudence ultimately are not contested; [n.146](#) rather, those essays rightly remind LatCrits that, as OuCrits, we proactively must ensure that historic hierarchies are not replicated, validated or reinforced by the manner of its execution. [n.147](#) This insistence, of course, itself cannot be contested in the context of critical coalitions as vehicles toward a postsubordination order--not under an approach to this shift that is congruent with and disciplined by the antiessentialist and antisubordination principles that help to ground LatCrit theory. [n.148](#) Thus, the LatCrit deconstruction of the paradigm and its effects on our understanding of "race relations" has undergone several stages of development and refinement during the past three years, a process of investigation and adjustment intended to ensure that this shift takes place in a principled and coalitional manner. [n.149](#)

*1313 These recent exchanges and developments have not, nor could they have, extracted definitive answers to the questions of identity, law and society that have occupied LatCrits for the past three years, for the questions raised specifically by the interaction of "race" and "ethnicity" are heavily freighted--whether or not approached from a paradigmatic perspective. But these exchanges and developments have helped to begin clarify, and guide, LatCrit theory's approach to white supremacy and its effects on racialized as well as ethnicized categories: "a threshold task of LatCrit theorizing is ascertaining the ways and means by which 'ethnicity' and 'race' can be turned into a useful analytical tool for unpacking and alleviating the Latina/o social and legal position, as well as the subordination of other racial and/or ethnic groups." [n.150](#) The result of these exchanges, at least for the moment, has been a programmatic, critical and long-term approach to the study of white supremacy and privilege that regards "both race and ethnicity [as necessary components of LatCrit antisubordination analyses]." [n.151](#)

Moreover, LatCrit theory's re-centering of this particular intersectional topic may be helping raise awareness of Blacks as an "ethnic" as well as a racial group. By way of example, the Roberts essay narrates an experience during the LatCrit II conference, in which she and other conference participants "discovered that most of the Black people [at LatCrit II there were of West Jamaican descent." [n.152](#) Having made that discovery, they "gathered together to share stories of [their common background." [n.153](#)

Substantively, Roberts' observation of this discovery implies more than can be unpacked in this Afterword, and thereby leaves pending provocative questions for a continuing LatCrit (and RaceCrit) interrogation of race and ethnicity as overlapping but not necessarily coterminous categories. What, for instance, does the "discovery" of West Indian commonality among the Blacks at a LatCrit venue suggest about nonwhite outsider jurisprudence as a whole? May it indicate that LatCrit can help to provide a new opportunity for Blacks who live in the United States to explore and reclaim nonAnglo "ethnicity" as elemental to Black identity, *1314 including African American ethnic identities? Does it suggest that both African American and nonAfrican American Blacks in this country, like Latinas/os, are a racialized and polyethnic grouping? [n.154](#) Does it suggest that both groups remain dominated by the ethnicized legacies of their colonial conquerors--for Latinas/os the Spaniard, for African American Blacks the Anglo and, in any event, for all Blacks and Latinas/os the "white" European? If so, can these lines of inquiry open up new understandings of "Blacks" and "Latinas/os" as postcolonial groups similarly yet differently racialized and ethnicized? Can these new understandings allow us to reconceive the possibilities and pivot points of Black-Brown critical coalitions that today may seem more like pipe dreams due to issues of "difference" and identity?

Whatever one imagines the ultimate answers to these questions should be, "the 'race' versus 'ethnicity' discussion is precisely the sort of substantive expansion that LatCrit theory can produce to existing critical legal discourses" about white supremacy and its ill effects on nonwhite and/or nonAnglo communities. [n.155](#) In effect, then, the ongoing effort to transcend critically and collaboratively the traditional paradigm in both word and deed has been a process of reconstructing our collective experience with, and understanding of, race and ethnicity. It is a process that can help RaceCrits and LatCrits reconstruct the meaning of race and ethnicity personally as well as intellectually, and from within--by and through the practices and principles that we choose to adopt and disseminate in critical coalitions to dismantle white supremacy and privilege. Our collective development of knowledge and community through nonwhite outsider jurisprudence can transform our experience of race and ethnicity, as well as our vision of these constructs in a postsubordination society, and this reconstructive process is a form of OutCrit praxis that can help enlighten and empower all communities disfavored by the paradigm's predilection for whiteness.

Because the value of this shift, if properly handled, does in fact resonate

within African American as well as other racialized communities--including Queer and Latina/o communities--this reformulation of the traditional paradigm underscores a basic but crucial point: antiracist transformation in a white-majority, white-controlled yet multicultural society depends in part on antisubordination collaboration built through critical recognition and mutual resistance of white power's multiple ***1315** manifestations. The engagement of ethnicity and the shift to the "white over Black" formulation of the traditional paradigm thereby may help substantively and discursively to bring us all closer to OutCrit perspectivity. These moves can help bring into focus the common yet variegated antisubordination interests that spread across conventional lines of identity, theory and community.

Related to these moves are other possibilities and tensions that arise from LatCrit interventions in, and contributions to, the continuing evolution of nonwhite outsider jurisprudence. In just three years, for instance, LatCrit theory has helped to highlight in the context of nonwhite outsider jurisprudence the relevance of trans/nationality, language, culture and religion to "race" [n.156](#) and to the sociolegal processes of racialization. [n.157](#) These early and continuing contributions also call for critical appreciation of the antisubordination issues that spring from the cultural and economic relationships that historically and presently link domestic communities of color to their overseas kin. [n.158](#) These lessons therefore help to center in nonwhite outsider jurisprudence the global and international dimensions of domestic social justice agendas. [n.159](#)

Perhaps most centrally, the emergence of LatCrit theory has prompted possibilities and tensions that implicate questions of structure, theory and community in the continuing development of nonwhite outsider jurisprudence. In fact, a key structural question that these essays raise is how the pending work of sharpening and advancing nonwhite outsider jurisprudence should be approached and conducted in the coming years. Or, more specifically, how LatCrit, RaceCrit and allied scholars should design and create spaces and institutional structures to maximize our collective resources and antisubordination punch. In the context of nonwhite outsider jurisprudence, the question is how LatCrit theorists might work with RaceCrit and all other antisubordination theorists to craft critical coalitions that are both principled and potent.

***1316** B. Particularity, Solidarity and Outsider Jurisprudence:
Re/imagining the Structures of Antisubordination

Of course, the future form, scope and direction of coalitionality through nonwhite outsider jurisprudence is a topic of fundamental importance, especially in light of our collective recent past. [n.160](#) As the comparative record sketched above strongly indicates, the varied experiments mounted by CRT, Queer and LatCrit in recent years jointly point to a common lesson: decisions and actions

regarding the means and models of convocation can affect profoundly the project of cultivating both a diversified discourse and a community grounded in outsider normativities and dedicated to antisubordination transformation. Whether we meet as critical legal scholars or not, or how and how often, will affect--for better or worse--the knowledge and community that we produce, as well as the conditions for the production of future knowledge and community. A baseline lesson that comparative experience should teach us all is that regularized meetings are a must--convocation is a predicate of collectivity and sustainability.

The question, therefore, really is not "if" but how, when, where and with whom we should or will meet--given our antisubordination purposes and antiessentialist principles. [n.161](#) The symposium essays discuss helpfully concrete suggestions of possible options. One, explored programmatically at LatCrit III, is reflected in the Roberts essay and its postulation of a BlackCrit subject position. [n.162](#) "We should think more about a BlackCrit Theory that develops a notion of a Black identity that is not rooted in biology," writes Roberts. [n.163](#) In this view, "BlackCrit" signifies a position from which to explore the ethnic and other diversities of Black communities in the United States, and of the ethnic and racial dis/continuities that dis/connect African Americans from the global diaspora of Black communities. [n.164](#) Ideally, then, BlackCrit theorizing progressively articulates Black particularities in intra- and intergroup frameworks.

But the effort to articulate a BlackCrit position, Phillips warns, might veer into a form of "regressive Black nationalism" that would reject multidimensional approaches to antiracist projects, and that thereby would undermine our collective progress toward "resisting all *1317 forms of oppression." [n.165](#) In effect, such a regression might seek to assert, this time intentionally and ideologically, lapses akin to those recorded in our collective experience with outsider jurisprudence. [n.166](#) "[Without the discipline that would be provided by working with people who come from other subject positions, there would be a substantial danger that a black nationalist formation would degenerate into the regressive type," explains Phillips. [n.167](#)

First, we should note that this concern over "regressive nationalism" is applicable, if at all, not only to African Americans, but also to Latinas/os and, probably, to other race/ethnicity groups as well. This point is aptly illustrated by the Johnson and Martinez essay, which describes nationalist moments in the evolution of Chicana/o studies that denied the relevance or salience of diversities and issues based on gender and sexual orientation. [n.168](#) This point is powerfully confirmed by Montoya's contribution to this symposium, which recounts the fitful history of Chicana/o studies in much the same spirit that this Afterword sketches a similar history among RaceCrits, QueerCrits and LatCrits. [n.169](#) Thus, the "discipline" provided by diversity is one of the safeguards that LatCrit has adopted, in part, for this reason. [n.170](#)

But Phillips' concern underscores a basic point that merits our emphatic

remembrance: the concrete interventions of nonLat LatCrits show that LatCrit today would be a very different phenomenon had we at the threshold conceived this project otherwise. Last year, at LatCrit *1318 II, for instance, the self-critical eruption over religion and Latina/o religious essentialism arose initially from a nonLat participant, and then attracted a tremendous amount of attention from the Lats. [n.171](#) At LatCrit I and since then, as the essays of this symposium again illustrate, race/ethnicity exchanges have been immeasurably enriched by nonLat contributions. Thus, in addition to fostering more incisive exchanges and promoting a sense of community grounded in antisubordination commitment, LatCrit's diversification has provided a self-imposed, self-activating disciplinary mechanism that helps keep us grounded, critical and self-critical in the moments that count most--that is, in the moments when our idiosyncratic or situational limitations tend to lead us astray. When those lapses of self-awareness descend upon us, diversity's discipline is activated by the prompt interventions of others in the room that keep us collectively honest. These moments provide the epiphanies of coalitional method, and help to develop patterns of LatCrit praxis for possible application to other sociolegal arenas that, like outsider jurisprudence, require ongoing negotiation of intergroup relations.

Moreover, this record of diverse involvement in the conception and advancement of LatCrit theory suggests that coalitional method, guided by a purposeful sense of OutCrit perspectivity, can serve as devices for critical coalitions based on antisubordination purpose and antiessentialist analysis. Indeed, these diversified interventions and exchanges, and their impact on the collective LatCrit consciousness and written record, effectively have helped to set the stage for further outsider advances, and to foster the relationships and exchanges that might lead next or soon to OutCrit perspectivity among LatCrit and allied scholars. Perhaps the jurisprudential and experiential continuum that links RaceCrit to LatCrit can lead both genres of scholarship toward an "OutCrit" subject position [n.172](#) as the next step in our collective development of a progressive nonwhite outsider jurisprudence.

To Phillips, however, the primary question at this juncture is not theoretical but institutional; her concerns over regressive nationalism are raised more by the prospect of institutionalizing a "separate BlackCrit organization" than by theorizing or articulating a BlackCrit position in nonwhite outsider jurisprudence. [n.173](#) This emphasis on organization of course is absolutely warranted by comparative jurisprudential experience *1319 among RaceCrits, QueerCrits and LatCrits: our collective experience demonstrates that choices about structure are integral to the content of knowledge, discourse, and community, and confirms that questions of organization and institutionalization are integral to the project's long-term sustainability. More specifically, our collective experience suggests that the prospects of critical coalitions and OutCrit perspectivity similarly depend upon the choices we make now and in the future about structure, organization and institutionalization. [n.174](#)

In effect, the self-reflective essays presented above call upon all RaceCrits and LatCrits to consider and decide collectively how we next should re/structure and re/articulate the advancement of nonwhite outsider jurisprudence in the United States with OutCrit perspectivity, through critical coalitions, and in light of our experiential record and its lessons. If past experience is any measure, that collective consideration will present both dangers and opportunities. It also will present tough issues of resources, human and otherwise, as well as ground rules and terms of engagement. To expand the possibilities, and to affirm Phillips' focus on convergence and advancement in outsider jurisprudence, this Afterward closes with a few tentative thoughts on the relationship of comparative jurisprudential experience to OutCrit perspectivity and critical coalitions.

C. Beyond Comparative Experience: A Progressive Jurisprudence of Color, Queer Positionality and OutCrit Perspectivity

The concerns over regressive nationalism that Phillips has raised, and their general relevance to other groups, call for critical skepticism of convocations delineated only or mostly by biologized notions of identity, including identities based on race and/or ethnicity. [n.175](#) Yet, the object of our critical and self-critical study remains the unjust uses and effects of culturally biologized notions of identity, including race and ethnicity. And because we value as a matter of method and substance personal familiarity with the sociolegal constructs or issues under scrutiny, we tend to look for guidance toward those in the room who embody, and know, those biologized yet socially constructed experiences. ***1320** Substantively, then, biologized constructs are the focus of our collective critical study while, structurally, the participants in the project are multiply diverse--and therefore do not embody uniformly the biologized construct(s) under inspection. Thus rises a whole host of tensions, which can help to explain the surge in recent years of sameness/difference dilemmas within and across various categories of identification in outsider jurisprudence. [n.176](#) These tensions are unresolvable, yet manageable.

To begin with, we must consciously recognize and accept the tension and its sources. Structurally, this acceptance means that LatCrits and RaceCrits, as OutCrits, must persist in experimenting with rotating centers and structural diversity. [n.177](#) Substantively, this acceptance means that we increasingly must situate our scholarship in intra- and intergroup frameworks. [n.178](#) Given the world in which we live, subjecting particular biologized identities to critical scrutiny from diverse sociolegal perspectives, at once, is the collective and individual technique that our meetings and writings should perform. It is a technique that history, culture and experience counsel, and that usefully may be conceived as the basic approach to antisubordination analysis of OutCrit perspectivity.

OutCrit perspectivity thus conjures and embraces the "convergence chronicle" of the moment: the intersection of a progressive jurisprudence of color forged by RaceCrit and LatCrit labors, a jurisprudence that embraces the expansive and strident antisubordination stance of Queer positionality [n.179](#) as well as the Queer of color. OutCrit perspectivity therefore encapsulates the embrace of outsider sociolegal identification, the adoption of a critical intellectual posture toward all forms of subordination, and, recalling specifically our collective jurisprudential experience, a forthright rejection of straight privilege, all as integral to social justice. This subject position effectively can serve as a positive expression of principled resistance to regressive nationalisms, or apolitical essentialisms. [n.180](#) The OutCrit position, in short, is a subject position that encapsulates and reasserts the gains of the comparative record sketched above, and seeks to denote and connote the sense of mutual ***1321** convergence and collective advancement expressed in Phillips' account of our joint histories.

Adopting OutCrit perspectivity, of course, does not per se address the questions of institution-building that the Phillips and other self-reflective essays rightly raise. But adopting OutCrit perspectivity toward the project of institution-building can make a difference to the outcome we collectively produce. In considering Phillips' as well as others' institutional proposals [n.181](#) in the months and years to come, OutCrit perspectivity can foreground coalitional method in our collective approach to threshold questions of focus, diversity, community, resources and sustainability. [n.182](#) The "OutCrit" subject position ought to be our point of departure for collective and critical engagement of the inevitable questions over process, scope, structure and substance that a RaceCrit and LatCrit institutional convergence would raise, because it evokes and invokes lessons learned from prior encounters with the same or similar issues. Whatever the institutional forms of the future might be, they ought to be crafted from a critical and self-critical assessment of comparative jurisprudential experience, and infused with the critical sensibility that here I denominate as OutCrit perspectivity, to help ensure that the future of a progressive nonwhite outsider jurisprudence is made ever sturdier by the lessons of our joint past.

Conclusion

The comparative survey outlined above illustrates how the CRT, Queer and LatCrit experiences in outsider legal scholarship converge and diverge in numerous significant ways, both substantively and structurally. In different ways and to different degrees, these outsider jurisprudential efforts strive similarly to: represent sociolegally marginalized viewpoints; espouse critical, egalitarian, progressive, antisubordination ***1322** projects; accept analytical and discursive subjectivity; recognize postmodernism; favor praxis; yearn for community. As this symposium demonstrates, the RaceCrit and LatCrit experiments, along with other outsider initiatives, have helped to yield the initial texts and basic

commitments of a progressive jurisprudence of color, imagined and articulated by outsider scholars.

This comparative look at the jurisprudential experiences of RaceCrits, QueerCrits and LatCrits is motivated by the need to interconnect these (and other) lines of sociolegal inquiry and action through critical coalitions and antistubordination community in a legalistic and white-controlled society. And, conversely, this discussion of critical coalitions as antistubordination praxis takes place against the backdrop of social history, formative circumstances, and record of collective jurisprudential experience. Some day, this work may aid the efforts of a future generation to solve the problems that we have inherited, combatted and sometimes exacerbated.

In the shorter term, the lessons we learn from past and present jurisprudential experience can help us to imagine and implement critical coalitions not only among OutCrit scholars specifically, but also among outgroups more generally. Even more broadly, this comparative look at the jurisprudential experiences of RaceCrits, QueerCrits and LatCrits can help interconnect not only outsider scholars with the current and future struggles of our larger communities but also help to interconnect the social justice quests of overlapping outgroups internationally. In short, a critical and self-critical assessment of comparative jurisprudential experience can help inform and refine antistubordination strategy in numerous ways and contexts. These experiences, and their lessons, can help set the stage for OutCrit perspectivity as a next step in the development of a progressive outsider jurisprudence. It is from this perspective that progressive legal scholars will be best positioned to engage the issues of structure, theory and community that face us today, to imagine in substantive terms the egalitarian postsubordination society for which we shall struggle together, and to fight collaboratively for its establishment based on antiessentialist principles of social justice for all.

NOTES:

[FN1]. See, e.g., [Kevin R. Johnson & George A. Martinez, Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship, 53 U. Miami L. Rev. 1143 \(1999\)](#). Cf. Margaret E. Montoya, LatCrit Theory: Mapping Its Intellectual and Political Foundations and Future Self-Critical Directions, [53 U. Miami L. Rev. 1119 \(1999\)](#).

[FN2]. See, e.g., [Athena D. Mutua, Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm, 53 U. Miami L. Rev. 1177 \(1999\)](#); Stephanie L. Phillips, The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History, [53 U. Miami L. Rev. 1247 \(1999\)](#); Dorothy E. Roberts, BlackCrit Theory and the Problem of Essentialism, [53 U. Miami L. Rev. 855 \(1999\)](#).

[FN3]. For an early assessment of LatCrit "guideposts," see Francisco Valdes, Foreword - Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self Empowerment, in [2 Harv. Latino L. Rev. 1, 52-59 \(1997\)](#) [hereinafter Valdes, Poised].

[FN4]. See generally *id.* at 55.

[FN5]. *Id.*

- [FN6]. See *infra* notes 133-140 and accompanying text.
- [FN7]. In this symposium, for instance, see *supra* note 2 and sources cited therein on intergroup identities and relations in LatCrit theory.
- [FN8]. See, e.g., Pat K. Chew, *Toward a Community of Critical Race Scholars: Racing to the Bottom ... Or What?*, in *Critical Race Theory: Histories, Crossroads, Directions* (Francisco Valdes, Angela P. Harris, Jerome McCristal Culp, Jr. eds. forthcoming 2000).
- [FN9]. See generally [Eric K. Yamamoto, Critical Race Praxis: Race Theory and Political Lawyering Practice in Post Civil Rights America](#), 95 Mich. L. Rev. 821 (describing color-on-color tensions and urging the importance of attending to them); see also Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, UCLA Asian Pac. Am. L.J. 33 (1995) (examining why minority racial groups practice or exploit white supremacy, and offering some solutions to this self-destructive phenomenon).
- [FN10]. In this sense, this process of self-reflection is akin to looking at "the bottom" of particular categories - our jurisprudential experiments, our larger outsider communities, and the legal academy. The message is that we must apply the work and lessons of outsider pioneers internally to the legal academy and to the projects or communities that we form both within and beyond it. See generally Elizabeth M. Iglesias & Francisco Valdes, *Afterword - 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 (1998).
- [FN11]. Indeed, the entire record of outsider jurisprudence, including, most recently, LatCrit, is a prime example of this contestation. See generally Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility in Social Justice Scholarship*, 75 Denv. U. L. Rev. 1409, 1412, 1459-63 (1998) (emphasizing the importance of critical legal theory and praxis in a legalistic society, such as the one we inhabit) [hereinafter Valdes, *Beyond Sexual Orientation*].
- [FN12]. See generally [Jerome McCristal Culp, Jr., To the Bone: Race and White Privilege](#), 83 Minn. L. Rev. 1637 (1999) (responding to recent attacks on outsider scholarship, in particular critical race theory, that question the efficacy and integrity of our collective work); see also *infra* note 61 and sources cited there for similar attacks.
- [FN13]. See *Mutua*, *supra* note 2.
- [FN14]. For two such examples, see *Critical Race Theory: The Cutting Edge* xiii-xvi (Richard Delgado ed., 1990); *Critical Race Theory: The Key Writings that Formed the Movement* xiii-xxvii (Kimberle Crenshaw et al. eds., 1995) (hereinafter cited as *Key Writings*). For another, more recent, account of CRT origins, see Sumi Cho & Robert Westley, *Historicizing Critical Race Theory's Cutting Edge: Key Movements That Performed The Theory*, in *Critical Race Theory: Histories, Crossroads, Directions*, *supra* note 8. For another recent historical overview, see also Richard Delgado & Jean Stefanic, *Critical Race Theory: Past, Present and Future*, in *Current Legal Problems: Legal Theory at the End of the Millennium* 51 (Michael D.A. Freeman, ed., 1998).
- [FN15]. LatCrits should be proactive about nurturing a self-critical evolution of our collective endeavors precisely because the lessons of comparative jurisprudential experience are not limited to our immediate condition. On the contrary, comparative experience can provide lessons applicable to the larger set or intra- and intergroup issues that afflict these times. From the lessons of our comparative experiences LatCrit and allied scholars can and must extrapolate both inward and outward advances: inwardly, we must develop critical antistatutory coalitions through our collective jurisprudential experiments with knowledge and community and, outwardly, we must link the lessons of comparative experience to the current positions and strategies of the larger communities from which we hail. It would be foolish, after all, to imagine that the professorate of color in the legal academy is unique in our relationship to the intra- and intergroup experiences, issues and aspirations that pervade our communities and this society. Thus, among the longer-term tasks that this Afterword pursues is the linkage of comparative

jurisprudential experience to outsider antisubordination struggles more generally; this Afterword ideally represents one step toward critical use of the lessons embedded in our experience to help our selves and communities to build a better politics of critical coalitions as part of our collective antisubordination strategies. But, necessarily, the first step toward this process of linkage is to begin with ourselves - to elucidate and learn from the experiments and lessons explored below - which is where this Afterword begins. See generally Iglesias & Valdes, *supra* note 10 (urging critical as well as self-critical analysis in the articulation of LatCrit theory).

[FN16]. For critical reflections of "inward" turns in outsider jurisprudence, see [Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 Wm. & Mary L. Rev. 741 \(1993\).](#)

[FN17]. By "critical coalitions" I mean alliances based on a thoughtful and reciprocal interest in the goal(s) or purpose(s) of the coalition. A critical coalition is the sort of collaborative project that results from a careful and caring commitment to the substantive reason(s) for it, and produces on all sides a reformatory agenda and cooperative dynamic that reflects this mutual commitment. A critical coalition is based not simply on a fortuitous or temporary convergence of interests but, rather, on a critical and self-critical commitment to antisubordination principles and practices - which must be applied and respected both inwardly (in the operation of the coalition) as well as outwardly (toward the dismantlement of external structures of oppression). Thus, critical coalitions are grounded first and foremost in a conscious and consistent effort to establish a postsubordination order based on a substantive and progressive vision of such a society. See Francisco Valdes, *Outsider Scholars, Legal Theory and OutCrit Perspectivity: Postsubordination Vision as Jurisprudential Method*, 49 De Paul Law Rev. 3 (forthcoming 2000) [hereinafter Valdes, *Outsider Scholars*].

[FN18]. See *infra* note 167. The proceedings of the "LatCrit I" conference appear in Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 Harv. Latino L. Rev. 1 (1997). Prior to that conference, a colloquium was held in Puerto Rico, in 1995, devoted to a discussion of Latinas/os in and within CRT. The proceedings of that colloquium appear in Colloquium, *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 La Raza L.J. 1 (1996). Since then, the proceedings of another colloquium, on LatCrit theory and human rights, held in Miami in 1996, and of LatCrit II, held in San Antonio in 1997, have been have appeared, respectively, in Colloquium, *International Law, Human Rights and LatCrit Theory*, 28 U. Miami Inter-Am. L. Rev. 177 (1997) and in Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 UCLA Chicano-Latino L. Rev. 1 (1998). In addition to these conference-based publications, one LatCrit symposium was published jointly by the California Law Review and La Raza Law Journal. See Symposium, *LatCrit Theory: Latinas/os and the Law*, 85 Cal. L. Rev. 1087 (1997), 10 La Raza L.J. 1 (1998). Upcoming LatCrit symposia also include the proceedings of LatCrit IV, slated to appear as Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, U.C. Davis L. Rev. (forthcoming 1999) and the proceedings of LatCrit V, slated for publication in the Denver University Law Review. Most recently, The Michigan Journal of Race and Law and the Michigan Journal of Law Reform similarly have decided to publish jointly an independent symposium, tentatively titled *Class, Culture and Color in LatCrit Theory: Activating Multidimensionality in Outsider Jurisprudence*.

[FN19]. Thus, from the outset, and as discussed below, LatCrit theorists have devoted themselves to mindsets and methods calculated to cultivate critical coalitions along both intragroup and intergroup axes. LatCrit theory has dedicated itself not only to centering "Latinas/os" in legal and public discourse, but also to cultivating intragroup coalitional projects among multiply diverse Latinas/os. At the same time, LatCrit has endeavored to situate analyses of the "Latina/o" within intergroup histories and frameworks as a conscious effort to build critical coalitions with other outsider groups and scholars. See generally *infra* notes

107-115 and accompanying text.

[FN20]. See Valdes, *Outsider Scholars*, supra note 17.

[FN21]. The "OutCrit" denomination is an effort to conceptualize and operationalize the social justice analyses and struggles of varied and overlapping yet "different" subordinated groups in an interconnective way. By 'OutCrit' I thus mean (at least initially) those scholars who identify and align themselves with outgroups in this country, as well as globally. Therefore, among them are the legal scholars who in recent times have formed the experiments that this Afterword considers - CRT, Queer, and LatCrit legal discourses - as well as scholars who have launched other lines of critical inquiry within legal culture, including critical race feminism and feminist legal theorists. But by "OutCrit" I mean additionally an embrace of multidimensional approaches to all antisubordination theory and praxis, including specific projects that might be focused principally on antiracist, antisexist and antihomophobic objectives. I mean a personal and proactive, as well as intellectual and collective, embrace of the historic and unfinished struggles against the interlocking legacies of white, Anglo, male and straight supremacies. In the converse, I mean a principled, concurrent and actual rejection of narrow and regressive nationalisms, or essentialisms, based unidimensionally on race, ethnicity, gender, sexual orientation or other single-axis categories of affinity or identification. Fundamentally, "OutCrit" signifies a position of multidimensional struggle against the specific kinds of racist, nativist, sexist and homophobic ideologies and elites that combine to produce and perpetuate Euroheteropatriarchy. See generally Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation on Sex, Gender and Sexual Orientation to Its Origins*, 8 Yale J.L. & Hum. 161 (1996) (describing some of the sex/gender and sexual orientation norms that underlie and animate androsexism and heterosexism to produce the patriarchal form of homophobia - heteropatriarchy - that still prevails in Euroamerican societies, including the United States, today). OutCrit positionality, in short, is framed around the need to confront in personal, collective and coordinated ways the mutually-reinforcing tenets and effects of the sociolegal forces that currently operate both domestically and internationally under Euroheteropatriarchy. See generally Valdes, supra note 17.

[FN22]. The term "outsider jurisprudence" is Professor Mari Matsuda's. See [Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story](#), 87 Mich. L. Rev. 2320, 2323 (1989).

[FN23]. For demographic portraits of Latina/o heterogeneity, see, e.g., [Berta Hernandez-Truyol, Bridling Bridges - Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement](#), 25 Colum. Hum. Rts. L. Rev. 369 (1991); Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 UCLA Chicano-Latino L. Rev. 69, 75-77 (1998).

[FN24]. See, e.g., [Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color](#), 43 Stan. L. Rev. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 Women's Rts. L. Rep. 7 (1989).

[FN25]. See, e.g., Valdes, *Poised*, supra note 3, at 58 ("[I]t is plain that LatCrit theory emerges not only from the need to center Latinas/os' identities, interests and communities in critical legal discourse, but from the analytical and conceptual paths imprinted by critical race theory ... LatCrit theory is closely related to, and affirmatively should ally itself with" CRT.); see also Francisco Valdes, *Foreword - Latina/o Ethnicities, Critical Race Theory, And Post-Identity Politics In Postmodern Legal Culture: From Practices To Possibilities*, in [9 La Raza L.J. 1, 26-27](#) (1996) ("LatCrit theory is supplementary, complementary, to critical race theory. LatCrit theory, at its best, should operate as a close cousin - related to [CRT] in real and lasting ways ... ideally, each would be a favorite cousin of the other - both always mutually present at least in spirit and both always mutually welcome to be present in the flesh.").

- [FN26]. Even though the relationships of LatCrit to feminist legal theory and critical white studies are not the focus of this Afterword, it bears emphasis that, among the scholars I think of in making this statement, are the scholars who identify principally with those categories, and who from the beginning have attended and participated in LatCrit conferences, including FemCrits (and, of course, also RaceFemCrits). See, e.g., Mary Coombs, *LatCrit Theory and the Post-Identity Era: Transcending the Legacies of Color and Coalescing a Politics of Consciousness*, 2 Harv. Latino L. Rev. 473 (1997); Barbara J. Cox, *Coalescing Communities, Discourses and Practices: Synergies in the Antisubordination Project*, 2 Harv. Latino L. Rev. 473 (1997); Stephanie M. Wildman, *Reflections on Whiteness and Latina/o Critical Theory*, 2 Harv. Latino L. Rev. 307 (1997). In this symposium, the contributions of scholars like William Bratton, Drucilla Cornell and Catherine Wells continue this practice. Thus, this Afterword's triangular focus on RaceCrit, QueerCrit and LatCrit experiences is not intended to slight the importance of feminist (or other) issues and scholars in the conception and development of LatCrit theory. Rather, as noted in the text immediately below, this focus simply reflects the limitations of my knowledge and experience in outsider jurisprudence. See *infra* notes 30-40 and accompanying text.
- [FN27]. See, e.g., e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 U. Conn. L. Rev. 441 (1998) (on wholism); Hernandez-Truyol, *supra* note 23 (on multidimensionality); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 Conn. L. Rev. 561 (1997) (on multidimensionality); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 Hastings L.J. 1257 (1997) (on cosynthesis); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 So. Cal. Rev. L. & Women's Stud. 25 (1995) (on interconnectivity).
- [FN28]. At the same time, this substantive belief in the analytical and discursive value of coalitional method is underscored by the political exigencies of cultural war: born in 1995, LatCrit theory, in its brief lifespan to date, has never known a time not marked by backlash lawmaking. See generally Valdes, *Beyond Sexual Orientation*, *supra* note 11, at 1426-54 (analyzing cultural war and backlash lawmaking). This formative circumstance no doubt has influenced the LatCrit preference for critical coalitions: given that minoritized outgroups are not only marginalized structurally but also outnumbered in this country, our sources of intellectual and political strength must include ourselves as well as our situational kin.
- [FN29]. Though it is not susceptible of any one definition, critical race theory has been described as the genre of critical legal scholarship that 'focuses on the relationship between law and racial subordination in American society.' Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *The Politics of Law: A Progressive Critique* 195, 213 n.7 (David Kairys ed., rev. ed. 1990); see generally [Angela P. Harris, Foreword - The Jurisprudence of Reconstruction](#), 82 Cal. L. Rev. 741 (1994) (introducing the first symposium devoted specifically to CRT in an American law review). Two recently-released book anthologies provide good compilations of the literature. See Delgado, *supra* note 14; *Key Writings*, *supra* note 14. Even though CRT is a 'movement' that comprises many voices and viewpoints, I discuss it as a collectivity in this Afterword for the sake of simplicity. In doing so I recognize that my description may gloss over some particularities that may be deemed relevant to this discussion. My effort will be to provide a general account that avoids, or keeps to a minimum, that possibility.
- [FN30]. For discussion of the term "Queer" as used in this Afterword, see *infra* notes 78-81 and accompanying text.
- [FN31]. The lessons to be drawn from a comparative and self-critical contemplation of RaceCrit, QueerCrit and LatCrit experiences can help all OutCrit scholars not only to better understand the context of this moment, but also may lead to a richer sense of connection,

collaboration and community among and across all OutCrits and outgroups. See *supra* note 21. As indicated above, my hope and purpose in proffering OutCrit perspectivity as a common position from which to articulate particularity within a progressive outsider jurisprudence thus are both substantive and strategic. Ideally, a broader identification as "OutCrits" among RaceCrits, QueerCrits, LatCrits, FemCrits and other outsider legal scholars will enhance our mutual understanding of the needs and goals that must underpin critical antistatization coalitions among and between us. See *supra* note 21.

[FN32]. This multi-year project began with Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of 'Sex,' 'Gender' and 'Sexual Orientation' in Euro-American Law and Society*, 83 Cal. L. Rev. 1 (1995) [hereinafter Valdes, *Queers, Sissies*].

[FN33]. After accepting the invitation to participate in the Sixth Annual CRT Workshop, in 1994, I served on the planning committee for the seventh workshop, co-chaired the eighth, and helped produce the programming for the ninth - perhaps destined to be the last workshop of the series based on the original model. As this Afterword indicates, my involvement in Queer and LatCrit legal scholarship is informed by the lessons I've drawn from CRT, both its texts and its workshops. In great measure, my involvement in Queer and LatCrit projects can be understood as a critical application of basic lessons I drew from my readings of, participation in, and experience with, CRT during the second half of its first decade. Though my jurisprudential outlook always has been critically comparative, I have tried to apply the lessons I learned from CRT both to it and to my Queer and LatCrit projects.

[FN34]. CRT's earliest proponents initiated a series of small summer workshops held every year in a different location. See generally Phillips, *supra* note 2, at 1248-50. This series was an approach to antistatization theorizing and community-building that still inspire OutCrits today, as the regional people of color conferences, the Asian lawprofessor conferences and the LatCrit conferences show. As elaborated below, the workshop series also was the site for much of CRT's first-decade growing and learning pains. See *infra* notes 68-73 and accompanying text. That series continues to contain many of the experiences and lessons explored here in relationship to LatCrit and its forms of convocation.

[FN35]. See generally Cho & Westley, *supra* note 14.

[FN36]. That first generation invented CRT and infused it with a focus of social transformation that from inception gave CRT its sharp political edge. See *supra* note 14 and sources cited therein on CRT's origins and early consciousness.

[FN37]. This generational unfolding was the topic of the first plenary session of the Eighth Annual CRT Workshop, held in Washington, D.C. in 1996, which was devoted to a critical discussion of CRT's history. The panel included presentations by Stephanie Phillips and Elizabeth Patterson, who were present at the first and other early summer workshops. For further discussion of the workshops, see *infra* notes 68-73 and accompanying text.

[FN38]. As the tenth anniversary conference held at Yale Law School in 1997 illustrates, CRT did that, and more. For the collection of essays based on that conference, see *Critical Race Theory: Histories, Crossroads, Directions*, *supra* note 8.

[FN39]. See, e.g., *supra* note 14 and sources cited therein on early accounts of CRT.

[FN40]. This continuing omission is unhealthy for all OutCrits, for it deprives the growing ranks of outsider scholars a crucial resource: a rich well of experiential or 'institutional' memory that is ongoing and that can aid outsider scholars, including LatCrits, progressively to refine and reiterate our work, both internally and externally, as antistatization praxis. This omission foregoes the opportunity to revisit and refine the lessons of those times to help create conditions that may better conduce egalitarian solidarity through critical coalitions both within and beyond any particular subject position. Engaging these lessons critically and constructively ideally may help LatCrit and other OutCrit scholars contextualize pending jurisprudential issues and pursue elusive shared hopes.

- [FN41]. See, e.g., Key Writings, *supra* note 14, at xiii (describing CRT's social justice goals to 'understand' and 'change' racial hierarchy and law's complicity in it); see also *id.* at xxv (describing CRT's mission as discerning 'how law constructed race' as a device and form of group hierarchy).
- [FN42]. For instance, prior to CRT's emergence, the legal scholarship of race and equality was dominated by, if not limited to, a handful of liberal, white, male, (and apparently heterosexual) modernists. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561 (1984); Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. Pa. L. Rev. 1349 (1992).
- [FN43]. See generally Harris, *supra* note 29, at 745-66 (describing the tensions within CRT caused by its pursuit of modernist ideals like 'equality' in light of its postmodern skepticism).
- [FN44]. Critical race feminists, and especially African American feminist theorists, account for much of CRT's early power and insight, including the development of advances like intersectionality, multiplicity and antiessentialism. For a representative sampling offoundational works by African American and other critical race feminists on these and similar concepts, see *supra* note 24 and sources cited therein on intersectionality and multiplicity; see also Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139; Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401 (1987); see generally *Critical Race Feminism: A Reader* (Adrien Katherine Wing ed., 1997).
- [FN45]. CRT arose during an era of retrenchment in civil rights policies and equality jurisprudence. See generally Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988) (critiquing juridical and political retrenchment during the 1980s). That era of retrenchment in more recent years has escalated to full-blown cultural war. See Valdes, *Beyond Sexual Orientation*, *supra* note 11, at 1426-43; see generally Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 Ohio St. L.J. 402 (1999).
- [FN46]. According to Phillips, this reluctance began at the very first workshop, and it continued to plague the workshop annually thereafter. See Phillips, *supra* note 2, at 1249-50.
- [FN47]. The reluctance to enter sexual orientation intersections is evinced by the published discourse, which fails generally to express any explicit recognition of sexual orientation diversity within communities of color. It also is evinced by the query that has been posed at the annual CRT summer workshops from their very inception: 'What has sexual orientation got to do with race?' See Valdes, *Foreword - Latina/o Ethnicities*, *supra* note 25, at 6. This query of course overlooks the intersection of minority race and minority sexuality, an odd oversight for a discourse otherwise more sensitive to intersectionality. For original analyses of race and gender intersectionality, see Crenshaw, *supra* note 24 (developing intersectional analysis and applying it to race and gender).
- In addition to Phillip's account in this symposium, oral histories report that openly gay or lesbian scholars of color have been present at every summer workshop, and that they endeavored since then to introduce 'race and sexual orientation' as an intersectional issue for workshop attention. Yet my personal experience, and the accounts that others have shared with me over the years, indicate that open acknowledgment and programmatic discussion of sexual orientation issues typically has triggered opposition and controversy within the workshop. Some gay or lesbian scholars of color consequently discontinued attendance. In recognition of this oppressive and exclusionary pattern, the Sixth Annual CRT Workshop, held in Miami in 1994, included for the first time a plenary session on sexual orientation and race. Peter Kwan and I selected, distributed and presented the reading materials for that programmatically unprecedented and wrenching discussion. Afterward,

the summer workshops included sexual orientation in the program every year, with a general consensus of incremental but touchy headway. For further discussion of the CRT summer workshops, see *infra* notes 68-73 and accompanying text.

[FN48]. See [Darren Lenard Hutchinson, Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Antiracist Politics](#), 47 *Buff. L. Rev.* 1 (1999). More generally, developmental circumstance clearly affected CRT's formation. See, e.g., Key Writings, *supra* note 14, at xxiv-xxv (describing early responses to CRT and the racialist 'reductionism' attributed to some of its 'foundational essays,' which may be a reflection of the 'context and conditions of their production' during CRT's nascency); see generally [Francisco Valdes, Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory and Politics of 'Sexual Orientation](#), 48 *Hastings L.J.* 1293, 1315-18 (1997) [hereinafter Valdes, *Queer Margins*] (reviewing some strengths and weaknesses of sexual minority legal discourse and considering similar developmental circumstances as they relate to the corresponding failure of lesbian and gay legal scholarship to take up the role of race and ethnicity in the law, theory and politics of 'sexual orientation' discrimination).

[FN49]. I thank Jerome Culp for this insight and vocabulary.

[FN50]. And, it bears emphasis that these harms affect both members of the sexual majority as well as members of sexual minorities, both as groups and as individuals. See generally *Homophobia: How We All Pay the Price* (Warren J. Blumenfeld ed., 1992); Suzanne Pharr, *Homophobia: A Weapon of Sexism* (1988).

[FN51]. The relevance of this paradigm both within and beyond CRT has been addressed by various scholars. See, e.g., Celina Romany, *Gender, Race/Ethnicity and Language*, 9 *La Raza L.J.* 49 (1996) (discussing how CRT has 'concentrated on white-Black racism' in domestic race relations, giving CRT a flavor of North American 'localism'); see also Harris, *supra* note 29, at 775 (discussing how 'African American experiences have been taken as a paradigm for the experiences of all people of color').

[FN52]. For a critical analysis of the 'Black/White paradigm' and its role in the legal history of civil rights in this country, see [Juan F. Perea, The Black/White Binary Paradigm of Race: The 'Normal Science' of American Racial Thought](#), 85 *Cal. L. Rev.* 1213, 1239-52 (1997). For recent calls to multicultural analyses, see [Deborah Ramirez, Multicultural Empowerment: It's Not Just Black and White Anymore](#), 47 *Stan. L. Rev.* 957 (1995); William R. Tamayo, *When the 'Coloreds' Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 *Asian L.J.* 1 (1995); see also [Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space](#), 81 *Cal. L. Rev.* 1241 (1993) (calling for an expanded race discourse that cognizes Asian American particularities); Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA*, Not!, 28 *Harv. C.R.- C.L. Rev.* 395 (1993) (focusing on the category 'women of color' to articulate this sort of expanded, intersectional analysis); Charles R. Lawrence, III, Foreword - Race, Multiculturalism, and the Jurisprudence of Transformation, 47 *Stan. L. Rev.* 819 (1995) (urging a reconceptualization of race and racism as a substantial societal condition that affects entire and various groups of people).

[FN53]. See Mutua, *supra* note 2, at 1188.

[FN54]. See Roberts, *supra* note 2, at 861.

[FN55]. These issues, as the Mutua and Roberts essays illustrate, range from the role of Blackness and the value of Black-specific critiques in a postbinary discourse, as well as the prospects of such a discourse helping to ameliorate intergroup tensions and racial justice. See Mutua, *supra* note 2; Roberts, *supra* note 2.

[FN56]. The account provided in the Phillips essay suggests that ethnicity's engagement was more ephemeral than it was ambivalent, though my own experience suggests to me that it was both. See Phillips, *supra* note 2, at 585-90. This engagement also did not lead to a sustained effort to transcend the dichotomy of the "domestic" and the "international" in

antisubordination analysis. See, e.g., [Elizabeth M. Iglesias, Out of the Shadow: Marking Intersections in and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Theory](#), 40 B.C.L. Rev. 349; 19 B.C. Third World L.J. 349 (1998) [hereinafter Iglesias, Out of the Shadow] (centering international relations and transnational identities in developing a collaborative critical theoretical agenda beyond the Black/White paradigm).

- [FN57]. See *infra* notes 142-156 and accompanying text. This move to multilateral, rather than bilateral, critiques of race relations additionally is counseled by the existence of outgroup tensions, which can impede all social justice struggles. See *supra* note 9 and sources cited therein describing the importance of intergroup justice in antisubordination struggles.
- [FN58]. The ethnicity lapse was promptly disclaimed, with a programmatic follow-up the next year, while the sexual orientation avoidance was prolonged for years. It took "an excruciatingly long time for the Critical Race Theory Workshop to reflect a strong stance against heterosexism." Phillips, *supra* note 2, at 1251.
- [FN59]. It bears mention that this failure is reciprocal; gay and lesbian legal scholarship similarly seems to assume that sexual minorities are constitutionally white (and middle class). This assumption has drawn a racial critique of this assumption and its analytical shortcomings. I describe this critique as 'internal' in the sense that it emanates from within lesbian and gay legal scholarship and is articulated by scholars writing from a sexual minority subject position. See, e.g., Hutchinson, *supra* note 27, at 585-90 (analyzing the relevance and class to lesbian and gay politics and legal discourse); Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay 'Victories'*, 4 *Law & Sexuality* 83 (1994) (questioning the transformative value of progress on selected current issues for sexual minority subgroups, including the trans/bi-gendered); Eric Heinze, *Gay and Poor*, 38 *How. L.J.* 433 (1995) (focusing on the intersection of poverty and same-sex orientation); see also Valdes, *Queer Margins*, *supra* note 48, at 1297 n.12 and additional sources cited therein (discussing similar shortcomings in sexual orientation legal scholarship).
- [FN60]. For the foundational critique of "unconscious" racism and its present effects, see [Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism](#), 39 *Stan. L. Rev.* 317 (1987).
- [FN61]. For an overview of attacks on outsider employment of narrative in legal scholarship and related aspects of CRT's interventions in legal discourse, see Valdes, *Foreword - Latina/o Ethnicities*, *supra*, note 25, at 2 n.3. These attacks have gone so far (afield) as to connect antisubordination legal theory, including CRT, with antisemitism. See [Daniel A. Farber & Suzanna Sherry, Is the Radical Critique of Merit Anti-Semitic](#), 83 *Cal. L. Rev.* 853 (1995). More recently, these attacks have extended into the popular media, outlandishly imputing to CRT the spectacle (and verdict) of the Simpson murder trial. See, e.g., Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law and the Triumph of Color in America*, *New Republic*, Dec. 9, 1996, at 27. For a very recent analysis of this campaign to delegitimize CRT specifically and nonwhite outsider jurisprudence more generally, see Culp, *supra* note 12.
- [FN62]. See, e.g., [Randall L. Kennedy, Racial Critiques of Legal Academia](#), 102 *Harv. L. Rev.* 1745 (1989). For rejoinders, see [Colloquy, Responses to Randall Kennedy's Racial Critiques of Legal Academia](#), 103 *Harv. L. Rev.* 1844 (1990); see also [Jerome McCristal Culp, Jr., Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy](#), 77 *Va. L. Rev.* 539 (1991); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 *Iowa L. Rev.* 803 (1994).
- [FN63]. See, e.g., *Key Writings*, *supra* note 14, at xiv-xvii (describing CRT's relationship to the Civil Rights era). For a general legal account of the Civil Rights Movement, see Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (1987).

- [FN64]. See Key Writings, *supra* note 14, at xvii-xxvii (discussing the CLS/CRT relationship). See generally [Symposium, Critical Legal Studies](#), 36 *Stan. L. Rev.* 1 (1984) (collecting various CLS works). CLS was the most proximate jurisprudential precursor to CRT; CRT was formed in part as a result of events during a CLS conference, which included a confrontation between scholars of color and white scholars regarding race within CLS. See Key Writings, *supra* note 14, at xxiii-xxvii (describing the moment of rupture but noting a basic sense of continuing political affinity); see also [Symposium, Minority Critiques of the Critical Legal Studies Movement](#), 22 *Harv. C.R.-C.L. L. Rev.* 297 (1987) (presenting the works that explain why minority scholars broke with CLS).
- [FN65]. See generally [Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma](#), 93 *Harv. L. Rev.* 518 (1980). This divergence, and its consequences, are alarming from a CRT perspective because CRT is not satisfied with the atomized liberal conceptions of privilege and prejudice, nor with the liberal antidiscrimination solution of formal equality. CRT views power and subordination to be structural, rather than atomized, and it seeks material transformation, rather than formal or marginal reform. See generally Key Writings, *supra* note 14, at xvi-xxx (describing CRT's critical stance toward racialization in American law and society); see also Harris, *supra* note 29, at 759-84 (describing similar points relating to modernism and postmodernism); Robert A. Williams, Jr., Taking Rights Aggressively: The Perils and Promise of Critical Legal theory for Peoples of Color, 5 *Law & Ineq. J.* 103 (1987) (urging scholars of color to resist ahistoricism to avoid irrelevancy). For further description of the early CRT mindset, see [John O. Calmore, Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World](#), 65 *S. Cal. L. Rev.* 2129 (1992). For similar or allied analyses, see Alan D. Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, in 62 *Minn. L. Rev.* 1049 (1978); Gary Peller, Race Consciousness, 1990 *Duke L.J.* 758 (1990).
- [FN66]. See Key Writings, *supra* note 14, at xxvii (explaining that, 'A thorough mapping of Critical Race Theory must ... include a discussion of the role of community-building among the intellectuals who are associated with it.').
- [FN67]. See, e.g., Critical Race Theory: Histories, Crossroads, Directions, *supra* note 8. The related works of critical race feminists are featured in Critical Race Feminism: A Reader, *supra* note 44.
- [FN68]. In addition to relying on the Phillips essay, this account is based both on personal experience and on oral histories, including the 1996 presentations on early CRT workshops. See *supra* note 37; see also Key Writings, *supra* note 14, at xxvii (describing workshop origins).
- [FN69]. During the 1980s, the academy was diversified along several identity axes, which made more evident the 'rainbow' of colors that constituted the nonwhite population and professorate. For a critical discussion of these changing demographics, and their relationship to CRT and race-conscious student activism during the 1980s, see Cho & Westley *supra*, note 14.
- [FN70]. Phillips, *supra* note 2, at 1251-53.
- [FN71]. See *supra* notes 51-57 and accompanying text.
- [FN72]. Of course, this annual experience was not constant, and Phillips' account also makes that clear in her recounting of the ethnicity story. See Phillips, *supra* note 2, at 1252. Instead, over the years, the planning and configuration of the workshops brought together different mixes of varied viewpoints on various intersectional issues, which in turn produced different workshop experiences from year to year. Some years, therefore, were 'better' than others--that is, in some years more than others the workshop planners and participants strove consciously to recognize and use as a source of strength the legal academy's changing demographics and CRT's correspondingly expanded intersectional frontiers.

[FN73]. See Phillips, *supra* note 2, at 1251.

[FN74]. I thank Jerome Culp for this wording.

[FN75]. See *supra* notes 46-57 and accompanying text.

[FN76]. The antiessentialist commitment describes a refusal to homogenize units of analysis into a false monolithic experience devoid of factors such as history, context, particularity and power. CRT's antiessentialist foundation has been secured primarily by women of color writing from a CRT perspective. For instance, both Kimberle Crenshaw and Angela Harris have questioned the reluctance of both antisexist and antiracist discourse to interrogate the intersection of race and gender. See Crenshaw, *supra* note 24; Harris, *supra* note 24. This critique has been questioned vigorously by some feminist legal scholars. See, e.g., Catherine Mackinnon, *From Practice To Theory, or What Is a White Woman Anyway?*, 4 *Yale J.L. & Feminism* 13 (1991)(responding to Harris).

Similar antiessentialist points have been raised about sexual orientation by lesbian feminists. See, e.g., Elvia R. Arriola, *Gendered Inequality: Lesbians, Gay Men, and Feminist Legal Theory*, 9 *Berkeley Women's L.J.* 103 (1994) (questioning feminist categories around sex, gender and sexuality); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 *Berkeley Women's L.J.* 191 (1989-90) (critiquing the invisibility of minority sexual orientations in feminist analyses of law). More recently, a similar questioning has been trained on the race essentialism of gay and lesbian legal scholarship. See, e.g., Hutchinson, *supra*, note 27. Cf. Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 *Va. J.L. & Pol'y* 43 (1994) (arguing for an unmodified, if temporary, critique of the 'lesbian' condition).

The antistubordination commitment describes a postliberal insistence on substantive and structural 'equality' that is meaningful to those who live oppression daily, rather than simply formal equality. See, e.g., Key Writings, *supra* note 14, at xiv-xx (juxtaposing liberal and CRT views of racial justice); Lawrence, *supra* note 52, at 824-39 (focusing on racism as a 'substantive societal condition' and urging that analysis be aimed on the actual transformation of such conditions); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *Harv. C.R.-C.L. L. Rev.* 323 (1987) (urging that scholars 'look to the bottom' - focus on the subordinated - to ground theory, making outsider jurisprudence socially meaningful and practically relevant).

[FN77]. See Crenshaw, *supra*, note 24 (on intersectionality); Harris, *supra*, note 24 (on multiplicity).

[FN78]. CRT scholars repeatedly have noted the importance of recognizing the interlocking nature of power hierarchies and social conditions. See, e.g., Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 *S. Cal. Rev.* 2231 (1992) (emphasizing the interconnectedness of teaching, theory and politics in the creation of substantive, enduring change); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 *Stan. L. Rev.* 1183, 1189 (1991) (urging antistubordination analyses to 'ask the other question' as a means of theorizing across single-axis group boundaries).

[FN79]. Queer legal theory describes a subject position that seeks to dismantle straight supremacy in law and society, and to oppose its mutually reinforcing interactions with other forms of oppression, including white supremacy and male supremacy. For one account of "Queer legal theory," see Valdes, *Queers, Sissies*, *supra* note 32, at 344-77. Various recent publications attest to the proliferation of this identification. See, e.g., Symposium, *More Gender Trouble: Feminism Meets Queer Theory*, 6 *Differences* 1 (1994); Symposium, *Queer Subjects*, 25 *Socialist Rev.* 1 (1995); Symposium, *Queer Theory/Sociology: A Dialogue*, 12 *Sociological Theory* 166 (1994); see also Valdes, *supra*, at 348 n.1231 (providing additional sources on Queer discourse). As with CRT and other jurisprudential communities, this movement is multiply diverse. I therefore discuss it here as a collectivity while understanding that generality of discussion necessarily tends to oversimplify. My aim is to minimize this effect as relevant to the purpose and scope of

this Afterword. See *supra* note 29.

[FN80]. LatCrit theory is the subject position that centers multiply diverse 'Latinas/os' in social and legal discourse. Seeking solidarity with CRT, LatCrit theory strives to connect critiques of the Latina/o condition to other experiences and forms of subordination. See Valdes, *Poised*, *supra* note 3, at 56-59. LatCrit theory remains an embryonic enterprise, and it thus bears emphasis at the outset that its summary description in this Afterword is limited by the brevity of its record. As with CRT and Queer legal theory, I discuss LatCrit theory as a collectivity for simplicity's sake, even though I recognize that doing so can elide variety within the collective. See *supra* notes 29 and 79.

[FN81]. Anonymous *Queers, Queers Read This* (1990), reprinted in *Lesbians, Gay Men and the Law* 45-47 (William B. Rubenstein, ed., 1993). The 'Queer' subject position therefore is not limited to persons or groups who identify or are identified as sexual minority members, though at the present a substantial overlap does exist between 'Queer' and persons with minority sexual orientations. See generally Valdes, *Queers, Sissies*, *supra* note 32, at 354-56 (describing the relationship of minority and majority sexual orientations to Queer positionality).

[FN82]. Although the 'Queer' reclamation stands for expansive and egalitarian antisubordination consciousness, it sometimes has been operationalized as a white and male force, which has caused some hesitation about the capacity of a 'Queer' movement to practice 'Queer' ideals. With this caveat, and a few others, in mind, it nonetheless seems that Queerness is a valuable construct: it provides an apt set principles to guide discourse and politics toward the practice of the posited ideals. See Valdes, *Queers, Sissies*, *supra*, note 32, at 360-75 (discussing reservations about Queerness, urging the net value of the construct, and offering some thoughts on Queer methods and objectives).

[FN83]. Lesbian legal theorists have pushed sexual minority legal discourse to be intersectional with regard to gender, class and race. See, e.g., Mary Eaton, *Homosexual Unmodified: Speculation on Law's Discourse, Race and the Construction of Sexual Identity*, in *Legal Inversions: Lesbians, Gay Men and the Politics of Law* 47 (Didi Herman & Carl Stychin, eds., 1995); Isabelle R. Gunning, *Stories from Home: Tales From the Intersection of Race, Gender and Sexual Orientation*, [5 S. Cal. Rev. L. & Women's Stud. 143](#) (1995); Cynthia Peterson, *Envisioning a Lesbian Equality Jurisprudence*, in *Legal Inversions*, *supra* at 118; Ruthann Robson, *To Market, To Market: Considering Class in the Context of Lesbian Legal Theories and Reforms*, [5 S. Cal. Rev. L. & Women's Stud. 173](#) (1995).

[FN84]. *Sexual Preference and Gender Identity: A Symposium*, 30 *Hastings L.J.* 799 (1979).

[FN85]. See Valdes, *Queer Margins*, *supra* note 48, at 1301-11 (summarizing the development of sexual orientation legal scholarship since the 1979 symposium).

[FN86]. In the past two years an internal critique of gay and lesbian legal scholarship has emerged, urging a more wide-ranging embrace of intersectional antisubordination analyses in this discourse. See *supra* note 59 and sources cited therein critiquing the overall failure of lesbian and gay legal scholarship to engage intersectional issues, especially those regarding color and class. Helping to rectify this neglect two law reviews recently held 'intersexional' symposia on sexual orientation and law. See *infra* note 90 and symposium sources cited therein.

[FN87]. See Valdes, *Queer Margins*, *supra* note 48, at 1301-19 (discussing recent or current agendas of sexual orientation scholars and activists, and some developmental circumstances that may help explain the contents and priorities of those agendas).

[FN88]. See Hutchinson, *supra* note 27.

[FN89]. For a brief description of the workshops, see *supra* notes 68-72 and accompanying text; see also *Key Writings*, *supra* note 14, at xxvii (describing the community-building aspects of these annual CRT gatherings). Since its formative years, feminist legal discourse similarly has included regular gatherings designed to foster the formation of scholarly exchanges, texts and communities. See generally *At the Boundaries of Law: Feminism and Legal Theory* (Martha A. Fineman & Nancy S. Thomadsen eds., 1991).

- [FN90]. As noted above, the first of these was in 1979 by the Hastings Law Journal. See *supra* note 84 and accompanying text. Interestingly, the Hastings Law Journal in 1997 also became the first law review to hold a second symposium devoted to sexual orientation, a symposium that also is the first-ever devoted to sexual orientation and 'intersexualities.' See [Symposium, Intersexions: The Legal and Social Construction of Sexual Orientation, 48 Hastings L.J. 1101 \(1997\)](#); see also Symposium, InterSEXionality: Interdisciplinary Perspectives on Queering Legal Theory, [75 Denv. U. L. Rev. 1129](#) (1998)(held in the same year, this symposium also takes sexual minority legal discourse into intersectional analyses).
- [FN91]. This program was held in Washington, D.C during October 4-5, 1996.
- [FN92]. The AALS Section on Gay and Lesbian Legal Issues was established during the 1983 AALS Annual Meeting and held its first formal meeting during the following year's Annual Meeting. Today the Section holds a program on selected sexual orientation legal issues every year during the Annual Meeting. In addition, sexual minority academics participate in the Lavender Law Conference, the now-annual meeting of the National Lesbian and Gay Law Association ("NLGLA").
- [FN93]. Thus, it seems clear that CRT's substantive and structural record already extends beyond the current reach of Queer - or sexual orientation - legal scholarship. Even while noting the shortcomings and costs elaborated earlier, CRT successfully has instituted and maintained regular convocations in the form of summer workshops to foster both a solid scholarly movement as well as the beginnings of a community of antistubordination scholars. See *supra* notes 41-78 and accompanying text. CRT likewise has forged and advanced concepts like multiplicity, intersectionality and multidimensionality that evince a sophistication still elusive in single-axis sexual minority legal discourse. See *supra* notes 24 and 27 and sources cited therein on these and similar concepts. Yet the overall record of intersectional selectivity noted above also shows that nonwhite outsider jurisprudence, as we have crafted it to date, does not quite extend as far as the egalitarian Queer credo might take us regarding antistubordination structure, scope, theory and community. See *supra* notes 46-57 and accompanying text.
- [FN94]. For a solid and succinct account of sexual minorityhood's emergence in this country during the mid-Twentieth Century, see John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Community in the United States, 1940-1970* (1983); see also Francisco Valdes, *Acts of Power, Crimes of Knowledge: Some Observations on Desire, Law and Ideology in the Politics of Expression at the End of the Twentieth Century*, 1 *Iowa J. Gender, Race & Justice* 213 (1997) (discussing the use of law to suppress, and thus isolate and invisibilize, the social and cultural expression of minority sexual orientation identities).
- [FN95]. See Hutchinson, *supra* note 27.
- [FN96]. See *supra* note 82.
- [FN97]. To be incisive, this overdue interrogation must produce critical mappings of the ways in which homophobia helps to constitute communities of color, and of the ways in which those communities in turn enforce and reward compulsory heterosexuality. This assessment similarly must include critical interrogation of the ways in which homophobia within communities or cultures of color may reinforce white supremacy more broadly. The pending OutCrit project therefore calls for theorizing by and through CRT, LatCrit and other subject positions how straight and white supremacy may be multiply cross-linked, and how antistubordination scholars may help to disrupt those linkages and dismantle both supremacies as symbiotic features of Euroheteropatriarchy. See generally Valdes, *supra* note 17.
- [FN98]. See *supra* notes 79-81 and accompanying text. Indeed, the move to multidimensionality is counseled as well by CRT's original vision of antiessentialist community and antistubordination commitment, which on its terms must include how racism and homophobia combine to oppress the lesbian, bisexual or gay members of African

American, Asian American, Latina/o, native and other communities of color. This pending interrogation therefore represents a joinder and vindication of CRT gains and of Queer ideals in the formation of social justice discourses and communities through critical legal theory. This joinder, in nonwhite outsider jurisprudence, ideally will facilitate appreciation among all OutCrits for the relevance of sexual minorities of color to antiracist communities and agendas, thereby helping to pave new paths toward critical coalitions across lines of minority colors and minority desires.

[FN99]. The proceedings of this gathering appear in *Colloquium, Representing Latina/o Communities: Critical Race Theory and Practice*, 9 *La Raza L.J.* 1 (1996).

[FN100]. See Valdes, *Foreword - Latina/o Ethnicities*, supra note 25, at 26- 27.

[FN101]. See *id.* at 3-7 (describing the circumstances leading up to the origination of LatCrit theory); see also supra note 25 and accompanying text (discussing the relationship of LatCrit to CRT).

[FN102]. In particular, the nonwhite demographics have changed dramatically. See supra note 69 and accompanying text.

[FN103]. While CRT conceived itself in a moment of "retrenchment" LatCrit came about in the midst of all-out cultural war. See supra note 45 and sources cited therein on retrenchment and backlash.

[FN104]. This charge is excitable by LatCrit's assertion of Latina/o identification and, ironically but predictably, it exploits the preexistence of CRT as the relatively established exemplar of nonwhite outsider jurisprudence. Implying that one "outsider" or nonwhite subject position tests the mainstream capacity for diversity of perspectives in legal discourse, this charge is likely to confront any other effort to activate dormant or potential forms of positionality in critical legal theory. Compare Phillips, supra note 2, at 1255 (expressing similar concerns over BlackCrit positionality).

[FN105]. See supra notes 41-78 and accompanying text.

[FN106]. LatCrit theory thus far has displayed a keen appreciation of the relationship between legal scholarship, politics, and power. See, e.g., Valdes, *Poised*, supra note 3, at 44, 49, 53 (acknowledging the political relevance of legal scholarship and, therefore, of LatCrit theory).

[FN107]. For further discussion of these four functions and their relationship to LatCrit theory, see [Francisco Valdes, Foreword - Under Construction: LatCrit Consciousness, Community and Theory](#), 85 *Cal. L. Rev.* 1087, 1093-94 (1997) [hereinafter Valdes, *Foreword - Under Construction*].

[FN108]. To date, the LatCrit gatherings include two colloquia and four conferences. The first colloquium was held in Puerto Rico in 1995 and the second in Miami in 1996. The first conference, 'LatCrit I,' was held in San Diego in 1996, LatCrit II in San Antonio in 1997, LatCrit III in Miami in 1998 and LatCrit IV near Lake Tahoe in 1999. The next two LatCrit conferences, LatCrit V and VI, are scheduled for Denver and for a site in the Northeast in 2000 and 2001, respectively. See supra note 18. For more information on these and other events, visit the (temporary) LatCrit website, located at <http://nersp.nerdc.ufl.edu/@malavet>.

[FN109]. For the LatCrit symposia, see supra note 18 and sources cited therein.

[FN110]. This commitment to expansiveness is reflected in LatCrit theory's written record - the symposia based on the various LatCrit gatherings published by the journals that have co-sponsored LatCrit conferences or that otherwise have held independent symposia on LatCrit theory. For instance, the symposium based on the First Annual LatCrit Conference includes 28 authors, of which (by my count) approximately 11 are non-Latina/o in self-identification. See Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 *Harv. Latino L. Rev.* 1 (1997); see also supra note 18 and the LatCrit symposia and colloquia cited therein.

However, the LatCrit commitment to expansiveness is not always fully evident in the published symposia based on our programs. This disjunction stems from the fact that each year

some program participants do not submit a contribution for publication in the symposium. Partially because programmatic initiatives are not always reflected in the written record, LatCrit theorists have established a website, at which all LatCrit programs to date are posted. To visit the LatCrit website, see *supra* note 108.

[FN111]. See, e.g., *supra* notes 46-78 and accompanying text.

[FN112]. I especially thank my friend and colleague, Lisa Iglesias, for discussions that developed these thoughts.

[FN113]. See, e.g., *supra* notes 24 and 27 and sources cited therein on postmodern analysis in outsider jurisprudence.

[FN114]. See Elizabeth M. Iglesias, Foreword: Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community, 53 U. Miami L. Rev. at 575 (1999) [hereinafter, Iglesias, Foreword: LatCrit III] (explaining objectives of rotating centers and need for collective commitment to continuity over time to make it work).

[FN115]. Therefore, immediately after the LatCrit III conference that this symposium commemorates, the planning committee for the following year's conference began to discuss the advisability of compiling an informal "LatCrit Primer" to be distributed to conference goers each year. This Primer in fact was produced, and prepared for distribution to those who attended the Fourth Annual LatCrit Conference in Lake Tahoe, to help orient newcomers by providing an easy way to overview some explanatory LatCrit writings. See LatCrit Primer (copy on file with author).

[FN116]. LatCrit engagement of this challenge already has produced vigorous exchanges, for instance, over the relative utility of 'race' and 'ethnicity' as categories of LatCrit analysis. See generally [Juan F. Perea, The Black/White Binary Paradigm of Race: The 'Normal Science' of American Racial Thought, 85 Cal. L. Rev. 1213 \(1997\)](#); Juan Perea, Five Axioms in Search of Equality, 2 Harv. Latino L. Rev. 231 (1997); Ian F. Haney Lopez, Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory, [85 Cal. L. Rev. 1143 \(1997\)](#); Ian F. Haney Lopez, Retaining Race: LatCrit Theory and Mexican American Identity in *Hernandez v. Texas*, 2 Harv. Latino L. Rev. 279 (1997); see also generally *supra* note 18 and symposia and colloquia cited therein.

[FN117]. For more information about the publications corresponding to the LatCrit colloquia and conferences held in various locales since LatCrit theory's inception in 1995, see *supra* note 18.

[FN131]. Indeed, as described above, intra- and intergroup, coalitional sensibilities have been foundational to the design of LatCrit programs and projects. See *supra* notes 107-113 and accompanying text. At the core of LatCrit theory has been the earnest practice both formally and functionally of intersectionality, multiplicity and multidimensionality across ethnicity, sexual orientation, trans/nationality, and other lines of identity and inquiry. Thus far, LatCrit enthusiasm for both the substantive and structural practice of multidimensionality has put in motion a promising, though imperfect, experiment in the articulation of a critical legal theory and the cultivation of a diverse scholarly community that self-consciously inclines nonwhite outsider jurisprudence toward an OutCrit movement. For elaboration of "OutCrit" positionality, see Valdes, *Outsider Scholars*, *supra* note 17; see also *supra* note 21.

[FN133]. LatCrit commitments to critical coalitions stem in part from a recognition that racial and ethnic (as well as sexual) minorities are outnumbered and outpositioned in the United States, specifically, and that social and legal transformation will depend in part on our collective capacity to influence majoritarian processes. See generally Valdes, *Beyond Sexual Orientation*, *supra* note 11, at 1426-43 (describing the tactics and strategies of majoritarian power in the context of today's cultural war).

[FN135]. For instance, a prolonged discussion of 'religion' erupted spontaneously at the Second Annual LatCrit Conference in San Antonio, Texas. Even though those exchanges were not part of the official program, they became the basis for a series of essays in the

symposium based on that conference. See Symposium, Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory, 19 UCLA Chicano-Latino L. Rev. 1 (1998). The role of religion and spirituality in Latina/o lives and in LatCrit theory then was formally included in the program for the Third Annual LatCrit Conference in Miami, Florida. To review the LatCrit III program, see *supra* note 108 and the address to the LatCrit website provided therein.

[FN136]. See Iglesias, Foreword: LatCrit III, *supra* note 114, at 575-85 (observing how and why LatCrit III demonstrated the possibility and necessity of collectively addressing controversial topics in a caring, respectful and community-building manner).

[FN137]. As CRT's experience with sexual orientation suggests, prolonged avoidance of intersectional analyses that defy the demographic and social realities of the communities for which we purport to speak simply cannot withstand critical self-scrutiny under antisubordination principles. See *supra* notes 46-50 and accompanying text; see also Phillips, *supra* note 2, at 1248-51.

[FN138]. The polyethnic and polyracial makeup of "Latinas/os" prompted the initial discussion of panethnic practices and possibilities at the original colloquium (and at LatCrit I). This discussion began an ongoing exploration of color and culture among and beyond Latinas/os via LatCrit conferences. Most recently, as this symposium illustrates, this ongoing exploration has ventured programmatically into the complexities of Indian identities, mestiza/o roots and Blackness in Latina/o, African-American and indigenous communities. While imperfect and incomplete, this ongoing exploration has taken original issues of intraLatina/o difference as an opportunity both to produce knowledge and cultivate community; by articulating racial/ethnic difference as a site of antiessentialist, antisubordination praxis, LatCrit theorists have sought to disrupt patterns of racial/ethnic hierarchies within Latina/o as well as other communities, and to form color-conscious critical coalitions within and between those communities.

[FN139]. The gender discussion at LatCrit I and since then has revolved around the place and position specifically of Latinas in the LatCrit project, and queried whether that place and position would reflect the androsexism of Latino (and Anglo) culture(s) generally. This early engagement has produced both plenary discussion and small-group Latina conversations, as well as a collective commitment to sex/gender intersectionality at LatCrit's inception. As a result, gender has been structurally and substantively integral to all LatCrit programs. This engagement has not triumphed over androsexist internalizations, but it incrementally has helped to bring them into sharp relief as one step toward combating even their unconscious traces.

[FN140]. The religion discussion, which erupted at LatCrit II and has been pursued programmatically since then, has revolved around the historic predominance of a particular church - Roman Catholicism - in Latina/o communities. This ongoing discussion has helped LatCrit theorists to underscore the differential impact of that predominance on 'different' elements of the LatCrit and Latina/o population. Most notably, this discussion has allowed LatCrit theorists to begin examining the differential impact of Christianity on white, male, straight, affluent European elements of Latina/o communities on the one hand and, on the other, indigenous, mestiza/o, poor, nonWestern, nonCatholic, female and sexual minority elements of the same communities. This engagement similarly produced much spontaneous discussion, and revealed not only additional complex diversities among Latina/o and LatCrit populations, but also the variety of agendas that demand theoretical and practical LatCrit attention. This variety spells both difficulty and opportunity for LatCrit scholars, and compels our continuing interrogation of religion and its social effects.

[FN141]. See generally Iglesias & Valdes, *supra* note 10 (discussing in a critical and self-critical way how LatCrit antisubordination agendas may be composed in light of Latina/o diversities and the complexities of social and legal analysis).

[FN142]. A key LatCrit practice when confronted with these issues has been to center them in

forthcoming programs and in multi-year time frames. This long-term programmatic response is key because it aids us collectively to excavate more thoroughly neglected sources of antiradicalization knowledge, as well as to engage in a process of discourse that can help to rectify sources of community disorganization. Because of its long-term nature, this programmatic response helps to produce knowledge and cultivate critical coalitions at once. But this programmatic response also makes for some bumpy rides. See *supra* notes 135-139 and accompanying text.

[FN143]. For a brief description of "OutCrit" perspective as used in this Afterword, see *supra* note 21.

[FN144]. See *Mutua*, *supra* note 2, at 1190-201.

[FN145]. For instance, the Phillips and the *Mutua* essays both raise a concern that LatCrit deconstruction of the traditional paradigm is, or appears to be, antagonistic or indifferent to African American positionality in the United States, both historically and presently. See Phillips, *supra* note 2, at 1253-54; *Mutua*, *supra* note 2, at Part II.

[FN146]. See, e.g., *Mutua*, *supra* note 2, at 1179-80. ("The aspects of American racial reality that are accurately captured in the 'White Over Black' paradigm must not be ignored even though the [traditional] paradigm is inadequate to describe all dimensions of the experiences of various American peoples of color.")

[FN147]. For similar cautionary warnings, see [Leslie Espinoza & Angela P. Harris, Afterword - Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race](#), 85 Cal. L. Rev. 1510 (1997), 10 La Raza L.J. 499 (1998); John O. Calmore, Our Private Obsession, Our Public Sin: Exploring Micheal Omi's 'Messy Real' World of Race: An Essay for 'Naked People Longing to Swim Free', 15 L. & Inequality J. 25 (1997).

[FN148]. See generally Iglesias & Valdes, *supra* note 10, at 513 (applying those basic precepts to LatCrit theory).

[FN149]. The first step in this deconstructive process, of course, was centering the traditional paradigm and its misuses. But since then our collective learning process has led to the recognition of the paradigm specifically as an apparatus of white supremacy and of its cultural roots in the exceptional history of Black subordination in this country. More recently, our collective learning process has led to a growing acknowledgement that this traditional, domestic-centric paradigm may tend to occlude the transnational characteristics that mark Latina/o communities. Even more recently our collective learning process led us to confront the erasure of indigenous and mestiza/o communities both by the paradigm and our earlier stages of critique. See Iglesias & Valdes, *supra* note 10, at 562-66 (describing this evolution). Now, as this symposium shows, our collective learning process has reached the point of yielding a renamed paradigm as well as a refined sense of its applicability and explanatory power. See *supra* notes 51-57 and accompanying text. These successive stages of deconstruction represent remarkable critical progress in the context of nonwhite outsider jurisprudence. However, these essays and their specific concerns make plain that this work is far from done.

[FN150]. Valdes, Foreword - Under Construction, *supra* note 107, at 1108, 22.

[FN154]. See, e.g., Iglesias, Out of the Shadow, *supra* note 56 at n.63-64 and accompanying text (noting need for critical analysis to center the particularities of transnational and intersectional Black identities in both LatCrit and CRT); Iglesias, Foreword: LatCrit III, *supra* note 114 at n.104-17 and accompanying text (asserting necessity and exploring implications of critical discourse engaging particularities of Black subordination from an anti-essentialist perspective).

[FN155]. Valdes, Foreword - Under Construction, *supra* note 107, at 1110, 24.

[FN156]. See generally *supra* note 18 and sources cited therein on LatCrit symposia.

[FN157]. See generally [Ian Haney Lopez, The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice](#), 29 Harv. C.R.-C.L. L. Rev. 1 (1994); Ian Haney Lopez, *White By Law: The Legal Construction of Race* (1996).

[FN158]. See generally *Romany* *supra* note 51, at 49 (discussing the "local character" and "North

American face" of nonwhite outsider jurisprudence); see also Berta Esperanza Hernandez-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 *La Raza* 69 (1996) (urging the interconnection of the "domestic" and the "international" in antisubordination analyses of law and society); Iglesias, *Out of the Shadow*, supra note 56 (reflecting on significance of Latina/o transnational identities in the articulation of LatCrit legal theory).

[FN159]. See [Elizabeth M. Iglesias, Foreword - International Law, Human Rights and LatCrit Theory](#), 28 *U. Miami Inter-Am. L. Rev.* 177 (1997).

[FN160]. See supra notes 41-116 and accompanying text.

[FN161]. From a LatCrit perspective, these twin precepts, and associated concepts or techniques, always should anchor critical analyses of social and legal power relations, and of their effects on human lives and hopes. See Iglesias & Valdes, supra note 10, at 513-15.

[FN170]. It is this diversity, and the tensions that go with its salutary discipline, that raise questions like those reported in Mutua's essay from the LatCrit III conference: whether, for example, LatCrit III lacked "Lat" - or, for that matter - "Crit." See Mutua, supra note 2, at 1185; see also Iglesias, *Foreword: LatCrit III*, supra note 114 at n.112-114 and accompanying text (noting and responding to these criticisms). We should expect (but not fear) more of the same - at least for so long as LatCrit continues to profess and practice its antiessentialist and antisubordination grounding: because LatCrit theory pushes for rotating centers programmatically and for implementing diversity structurally across multiple levels, questions about our collective focus or anchor are bound to come up and recur. In fact, their appearance at LatCrit III was itself a recurrence, as substantively similar questions came up at the very commencement of this enterprise - in the early stages of planning for LatCrit I. At that time, a threshold question was consciously confronted: whether LatCrit would be "open" and, if so, to what extent. A "closed" or nondiverse environment was consciously rejected in favor of the current model directly as a result of the earlier CRT experiences recounted above. See supra notes 68-72 and accompanying text. Since then, the kind of self-aware questioning reported in Mutua's essay has committed LatCrit collectively to an ethic of balance demonstrated by practices such as rotating centers and, now, shifting bottoms. See supra notes 111-115 and accompanying text. Moreover, since then, nonLat participation in LatCrit has been consistently crucial to our collective advances, as the Mutua, Phillips and Roberts essays, among others, exemplify in this symposium.

[FN171]. See Nancy K. Ota, *Falling from Grace: A Meditation on LatCrit II*, 19 *UCLA Chicano-Latino L. Rev.* 437 (1998). That intervention produced a cluster of essays devoted to religion in LatCrit II in that year's symposium. See *Religion and Spirituality in Outsider Theory: Toward a LatCrit Conversation*, id. at 417; see also Iglesias & Valdes, supra note 10, at 511-55 (discussing critical antisubordination analyses of religion in LatCrit theory).

[FN174]. Phillips, then, is concerned more with a critical and self-critical exploration of the means or venues for continuing the discourse that CRT founded and that LatCrit expanded. Providing concrete examples, Phillips invites LatCrits and allied scholars to alternate annually between the formats provided by the original CRT workshop model and the current LatCrit conferences. Id. at 1254. Other possibilities, such as holding the workshop and the conference at the same time and place with some flexible points of interphase, also have been posed and discussed - inconclusively, due to timing and other logistics - during the planning phase of this year's conference. Whatever option one currently prefers, Phillips' focus is a timely reminder of the importance nonwhite outsider jurisprudence must accord to institution- building.

[FN179]. OutCrit identification thus signifies a "coming out" as a biologized outsider, as well as a crit scholar, while also affirming the collective commitment of outsider jurisprudence to antisubordination criticality regarding sexual orientation diversities and issues. Tellingly, it grounds us in outsider and critical traditions, while reminding us that sexual orientation is an outsider and antiracist issue after all - after all the efforts that precede and are

reflected in this symposium. See *supra* notes 41- 116 and accompanying text.

[FN182]. For my part, the next structural move toward the cultivation of OutCrit perceptivity and community might be the organization of an annual workshop that builds on both the CRT model and the LatCrit model of outsider convocation. More specifically, I would recommend an OutCrit "workshop" (rather than a conference), which would be relatively small in size and organized around the reading and discussion of pre-assigned texts, but that would remain committed proactively and programmatically to long-term continuity, multidimensional analysis and critical coalitions in the production of knowledge and cultivation of community. This combined model, grounded in antiessentialist and antisubordination principles and dedicated to critical and self-critical discourse, seems counseled by our collective jurisprudential experience to date: it has the virtue of recreating the kind of intimate and intense intellectual exchange of the original CRT model while ensuring that we retain and build on the benefits of LatCrit innovations both in substantive and structural terms. At the same time, I would encourage the continuation of LatCrit events, Asian Law professor conferences, the regional people of color scholarship conferences and, perhaps, the initiation of "BlackCrit" gatherings.

Chapter II:
LatCrit IV Symposium
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1. Kevin R. Johnson, *Celebrating LatCrit Theory: What Do We Do When the Music Stops?*, 33 U.C. Davis L. Rev. 795 (2000)

let us be the key that opens
new doors to our people
let tomorrow be today
yesterday has never left
let us all right now
take the first step:
let us finally arrive
at our Promised Land! n. 1

INTRODUCTION

The fourth annual critical Latina/o theory conference (LatCrit IV) entitled "Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections," built on the scholarly and collegial successes of the first three. n. 2 On the shores of Fallen Leaf Lake at the Stanford Sierra Center near Lake Tahoe, n. 3 race scholars, students, and governmental officials, including Greg Stewart, General Counsel of the Equal Employment Opportunity Commission, from across the nation came together to discuss racial and other subordination in the United States. One of the most diverse conferences in legal (if not all) academia, LatCrit IV included African American, Asian American, Native American, Latina/o, Anglo, gay, lesbian, straight, and other participants. Legal academics, historians, sociologists, ethnic studies scholars, and students of many other disciplines facilitated the cross-fertilization of ideas. The varied backgrounds of the participants contributed immeasurably to the intellectual discourse. The following

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pages document those proceedings, including the scholarly achievements, intellectual ferment, and high ambitions, as well as the emerging tensions and fault lines in critical Latina/o theory.

The uninitiated might ask: just what is LatCrit? "LatCrit is a group of progressive law professors engaged in theorizing about the ways in which the Law and its structures, processes and discourses affect people of color, especially the Latina/o communities." [*755 n. 4 In many ways, LatCrit is helping us delve deeper into the impact of the law on Latina/o lives, dispelling popular stereotypes without essentializing or bracketing the Latina/o experience. n. 5 But the LatCrit project has broader ambitions; it seeks to further (1) "The Production of Knowledge"; (2) "The Advancement of Transformation"; (3) "The Expansion and Connection of Struggle(s)"; and (4) "The Cultivation of Community and Coalition. " n. 6 This symposium exemplifies the breadth and expansiveness of LatCrit.

LatCrit events have become known as celebrations of wide-ranging intellectual interchange, marked by frank, tough, and critical discussion; tensions arise and tempers flare. n. 7 LatCrit IV was no different. Capitalizing on the successes of LatCrit III, LatCrit IV generally was positive, upbeat, and focused on scholarship and community. This description is not meant to mute tensions that arose during the conference and will likely resurface within LatCrit. Nonetheless, LatCrit IV focused on the substantive in a positive and generally constructive way.

The essays in this symposium issue reflect differences of opinion and sincere efforts to grapple with the complexities of the issues facing Latinas/os and other subordinated peoples in the United States. As Professor Frank Valdes aptly put it, LatCrit theory, like all scholarly movements, is "under construction. " n. 8 In forming this new intellectual community, LatCrit theorists, unified by their experiences as outsiders in the law, seek to move the law toward new frontiers. n. 9

In my mind, the contributions to this symposium demonstrate the strength, vibrancy, and potential of LatCrit scholarship. Racial identity, diversity, commonality, religion, gender, class, and international linkages, among many other topics, are scrutinized. The *756 richness, ambition, insight, and foresight of these essays show dedicated scholars attempting to reveal and remedy the various subordinations, especially that of Latinas/os, afflicting modern social life in the United States. We see a full range of methodological approaches, from doctrinal analysis of the civil rights laws, n. 10 to new theoretical approaches to international law, to narrative scholarship shedding fresh light on legal issues. n. 11 As we begin a new century, such eclecticism, energy, excitement, and engagement are necessary and essential for scholars truly committed to the antirubordination project.

Once again, the melding of theory and practice, a bedrock principle of LatCrit theory, n. 12 played a prominent role at LatCrit IV. This issue offers an

important cluster of essays focusing on making theory practical. n. 13 Other contributions engage legal doctrine and the making of law by legislatures and courts. Such inquiries are crucial to prevent LatCrit from becoming a purely intellectual exercise. Dean Rex Perschbacher of U.C. Davis praised "the remarkable ability of LatCrit IV scholars to blend academic theory ... with one of the law's most positive attributes -- its link with people's day-to-day lives and their communities." n. 14

Narrative scholarship can be seen in the latest LatCrit installment, reflecting acceptance of the wisdom that counter-stories are needed to counteract the conventional wisdom in our society. n. 15 LatCrit narrative helps us better understand "Latina/o marginality and vulnerability traceable to dominant race/ethnicity norms of Anglo-American society." n. 16 The stories employed in the symposium *757 essays address a broad range of issues, from insights about the complexities of, and tensions at, LatCrit conferences n. 17 to discussions of the vulnerability experienced by untenured law professors of color. n. 18

Part I of this Foreword situates the essays comprising the written record of the LatCrit IV conference into the existing body of LatCrit literature and shows how this scholarship poises the movement for theoretical development. The five clusters are (1) Diversity, Commonality, and Identity, (2) Religion, Subordination, and Gender, (3) Class, Workers, and the Law, (4) LatCrit Praxis, and (5) International Linkages and Domestic Engagement. Part II discusses the evolution of LatCrit, including its past achievements and future aspirations, as well as its potential pitfalls. Ultimately, we all -- LatCrit scholars, organizers, participants, and other interested bystanders -- must be vigilant to ensure the survival of this emergent project so that it satisfies its lofty, all-important objectives.

I. LATCRIT IV: A CELEBRATION OF INTELLECTUAL INTERCHANGE

The contributions to this symposium reflect the intellectual breadth and ambition of LatCrit theory. At the same time, they reveal the ferment and potential fault lines that will shape future theoretical development. Ultimately, this development hopes to influence the law to improve the status of Latinas/os and other people of color.

A. Diversity, Commonality, and Identity

A cornerstone premise of LatCrit theory is that the various forms of subordination in U.S. society, if not the world, are deeply inter-related and intertwined. n. 19 Woven together into the American social *758 fabric, racial, gender, sexual orientation, class, and other subordinations all warrant careful inquiry. This section amply demonstrates the breadth of experiences relevant to

LatCrit inquiry.

A much-debated issue at all LatCrit conferences has been the need to expand the discussion of civil rights discourse beyond simply African American and White relations. n. 20 LatCrit III focused our attention on the African American experiences in an important panel entitled "From Critical Race Theory to LatCrit to BlackCrit? Exploring Critical Race Theory Beyond and Within the Black/White Paradigm." n. 21 Nobody seems to disagree with the need for a multiracial understanding of civil rights in the United States; indeed, such analysis has gone on for quite some time. n. 22 However, objections to the sustained LatCrit criticism of the "Black-White paradigm," as it has been denominated, have emerged. Sensitivity in this area is especially necessary. Like all communities, anti-African American sentiment exists in some quarters of the Latina/o community. All interested in civil rights must take great care not to exacerbate, tap into, or capitalize upon such sentiment in advocating for Latina/o civil rights. n. 23 Unfortunately, however, the subject has not always been approached as delicately as it could have been. n. 24

***759** Besides the focus on the Black-White paradigm, LatCrit discourse also has considered the connections between the subordination of Latinas/os and other racial groups. Beginning in earnest at LatCrit II and continuing at LatCrit III, n. 25 LatCrit has analyzed the relationship between Latinas/os and indigenous peoples. In Mexico and other Latin American countries, the mixing of native and European peoples, known as *mestizaje*, has been the norm. n. 26 Over time in the United States, there have been efforts, part of the assimilation process imposed on Latinas/os, to downplay indigenous roots and emphasize a Spanish ancestry. n. 27 As influential Chicano/a Studies scholar Rudy Acuna, a keynote speaker at LatCrit IV, put it in referring to the Chicano/a experience in Los Angeles, efforts were made to be "Anything But Mexican." n. 28

Several conference presentations analyzed the intricacies of the indigenous heritage of Latinas/os. Professor Berta Hernandez describes her painful reaction as others at LatCrit IV questioned her exploration of her native ancestry because no tribe claimed her as a member. n. 29 This challenge to Professor Hernandez's interrogation of her identity misses the central point of recognizing racial mixture among Latinas/os, which has relatively little to do with tribal membership. "Despite the fact that most Chicanos have substantial indigenous ancestry, Chicanos do not generally, as a group, identify as an Indian tribe." n. 30 Sadly enough, coerced assimilation ***760** led to destruction of tribal cultures, denial of indigenous roots, and efforts to strive to be white. To counteract this unfortunate history, Chicano/a activists embraced *mestizaje* and the recognition of our native ancestors. Chicanismo employs positively the phrase "La Raza" (the race) to connote that mestizos, a mixture of Spanish, native peoples, and others in Mexico, are in fact a separate and new race. n. 31

Professor Hernandez's story further suggests the need to avoid

blind application of other group's experiences to Latinas/os and to ensure sensitivity by all LatCrit participants. If one of the most prolific scholars of the LatCrit movement can feel under attack, n. 32 we should all take pause.

Bringing her federal Indian law expertise to bear on LatCrit theory, n. 33 Professor Rebecca Tsosie's presentation considered the parallels between Native American and Chicano/a struggles for land. n. 34 Similar to Latinas/os, Indian peoples historically have suffered due to coerced assimilation at the hands of the U.S. government. n. 35 Professor Tsosie observed that, just as land is important to the identity of native peoples, it also plays a role in the Chicano/a movement, specifically the mythical Aztlan. n. 36 Her preliminary ideas on this subject raise important issues for future inquiry. * Importantly, Aztlan and land do not appear to be as central to Chicano/a identity or to activism as they are to Indian tribes. n. 37 "[Few Chicanos advocate the secession of Aztlan as a realistic solution to problems facing the community"; however, "the idea that Chicanos are indigenous to the Southwest remains powerful today." n. 38 Chicano/a activism over land in the past centered on efforts to reclaim lands in New Mexico and Arizona based on legal claims under the Treaty of Guadalupe Hidalgo. n. 39

Considering the status of native Hawaiians through a LatCrit lens, Professor Eric Yamamoto, who has analyzed interracial conflict, n. 40 shows how the perception of native Hawaiians, based on the performance of a hula dance, may affect judges and judging. n. 41 He opines that the Supreme Court's decision in *Rice v. Cayetano*, n. 42 "probably the most important Hawaiian rights case ever," n. 43 might well rest on whether indigenous Hawaiian communities are characterized as a political or a racial group. His insights about the centrality of judicial perceptions to the resolution of the dispute demonstrate *762 that culture's impact on the law is well worth LatCrit inquiry. n. 44

Two intriguing essays focus attention on the place of Filipinos in the American racial mosaic. n. 45 Although Filipinos commonly are thought of as "Asians," this classification, like all racial ones, is not inevitable. The Philippines once was a Spanish colony and the Spanish-American War of 1898 brought the Philippines under U.S. colonial control for half a century. n. 46 Due to the legacy of Spanish colonialism, Filipinos share cultural, religious, and other affinities and similarities with Latinas/os. Like Latinas/os, Filipinos have long been racialized in the United States, especially in California. n. 47

Consistent with his previous call for interracial understanding, n. 48 Professor Victor Romero analyzes how commonality between Latinas/os and Filipinos may allow for "building bridges" between the groups. n. 49 Advocating the investigation of minority-on-minority oppression, n. 50 he identifies schisms among Asian Americans and Latinas/os by analyzing his naturalization interview with a hostile Latina Immigration & Naturalization Service officer. Showing the fluidity of racial identity, Professor Romero tells of the differences in how he is treated by those that see him without knowing his last name (and assume because of his physical appearance that he is Asian) and those that have not seen him but

assume that he is Latino because of his Spanish surname. n. 51 This shows the importance *763 that surname and phenotype can play in racial identity and racial identification. n. 52

In a similar vein, Professor **Leti Volpp**, whose vibrant scholarship considers the complex relationship between law, culture, race, and gender, n. 53 analyzes the difficulties historically faced by the courts in fitting Filipinos into a racial category under California's antimiscegenation laws. n. 54 Evidence used by the courts and policymakers to determine whether Filipinos were subject to the antimiscegenation laws once again demonstrate how race is socially, not biologically, constructed. n. 55 Professor Volpp's analysis of the antimiscegenation laws raises fascinating points, among them the observation that many of the prevailing stereotypes about Filipino men, such as their "sexual passion," had long been held about African American men. n. 56 Her analysis also suggests some anomalies, however. For example, why weren't the antimiscegenation laws applied to people of Mexican ancestry? Why, if people of Mexican ancestry were treated as white under these laws, was concern not expressed about relationships between Filipino men and Mexican "girls"? n. 57 One legal classification treated Mexicans as White (i.e., not subject to the antimiscegenation laws) while social custom treated them as non- White (i.e., society did not penalize Filipino/Mexican relationships). n. 58 This suggests that Filipinos and Mexican-Americans may have different as well as common experiences. It more generally suggests that race mixing was not a concern unless "Whites" were part of the mix.

Professor Romero's and Volpp's essays raise the intriguing question whether Filipinos are Latinas/os. Professor Volpp directly poses the question whether "we should place Filipino/as within the *764 rubric of Latina/o, primarily because of a shared legacy of Spanish colonization. " n. 59 Similar questions might be asked about other groups whose histories bear commonalities with the Latina/o experience. Are people of Jamaican ancestry from the Caribbean Latinas/os? n. 60 This once again illustrates the "'messiness' of race," n. 61 its uncertain borders, and the inherent contradictions of socially constructed meanings.

This cluster of papers makes it clear that the process of racialization is complex, affecting different groups in different ways. n. 62 Latinas/os comprise a truly complex racial mixture of peoples facing complex identity choices. By political necessity, Latinas/os have built coalitions at different historical moments. n. 63 Filipinos, for example, were a critical component of the United Farm Worker movement. n. 64 Geography plays a crucial role in the racialization process as well. n. 65 For example, intermarriage rates between Anglos and Mexican Americans are high in California's urban centers, but much lower along the border with its high racial tensions. n. 66

We should be sensitive to the complex interaction between law and racial mixture. On the one hand, racial mixture shapes law. The antimiscegenation

laws responded to the mingling of the races and the fear that intermarriage and mixed race offspring might undermine racial hierarchy. n. 67 Racial mixture, however, need not *765 be feared. n. 68 Juan Gomez Quinones, for example, observed that, in New Spain, "the process of mestizaje ... which moved from Central America to New Mexico ... undermin[ed racial prejudice in its wake]." n. 69 It also changed the way that racism manifested itself. n. 70 On the other hand, the law shaped racial mixture in that the antimiscegenation laws limited intermarriage and, thus, racial mixture.

B. Religion, Subordination, and Gender

The understatement of LatCrit I probably was Professor Keith Aoki's prescient observation that "religion and spirituality are submerged not far below the surface of emerging Latina/o Critical Theory." n. 71 The complexities of religion flashed in a tense emotional outburst at LatCrit II. n. 72 Religion, specifically Catholicism, obviously is a difficult topic for many Latinas/os. n. 73 It proves all the more complex because Catholicism, for example, has contributed to the subordination of women, lesbians, and gay men; at the same time, it has been at the core of important social movements, such as the Chicano/a Movement of the 1960s, the United Farm Workers' organizing efforts of the 1960s and 1970s, and the Sanctuary movement of the 1980s. n. 74 Catholicism, as well, remains an important *766 aspect of Latina/o culture, and shapes individual identities. We cannot fully understand Latinas/os without appreciating the impact of Catholicism on the historical development and current status of our communities.

Latinas/os must squarely and critically address the problematic aspects of religion on the community. n. 75 The papers in the Religion, Subordination, and Gender cluster contribute to the ongoing LatCrit analysis. The author of foundational work on the legal history of the enforcement of the Treaty of Guadalupe Hidalgo, which ended the U.S./Mexico War in 1848, n. 76 Professor Guadalupe Luna considers how the Catholic missionaries subordinated, often violently, native peoples and taught them how to subordinate women. n. 77 Her analysis of this legal history demonstrates how the concept of "[saving souls for Christianity]" authorized unmitigated brutality against indigenous peoples. n. 78 In the name of the Father, missionaries forcibly restructured tribal societies to bring them into compliance with a "patriarchal ideology." n. 79 This historical chapter starkly shows the role played by the Catholic Church in the subordination of indigenous Californians and women.

Building on Professors Iglesias's and Valdes's analysis of religion, n. 80 Professor Terry Rey analyzes how the sacred religious symbol of the Virgin Mary contributes to Latina subordination. n. 81 Professor Rey offers examples of how Latin American Catholicism functions *767 as a "repressive and antisubordination force in Latin American history and cultures and select

diasporic Latina/o communities." n. 82 Viewing Marianist Catholicism as Max Weber's "legitimizing authority" (legitimierende Macht), Professor Rey critically analyzes the symbols of the Virgin for Latinas. n. 83

Religion, however, continues to present vexing perplexities for LatCrit theorists. Central to the organizing of the original LatCrit conference (as well as LatCrit IV) and a knowledgeable observer of the impact of the law on women of color, n. 84 Professor Laura Padilla highlights the intricacies posed to Latinas by religion. n. 85 She contends that "religion simultaneously subordinates Latinas while serving as a source of strength" n. 86 and considers the important role of religion in Latina/o culture and family. n. 87 Far from an apologist for Catholicism, Professor Padilla considers the racial and gender discrimination in the Church, noting for example the fact that it was not until 1970 that the first Mexican American bishop was ordained by the American Catholic Church and that less than one percent of the nuns in the United States are Latina. n. 88 Professor Padilla contends that, although Latinas may look to the Church for solace, they must reconstruct the Church in their image.

In analyzing religion, one wonders whether national origin differences, as well as class differences, might exist among Latinas/os with respect to Catholicism. One would expect Cuban immigrants, for example, who have experienced the Castro government's attempts to stifle religion, to have a different perspective on the subject than Mexican immigrants and Mexican American citizens. n. 89 *768 Similarly, as with all religion, class differences divide the Latina/o community. As Richard Rodriguez's famous *Hunger for Memory* n. 90 illustrates, devout Catholicism often flourishes with first generation immigrants as well as blue collar and farm workers. Rodriguez's own transformation shows that reaching professional status has often meant for many Latinas/os downplaying or abandoning their spirituality.

Importantly, we must not essentialize the Catholic Church as a unified monolith, because parts of the church have lent support to social justice movements. n. 91 Liberation theology has transformed some sectors of the Church, as have clergy who have fought for social justice in various locales. n. 92 Theological teaching may be relevant to legal analysis. n. 93 For example, some contend that religious convictions mandate more generous, less punitive immigration and welfare laws. n. 94

As these essays make clear, we must be forever attentive to how Latinas are mistreated, legally, religiously, and otherwise. n. 95 Spousal abuse is an obvious, all-too-common example. Professor Donna Coker analyzes how, as suggested by influential articles on the concept of intersectionality, n. 96 spousal abuse disparately affects women of color. n. 97 She highlights social science research illustrating this *769 point and calls for additional remedial action. Professor Coker's article fits in with the burgeoning Critical Race Feminism movement, which posits that women of color are disparately affected by the law. n. 98 The focus on the particular forms of oppression suffered by women of color

invites further inquiry into the class, gender, and race disadvantages facing Latinas in employment, housing, and immigration. n. 99 Immigration law deserves especially close scrutiny, as it has had a devastating effect on the well-being of undocumented Latinas in this country, undermining their legal rights and, tragically enough, increasing the violence done to them. n. 100

The study of the subordination of Latinas is of central importance to the LatCrit project. LatCrit, as an intellectual community, is committed to not replicating the dynamics of subordination. We must continue to analyze how that subordination originates and perpetuates itself through religious and other social institutions.

C. Class, Workers, and the Law

Class issues are especially salient for Latinas/os in the United States. n. 101 Early in LatCrit, attention was paid to the diversity among Latinas/os, including class diversity among national origin groups. n. 102 The LatCrit III symposium included a cluster on "Inter/*770 National Labor Rights: Class Structures, Identity Politics and Latina/o Workers in the Global Economy." n. 103 The essays in this cluster on Class, Workers, and the Law continue this important discussion.

A thoughtful observer of racial stratification in the United States, n. 104 Professor Tanya Hernandez raises the important issue of intra-Cuban class and racial conflicts. n. 105 She documents the history of repression of Afro-Cubans, replete with atrocities, and shows how in modern times they are poorer on the whole than most Cubans. More recently, class and race differences have, for example, contributed to lukewarm Cuban American support for continued refugee admissions in south Florida. n. 106 Today's Cuban migrants are poorer and Blacker -- and, not coincidentally, less popular in the United States -- than ones of times past. Professor Hernandez questions whether LatCrit theory's "antisubordination goal can be achieved if we as scholars do not explicitly challenge the Latin American model of discounting our own racial diversity" n. 107 Importantly, Latinas/os must uncover racial subordination within their communities, which by necessity requires a race conscious approach. Professor Hernandez ties this into criticism of class-based affirmative action by contending, in effect, that its failure in Cuba suggests a similar fate in the United States. Such comparisons must remain tentative, although the central point remains well taken.

More generally, Professor Hernandez's article implicates broader questions concerning Afro-Latinas/os. Scholarship has begun to focus attention on Black immigration to the United States from the *771 Caribbean n. 108 and other nations. n. 109 Additional inquiry must be focused on Mexican, Cuban, Puerto Rican, and other Latinas/os of African ancestry; the experience in each of these communities, inside and outside the United States, differs from that of non-Afro Latinas/os in important respects. Scholarship on this topic is emerging. n. 110

This phenomenon demonstrates once again the diversity of the Latina/o experience and how LatCrit theorists must take care not to homogenize or essentialize the communities.

Other essays in this cluster document how the law continues to adversely affect working class and poor Latinas/os. Dean Christopher David Ruiz Cameron skillfully analyzes how the ban of gas-powered leaf blowers by the city of Los Angeles, supported by environmentally conscious celebrities, negatively affected Mexican gardeners. n. 111 He effectively ties this movement into the fundamental LatCrit tenets of Latina/o invisibility and forced assimilation. Class dynamics cannot be missed in a story in which white Hollywood media stars seeking more personal comfort and environmental aesthetics advocate changes in the law that would make the lives of poor Mexican workers harsher than they already are. Although interests of environmentalists and people of color have been *772 aligned in the environmental racism movement, n. 112 this case study reflects the continuing class and racial divisions on environmental issues. n. 113

The next contribution analyzes how the law has used proxies -- facially neutral substitutes for racial classifications -- to discriminate against Latinas/os, with particular impacts on poor and working class Mexican immigrants. n. 114 Immigration status n. 115 and language discrimination, n. 116 two issues of central importance to LatCrit inquiry, constitute two proxies for race that discriminate subtly yet with impunity against Latinas/os. Professor George Martinez and I, n. 117 "writing squarely as law professors," n. 118 analyze how the antibilingual education initiative known as Proposition 227 adopted by the California voters in June 1998, in effect discriminated against Spanish-speaking persons of Mexican ancestry. This measure fits *773 into a longer history of discrimination against people of Mexican ancestry in the Golden State. n. 119 The discrimination by proxy concept may prove to be an important doctrinal tool that has the potential of increasing Latinas/os' and other subordinated peoples' ability to attack the often subtle discrimination directed at them. As discrimination is driven underground, legal doctrines must evolve in sophistication to keep up with ingenious, facially neutral devices that discriminate.

Professor Pamela Smith offers a perspective on the difficulties of minority "workers" -- law professors -- in legal academia. n. 120 Her essay serves as a reminder to those among our ranks with tenure to consider the experiences, perspectives, and perceived vulnerability of the untenured, even at relatively safe settings such as LatCrit conferences. The discussion group of untenured professors that originated at LatCrit IV should be continued at future conferences. Moreover, Professor Smith tells of the kindness offered her as she entered the turbulent waters of legal academia by a tenured African American professor, Isabelle Gunning, who serves as a model for us all. n. 121

Placing into doubt the ability of LatCrit theorists to influence the law and help the subordinated, Professor Larry Cata Backer, an important voice on welfare "reform," n. 122 offers a gloomy forecast about the future impact of

critical scholarship on the courts. n. 123 He presents the results of searches of computer databases showing few judicial citations to leading Critical Race scholars, which he interprets as suggesting that hope of changing the law through scholarship may be misplaced. However, even if citations fail to register on the computer databases, critical scholarship may well inform and influence judicial decision-making in subtle ways, through, for example, amicus curiae briefs and by educating the next generation of lawyers. Critical theory indeed may help bring about shifts in ways of thinking about the law. For example, even if a court *774 does not cite Paul Butler's famous jury nullification article, n. 124 national attention has been raised about the racial implications of the criminal justice system.

Professor Backer further posits that the evidence indicates that state courts may be more likely to adopt a critical bent than the federal courts. In light of the anti-Latina/o sentiment in the states, often embedded in laws upheld and enforced by the state courts, n. 125 this optimism seems unwarranted. The trust in federalism requires a leap of faith and, at a minimum, a considerable amount of further investigation. n. 126

Is there reason for hope? Bill Tamayo, Regional Attorney for the Equal Employment Opportunity Commission ("EEOC") who has written important work on civil rights issues, n. 127 documents recent EEOC efforts to protect Latina/o farm workers. n. 128 Tamayo discusses outreach programs of the EEOC, including training of California Rural Legal Assistance attorneys about the law of sexual harassment. He recounts the EEOC-initiated litigation culminating in an over \$1.8 million settlement for the atrocious sexual harassment of farm worker Blanca Alfaro. n. 129 Such successes warrant celebration. One wonders, however, how effective litigation like this will ultimately prove to be, especially given the fact that farm worker labor conditions have been shameful for years without significant change. n. 130

D. LatCrit Praxis

LatCrit theory has an enduring commitment to putting theory into practice. n. 131 In this spirit, Professors Sumi Cho and Robert *775 Westley offer a history of progressive political activism at U.C. Berkeley's Boalt Hall School of Law that contests the conventional wisdom. n. 132 They contend that student activism from the 1960s to the 1990s was central to the development of Critical Race Theory. To shed light on that contention, they focus on the history of U.C. Berkeley's Boalt Coalition for a Diversified Faculty, an organization in which both authors played leadership roles as law students. This history is absent from the official record of this distinguished law school. Their historical research shows that the student activism that facilitated the formation of Critical Race Theory was not just a Harvard-centered phenomenon, as is commonly understood. n. 133 Because Critical Race Theory helped create the intellectual space

necessary for the emergence of LatCrit theory, n. 134 its roots and its fortunes in legal academia are important to this project.

As history reveals, art also can be employed for political ends. n. 135 In a fascinating LatCrit IV panel on "Literature and Arts as Anti-subordination Praxis: LatCrit Theory and Cultural Production," the panelists explored the nexus between art and LatCrit theory. Professor Pedro Malavet offers his perspectives on this panel, while describing his "accidental" descent into LatCrit theory. n. 136 His narrative tells how he was radicalized by a rough-and-tumble initiation into the legal academy and moved from traditional to critical scholarship with a Latina/o bent. In addition, Professor Malavet touches on the link between law, culture, and subordination. n. 137

Offering a specific example of art as praxis, Nicholas Gunia analyzes Jamaican music as a form of resistance. n. 138 He places the resistance into context by describing the racial stratification in Jamaica and the religious and social movement of Rastafarianism. Like the *776 old slave songs in the United States, n. 139 this form of Jamaican music constitutes a type of resistance to subordination. Viewing art as resistance in certain circumstances sheds light on current social phenomena such as gangsta rap and gang membership. n. 140

Although radically different from art, clinical teaching holds the promise of linking theory and practice. n. 141 Professor Alfredo Mirande Gonzalez, an established Chicano/a Studies scholar n. 142 turned law professor, utilizes the narrative form to reflect on teaching clinic students how to put the law into practice. n. 143 Attempting to follow the methodological path blazed by Derrick Bell n. 144 and Richard Delgado, n. 145 Professor Mirande uses fictitious field reports from a clinical placement similar to those he did as a student in Stanford's now-defunct Lawyering for Social Change Program. Through alter ego Fermina Gabriel, Professor Mirande raises questions about critical theory. His imaginary dialogue, however, fails to present a unified thread of inquiry and neglects relevant LatCrit and critical lawyering scholarship. n. 146 Most troubling, Professor Mirande's fiction lacks gender sensitivity. n. 147 Work that neglects subordinations undermines the LatCrit project. In addition, narratives, particularly those not based in personal experience, have *777 come under vitriolic attack as of late. n. 148 Narrative in scholarship must tread with care in order to avoid scathing critiques that have recently become fashionable and undermine LatCrit theory's scholarly mission.

E. International Linkages and Domestic Engagement

For many reasons, including globalization, immigration, and technological advancement, to name a few, the local and the global are increasingly intertwined. n. 149 LatCrit has been central in considering the international. On the heels of LatCrit I, a LatCrit colloquium at the Hispanic National Bar Association 1996 annual conference explored international law and

human rights. n. 150 At the forefront, Professor Elizabeth Iglesias focused LatCrit attention on the importance of human rights to international economic law and the Latina/o condition in the United States. n. 151 LatCrit III saw a discussion of "Global Intersections." n. 152 LatCrit IV also focused on the international. Professor Celina Romany, the author of influential scholarship on women's rights as international human rights, n. 153 offered an inspiring keynote speech entitled "Global Capitalism, Transnational Social Justice and LatCrit Theory as Antisubordination Praxis."

Because the expansion of the Spanish colonial empire shaped the evolution of Latin America, "empire" is a central concept for Latinas/os to consider in evaluating their place domestically and internationally. n. 154 Reviewing Vday Singh Mehta's book *Liberalism *778 and Empire: A Study of Nineteenth-Century British Liberal Thought*, n. 155 Professor Tayyab Mahmud articulates his vision of the impact of empire-building and how colonialism is important to liberal thought. n. 156 He contends that liberalism also calls for racial, class, cultural, and other exclusion.

Consistent with this pessimistic version of liberalism, Professor Tim Canova criticizes the claim that meaningful positive economic and social transformation for developing nations can be accomplished through the efforts of the International Monetary Fund (IMF). n. 157 This criticism finds intellectual support in the longstanding critique of liberalism. n. 158 Professor Canova astutely applies LatCrit teachings to the study of the international economic system. He claims categorically that "the global monetary system, and the IMF in particular, systematically subordinates entire nations of color." n. 159 In making his case, Professor Canova disagrees with the relative optimism of Professor Enrique Carrasco about the IMF's transformational potential. n. 160 Whatever the relative strength of his argument on the merits, Professor Canova's mode of criticism should serve as a positive role model for LatCrit theorists. ***779** Admitting Professor Carrasco's laudable goal of protecting vulnerable groups in Latin America and respectfully treating his views, n. 161 Professor Canova constructively questions the means of achieving that end.

Considering the domestic impacts of international developments, Professor Chantal Thomas critically evaluates the effects of the "globalization" of the world economy on the United States, marred as it is by deep and enduring racial and economic inequality. n. 162 She opines that, despite the frequent trumpeting of the benefits of the emerging global economy, "[without intervention, globalization may instead lead to increased socioeconomic inequality and economic volatility." n. 163 Indeed, "[it is ... possible that globalization will generally entrench existing structural inequalities, and that some of these inequalities will be racial in character." n. 164 Consequently, Professor Thomas asks us to consider the possible racial impacts in the United States resulting from the development of a global economy.

Professor Thomas thoughtfully demonstrates the inextricable links

between the global and the local, the overlapping nature of class and racial inequality, and the interrelationship between the subordination of various groups, especially African Americans and Latinas/os. These, of course, all are central to LatCrit theory. n. 165 The article also suggests questions for future inquiry. Importantly, by distinguishing between Latina/o immigrants and the well-established Mexican American community in the inner cities, n. 166 Professor Thomas obliquely raises the question of how migration and labor flows into the United States, part of the globalization of the world economy, figure into her analysis. The domestic racial ***780** impact, if any, of international migration has been the subject of considerable controversy. For example, prominent labor economist Vernon Briggs has long contended that "mass migration" from Asia and Latin America has injured the African American community. n. 167 Similarly, some commentators claim that the impoverished state of farm workers in the United States can only be improved with a clamp down on undocumented immigration from Mexico. n. 168 These difficult issues, representing potential fault lines among subordinated communities, warrant close attention.

This ambitious cluster proposes not one, but two, important international law perspectives that require future exploration. A keen observer of the international legal scene, n. 169 Professor Gil Gott suggests the need for a new genre of "Critical Race Globalism," which would "expressly link racial with international justice struggles." n. 170 He views white supremacy as a global phenomenon, thereby requiring global solutions. Similarly, Professor Ediberto Roman advocates a Critical Race approach to international law. n. 171 Ferment in international law has spawned many new approaches, including New Approaches to International Law, Third World Approaches to International Law, and feminist approaches to international law. n. 172 However, the impact of race on international law generally goes unexplored. Demonstrating the inability of various methodological approaches to account for race, Professor Roman calls for an expressly race-based perspective and articulates the case for race being at the center of international discourse. n. 173 Importantly, ***781** events in Latina/o history, such as the U.S./Mexican War and the Treaty of Guadalupe Hidalgo n. 174 as well as the Spanish/American War and the subsequent denial of constitutional rights to racialized peoples in U.S. territories, n. 175 need concentrated analysis with race at the forefront. This racial history continues to impact the present and therefore warrants future LatCrit analysis.

II. FUTURE CHALLENGES AND TRAJECTORIES?

We are at a critical juncture in the evolution of LatCrit theory. In the next few pages, I identify future challenges and potential pitfalls. Importantly, although we should celebrate LatCrit theory's early success, we must brace ourselves for growing pains, internal tensions, and external critique.

A. LatCrit Must Remain Inclusive

Critics might claim that the LatCrit movement has strayed from its Latina/o roots. The "rotating centers" concept captured in the title to LatCrit IV, however, allows us to be inclusive and to consider the subordination of other peoples of color and the relationship to Latinas/os' status in the United States. n. 176 As LatCrit theorists have observed, n. 177 Latina/o subordination is related to and connected with other subordinations. To fully understand one, we must comprehend them all.

Moreover, the inclusiveness of LatCrit theory is an important source of strength that holds great promise for the future. Inclusiveness has fostered coalitions and mutual self-help. It has built good will and promoted serious scholarship in new and important ways. Inclusiveness allows the LatCrit community to engage in ongoing intellectual ferment and allows it to remain dynamic rather than static.

*782 B. External Challenges and Internal Tensions

As LatCrit matures, we must anticipate external challenges and continuing, perhaps mounting, internal tensions. The maturation process may well subject LatCrit to attack, such as that leveled at Critical Race Theory, feminist jurisprudence, and other critical genres. n. 178 As we prepare for external critiques, we should keep in mind that Critical Race Theory ("CRT") has been vulnerable to attack because critics have ascribed certain intellectual positions as part of CRT orthodoxy. Yet, CRT remains difficult to reduce to fundamental tenets because its fluid and eclectic approach encompasses diverse methodologies from many disciplines. n. 179 LatCrit should retain the prerogative to define and redefine itself rather than be defined by critics. Constant self-criticism and self-definition is essential to a movement as dynamic as LatCrit.

To fend off external attacks effectively, LatCrit theorists must address internal tensions within the movement. We must support each other and be ready to respond to the future intellectual challenges. Striving to maintain unity, LatCrit theorists must resist the centrifugal pressures toward disintegration.

To this end, LatCrit must keep internal tensions in perspective and learn the lessons of the past. Importantly, LatCrit theorists cannot let the personal dominate the intellectual and allow interpersonal antagonisms to undermine the project. n. 180 Specifically, we must avoid at LatCrit conferences, the spontaneous "slash-and-burn, hold-no-prisoners, hypercritical attack upon some unfortunate and often unsuspecting target." n. 181 In that vein, we hopefully will never see the day when so-called "attack scholarship" focuses on each other's work. n. 182

We must nip in the bud the development of schisms along gender, class, national origin, racial, and other lines. One way to ease ***783** tensions is to recognize and encourage separate investigations of specific group histories, both inside and outside LatCrit. n. 183 All of these competing strands and thoughts must continue to be included within the umbrella LatCrit intellectual community.

At the same time, we must allow dissent within our ranks. Criticism of ideas and diversity of approaches, of course, remains essential to intellectual growth. LatCrit must continue to emphasize the critical. As scholars, we should be critical of each other's work. Nonetheless, the tone and method by which we criticize is all-important. In voicing dissent and promoting sophisticated intellectual discourse, we must be sensitive to the feelings of others and attempt to offer constructive, not destructive, criticism. n. 184 An ongoing intellectual scholarly community requires sensitivity to each other, our differences, and our humanity, not a scorched earth approach to scholarship and the views of our colleagues.

In my mind, a wonderful example of constructive criticism was Professor Frank Valdes's presentation at the June 1999 LatCrit conference in Spain. n. 185 He presented a provocative and devastating thesis -- that Spain should seriously consider the payment of reparations for the plunder of the grand indigenous societies of the New World -- to a group of Spanish legal scholars. The challenge to Spain from an American ran the risk of causing tension, discord, and hard feelings. Professor Valdes offered a balanced account of the need for an investigation of reparations by Spain for its exploitation of New World natural resources and people. We need this type of constructive and positive engagement both at the live events and in the symposium contributions.

C. Engaging LatCrit Literature

Future LatCrit scholarship must fully grapple with the breadth and nuances of the rapidly evolving LatCrit scholarship. This formidable task, which at a minimum requires engagement with a series of symposia, colloquia, and an anthology of readings, n. 186 as ***784** well as review of LatCrit pieces published in other venues, n. 187 is as daunting as it is exhausting. Recent actions should make the task easier. Professor Roberto Corrada compiled a primer of LatCrit readings, provided to LatCrit IV participants, which attempts to capture the essence of the movement and offer an introduction to those interested in the field. n. 188 The LatCrit web page created by Professor Pedro Malavet n. 189 allows us to keep up on the growing body of literature as well as upcoming events and related LatCrit information.

In future contributions to LatCrit symposia, I hope that participants seriously engage the existing scholarship, study the literature, and acknowledge previous contributions. Ideally, each contribution to a LatCrit symposium would explain how the author's contribution fits into LatCrit theory and the existing

body of LatCrit scholarship. n. 190 Publication opportunities for scholarship obviously are central to the LatCrit mission. However, they cannot be the sole purpose of LatCrit theory or the movement will soon dissolve as a cohesive and distinct body of scholarship. Due to Frank Valdes's leadership and foresight, LatCrit crystallized with the formation of the annual LatCrit conferences, an event with importance that cannot be underestimated. However, the critical study of Latina/o issues did not begin in 1995. The work of the scholars *785 from law and many other disciplines who were doing LatCrit before it became "cool" should not be marginalized or ignored. n. 191

In our scholarship, LatCrit theorists also must strive to avoid the "star system" and exclusive citation to a small group of perceived stars for legitimacy. If we do not take care, the "imperial scholar" phenomenon may well infect LatCrit scholarship as it has majority scholarship. n. 192 We must be inclusive or risk the splintering of LatCrit into disgruntled factions.

To warrant intellectual respect, the LatCrit authors should always strive for high quality scholarship. The scholarship should fulfill the LatCrit mission, which requires critical analysis of Latina/o and related subordinations. All of us should be conscious of how our LatCrit scholarship contributes to this important mission.

D. The Need for Infrastructure

A LatCrit infrastructure, currently under construction, is necessary to ensure the continuity and future of the project. n. 193 The legal incorporation of LatCrit n. 194 and the overlapping membership of the planning committee have helped provide necessary continuity and institutional memory. This infrastructure, missing from Critical Legal Studies and Critical Race Theory, hopefully will keep LatCrit moving forward and should help LatCrits avoid getting bogged down in the same old disputes. n. 195

*786 Because of the success of LatCrit III and IV, I firmly believe that we are beyond the time when it is accurate to refer to "the fragile and tentative nature of the LatCrit enterprise." n. 196 LatCrit is now robust enough to undergo its own internal close scrutiny and on-going self-criticism. We must refine and improve the project to ensure its longevity and influence.

NOTES:

1. Francisco X. Alarcon, *Tierra Prometida (Promised Land)*, in S. BETH ATKIN, *VOICES FROM THE FIELDS: CHILDREN OF MIGRANT FARMWORKERS TELL THEIR STORIES* 95 (1993).

2. See Symposium, LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship, 2 HARV. LATINO L. REV. 1 (1997) (proceedings of LatCrit I, May 1996 in La Jolla, California); Symposium, [Difference, Solidarity, and Law: Building Latina/o Communities Through LatCrit Theory](#), 19 CHICANO-LATINO L. REV. 1 (1998) (proceedings to LatCrit II, May 1997 in San Antonio, Texas); Symposium, Comparative Latinas/os: [Identity, Law and Policy in LatCrit Theory](#), 53 U. MIAMI L. REV. 575 (1999) (proceedings to LatCrit III, May 1998 in Miami, Florida). A 1995 colloquium at the Hispanic National Bar Association annual conference in Puerto Rico served as a precursor to the annual LatCrit conferences. See Colloquium, Representing [Latina/o Communities: Critical Race Theory and Practice](#), 9 LA RAZA L.J. 1 (1996). Published symposia that grew out of LatCrit I in 1996 were Colloquium, [International Law, Human Rights, and LatCrit Theory](#), 28 U. MIAMI INTER-AM. L. REV. 177 (1997); Symposium, LatCrit Theory: Latinas/os and the [Law](#), 85 CAL. L. REV. 1087 (1997), 10 LA RAZA L.J. 1 (1998). For collected critical readings on law and Latinas/os, see THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998).

3. Because of the location of the conference, a number of the symposium contributions focus on the impact of law on Chicanos/as and Latinas/os in California.

4. Fact Sheet: LatCrit, in LatCrit Primer, unpublished materials distributed to participants at LatCrit IV (1999).

5. See Gerald P. Lopez, [Learning About Latinos](#), 19 CHICANO-LATINO L. REV. 363, 368 (1998).

6. Francisco Valdes, Foreword: [Under Construction -- LatCrit Consciousness, Community, and Theory](#), 85 CAL. L. REV. 1087, 1093-94 (1997), 10 LA RAZA L.J. 1, 7-8 (1998).

7. See Elizabeth M. Iglesias, Foreword: [Identity, Democracy, Communicative Power, Inter/National Labor Rights, and the Evolution of LatCrit Theory and Community](#), 53 U. MIAMI L. REV. 575, 576-79 & nn. 2-3 (1999) (discussing how LatCrit III helped calm tensions, particularly those surrounding religion, which arose at LatCrit II); see also infra text accompanying notes 71-75 (analyzing complexities of Catholicism for Latinas/os).

8. Valdes, supra note 6.

9. See generally THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970) (articulating theory of paradigm shifts in intellectual disciplines).

10. See infra notes 117-19 and accompanying text.

11. See infra notes 120-21, 141-48, 169-75 and accompanying text.

12. See, e.g., Sumi K. Cho, Essential Politics, 2 HARV. LATINO L. REV. 433, 434-36 (1997); Laura M. Padilla, LatCrit Praxis to Heal Fractured Communities, 2 HARV. LATINO L. REV. 375, 386-92 (1997).

13. See infra text accompanying notes 131-48.

14. Rex R. Perschbacher, [Welcoming Remarks for LatCrit IV](#), 33 U.C. DAVIS L. REV. 751 (2000).

15. See, e.g., Richard Delgado, [Storytelling for Oppositionists and Others: A Plea for Narrative](#), 87 MICH. L. REV. 2411 (1989); George A. Martinez, [Philosophical Considerations and the Use of Narrative in Law](#), 30 RUTGERS L.J. 683 (1999). Feminist theorists also have advocated storytelling. See, e.g., Kathryn Abrams, [Hearing the Call of Stories](#), 79 CAL. L. REV. 971 (1991); Lisa R. Pruitt, [Law Review Story](#), 50 ARK. L. REV. 77 (1997).

16. Valdes, *supra* note 6, at 1102; see also MARILYN P. DAVIS, *MEXICAN VOICES/AMERICAN DREAMS* (1990) (collecting interviews of Mexican immigrant experience); Elvia R. Arriola, [LatCrit Theory, International Human Rights, Popular Culture, and The Faces of Despair in INS Raids](#), 28 U. MIAMI INTER-AM. L. REV. 245, 256-62 (1996-97) (offering stories of personal impact of immigration enforcement); Roberto L. Corrada, [Familiar Connections: A Personal Re/View of Latino/a Identity, Gender, and Class Issues in the Context of the Labor Dispute Between Sprint and La Conexion Familiar](#), 53 U. MIAMI L. REV. 1065 (1999) (presenting narrative highlighting class, racial, and gender identity issues).

17. See Berta Esperanza Hernandez-Truyol, [LatIndia II -- Latinas/os, Natives, and Mestizajes -- A LatCrit Navigation of Nuevos Mundos, Nuevas Fronteras, and Nuevas Teorias](#), 33 U.C. DAVIS L. REV. 851 (2000).

18. See Pedro A. Malavet, [Literature and Arts as Antisubordination Praxis LatCrit Theory and Cultural Production: The Confessions of an Accidental Crit](#), 33 U.C. DAVIS L. REV. 1293 (2000); Pamela J. Smith, [The Tyrannies of Silence of the Untenured Professors of Color](#), 33 U.C. DAVIS L. REV. 1105 (2000).

19. See Iglesias, *supra* note 7, at 595, 622-29; **Kevin R. Johnson**, [Racial Hierarchy, Asian Americans, and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?](#), 76 OR. L. REV. 347, 358-62 (1997); George A. Martinez, [African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition](#), 19 CHICANO-LATINO L. REV. 213, 221-22 (1998); Athena D. Mutua, [Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm](#), 53 U. MIAMI L. REV. 1177, 1202-15 (1999). Professor Frank Valdes has referred to this phenomenon as "webs of power." Francisco Valdes, [Piercing Webs of Power: Identity, Resistance, and Hope in LatCrit Theory and Praxis](#), 33 U.C. DAVIS L. REV. 897 (2000).

20. Compare Juan F. Perea, [The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought](#), 85 CAL. L. REV. 1213 (1997), 10 LA RAZA L.J. 127 (1998) (criticizing Black/White view of civil rights), with Anthony Paul Farley, [All Flesh See It Together](#), 19 CHICANO-LATINO L. REV. 163 (1998) (challenging criticism of Black/White paradigm).

21. See Iglesias, *supra* note 7, at 622-29 (responding to critiques of focus on African Americans in LatCrit, including claim that this approach leaves "Lat" out of LatCrit).

22. See Farley, *supra* note 20, at 172-74; **Kevin R. Johnson** & George A. Martinez, [Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship](#), 53 U. MIAMI L. REV. 1143, 1157-59 (1999); see also CHALLENGING FRONTERAS: RESTRUCTURING LATINA AND LATINO LIVES IN THE U.S. (Mary Romero et al. eds., 1997) (providing analysis of Latina/o civil rights issues); RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA (1993) (offering multicultural approach to history of racial subordination).

23. See Farley, *supra* note 20, at 174.

24. See, e.g., Juan F. Perea, Five Axioms in Search of Equality, 2 HARV. LATINO L. REV. 231, 238 (1997) (suggesting that certain African Americans have a "possessory attitude toward civil rights"). Some have stated that the challenge to the Black/White paradigm "could be read as a criticism of African-American scholars We must remember that African Americans did not create the binary color line." Leslie Espinoza & Angela P. Harris, [Afterword: Embracing the Tar-Baby -- LatCrit Theory and the Sticky Mess of Race](#), 85 CAL. L. REV. 1585, 1615 (1997), 10 LA RAZA L.J. 499, 529 (1998); see also Mutua, *supra* note 19, at 1189 (objecting to "tone" of criticism of Black/White binary and emphasizing that "blacks did not invent white racism, nor do we control the primary institutions supporting racial hierarchy") (footnotes omitted).

25. See, e.g., Luz Guerra, [LatCrit y La Des-Colonizacion Nuestra: Taking Colon Out](#), 19 CHICANO-LATINO L. REV. 351 (1998) (analyzing relationship of term "Latino" to Native American history); Siegfried Weissner, [Esa India! LatCrit Theory and the Place of Indigenous Peoples Within Latina/o Communities](#), 53 U. MIAMI L. REV. 831 (1999) (analyzing history of subordination in Latin America). LatCrit inquiry into the status of indigenous peoples in the United States and Latin America is necessary given the well-documented human rights abuses of these peoples. See, e.g., AMNESTY INTERNATIONAL, HUMAN RIGHTS VIOLATIONS AGAINST THE INDIGENOUS PEOPLES OF THE AMERICAS (1992).

26. See generally JULIAN SAMORA, MESTIZAJE: THE FORMATION OF CHICANOS (1996).

27. See, e.g., **Kevin R. Johnson**, ["Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience](#), 85 CAL. L. REV. 1259, 1272-74 (1997), 10 LA RAZA L.J. 173, 186-88 (1998); George A. Martinez, [Latinos, Assimilation, and the Law: A Philosophical Perspective](#), 20 CHICANO-LATINO L. REV. 1 (1999).

28. See RODOLFO F. ACUNA, ANYTHING BUT MEXICAN: CHICANOS IN CONTEMPORARY LOS ANGELES (1996).

29. See Hernandez-Truyol, *supra* note 17.

30. Luis Angel Toro, ["A People Distinct from Others": Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15](#), 26 TEX. TECH L. REV. 1219, 1238 (1995) (footnote omitted).

31. See MANUEL G. GONZALES, *MEXICANOS: A HISTORY OF MEXICANS IN THE UNITED STATE* 4 (1999); see also Ramon A. Gutierrez, *Community, Patriarchy and Individualism: The Politics of Chicano History and the Dream of Equality*, 45 AM. Q. 44, 46 (1993) ("Chicanismo meant identifying with la raza (the race or people), and collectively promoting the interests of carnales (or brothers) with whom they shared a common language, culture, religion, and Aztec heritage.").

32. See, e.g., Berta Esperanza Hernandez-Truyol, [Borders \(En\) Gendered: Normativities, Latinas, and a LatCrit Paradigm](#), 72 N.Y.U. L. REV. 882 (1997); Berta Esperanza Hernandez-Truyol, [Building Bridges -- Latinas and Latinos at the Crossroads: Realities, Rhetoric, and Replacement](#), 25 COLUM. HUM. RTS. L. REV. 369 (1994).

33. See, e.g., Rebecca Tsosie, [Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act](#), 29 ARIZ. ST. L.J. 25 (1997); Rebecca Tsosie, [Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Thurgood Marshall's Indian Law Jurisprudence](#), 26 ARIZ. ST. L.J. 495 (1994). Other LatCrit theorists also have federal Indian law expertise. See, e.g., READINGS IN AMERICAN INDIAN LAW: RECALLING THE RHYTHM OF SURVIVAL (Jo Carrillo ed., 1998); Nell Jessup Newton, [Indian Claims in the Courts of the Conqueror](#), 41 AM. U. L. REV. 753 (1992).

34. See Rebecca Tsosie, Native Cultures, Comparative Values and Critical Intersections Panel Presentation at LatCrit IV (Apr. 30, 2000). Other panelists included Jo Carillo, Donna Coker, Berta Esperanza Hernandez-Truyol, and Eric Yamamoto.

35. See generally FELIX S. COHEN, *FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* (1986) (recounting history of U.S. government's policies toward Indian tribes).

36. See GLORIA ANZALDUA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* 1-13 (1987) (placing Aztlan in historical and political context); Ian F. Haney Lopez, [Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory](#), 85 CAL. L. REV. 1143, 1176 (1997), [10 LA RAZA L.J. 57, 90](#) (1998) (referring to "Aztlan, the mythical homeland for those of Aztec descent and a powerful symbol of Chicano identity and resistance") (footnote omitted). See generally *AZTLAN: ESSAYS ON THE CHICANO HOMELAND* (Rodolfo A. Anaya & Francisco Lomeli eds., 1989) (collection of essays analyzing concept of Aztlan).

37. See generally IGNACIO M. GARCIA, *CHICANISMO: THE FORGING OF A MILITANT ETHOS AMONG MEXICAN AMERICANS* (1997) (analyzing evolution of Chicano/a movement).

38. Toro, *supra* note 30, at 1250 n. 184 (citation omitted).

39. See RODOLFO F. ACUNA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 340-41 (3d ed. 1988); see also *infra* note 76 (citing authorities analyzing legacy of Treaty of Guadalupe Hidalgo). See generally RICHARD

GARDNER, GRITO! REIES TIJERINA AND THE NEW MEXICO LAND GRANT WAR OF 1967 (1970); REIES TIJERINA, MI LUCHA POR LA TIERRA (1978).

40. See, e.g., ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND CONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999); Eric K. Yamamoto, *Conflict and Complicity: Justice Among Communities of Color*, 2 HARV. LATINO L. REV. 495 (1997); Eric K. Yamamoto, [Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America](#), 95 MICH. L. REV. 821 (1997).

41. See Eric K. Yamamoto, [Practically Reframing Rights: Culture, Translation, and Judging](#), 33 U.C. DAVIS L. REV. 875 (2000).

42. [146 F.3d 1075 \(9th Cir. 1998\)](#), rev'd, [120 S.Ct. 1044 \(2000\)](#). In this case, the Court decided the constitutionality of "special elections for trustees of the Office of Hawaiian Affairs ..., who must be Hawaiian and who administer public trust funds set aside for the betterment of 'native Hawaiians' and 'Hawaiians,' in which only people who meet the blood quantum requirement for 'native Hawaiian' or 'Hawaiian' may vote." [Rice](#), 146 F.3d at 1076 (footnote omitted). The Court invalidated the election scheme under the Fifteenth Amendment. See [Rice](#), 120 S.Ct. at 1060.

43. Yamamoto, *supra* note 41, at 875.

44. See *infra* text accompanying notes 135-40. Law and culture have been explored in other contexts. See, e.g., RENATO ROSALDO, *CULTURE & TRUTH: THE REMAKING OF SOCIAL ANALYSIS* (1993); Janet E. Halley, [Sexuality, Cultural Tradition, and the Law](#), 8 YALE J.L. & HUMAN. 93 (1996); Madhavi Sunder, *In Fragile Space: Sexual Harassment and the Construction of Indian Feminism*, 18 LAW & POL'Y 419 (1996).

45. See Toro, *supra* note 30, at 1262-63 (raising question whether Filipinos are Latina/o).

46. See generally STANLEY KARNOW, *IN OUR IMAGE: AMERICA'S EMPIRE IN THE PHILIPPINES* (1989) (exploring history of Philippines as part of U.S. colonial empire).

47. See, e.g., *In re Lampitoe*, 232 F. 382 (S.D.N.Y. 1916) (holding that Filipino could not naturalize because he was not "White"); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 315-54 (rev. ed. 1998) (analyzing history of Filipinos in United States); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899) (stating that "the half-civilized Moros of the Philippines ... or even the ordinary Filipino of Manila" in recently-acquired U.S. Territories did not deserve constitutional protections afforded to U.S. citizens).

48. See Victor C. Romero, [Broadening Our World: Citizens and Immigrants of Color in America](#), 27 CAP. U.L. REV. 13 (1998).

49. See Victor C. Romero, ["Aren't You Latino?" Building Bridges upon](#)

[Common Misperceptions](#), 33 U.C. DAVIS L. REV. 837 (2000).

50. See, e.g., YAMAMOTO, *supra* note 41; Deborah A. Ramirez, [Multicultural Empowerment: It's Not Just Black and White Anymore](#), 47 STAN. L. REV. 957 (1995).

51. See Romero, *supra* note 49, at 846-47.

52. See Johnson, *supra* note 27, at 1295-97, 209-10.

53. See **Leti Volpp**, [Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism](#), 96 COLUM. L. REV. 1573 (1996); **Leti Volpp**, [\(Mis\)Identifying Culture: Asian Women and the "Cultural Defense"](#), 17 HARV. WOMEN'S L.J. 57 (1993).

54. See **Leti Volpp**, [American Mestizo: Filipinos and Antimiscegenation Laws in California](#), 33 U.C. DAVIS L. REV. 795 (2000).

55. See generally MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (2d ed. 1994) (analyzing dynamics of racial transformation); IAN F. HANEY-LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (studying similar issues in context of naturalization laws).

56. Volpp, *supra* note 54, at 809-10.

57. *Id.* at 810 n. 59.

58. See George A. Martinez, The Legal Construction of Race: Mexican-Americans and Whiteness, 2 HARV. LATINO L. REV. 321 (1997) (showing how, although Mexicans were classified as "white" for naturalization purposes, there were subject to discrimination and segregation).

59. Volpp, *supra* note 55, at 833.

60. See Devon W. Carbado, The [Ties that Bind](#), 19 CHICANO-LATINO L. REV. 283, 283 (1998) ("My father [is an African Cubano. My mother is Jamaican Am I Latino?").

61. John O. Calmore, Private Obsession, Our Public Sin: Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free", 15 LAW & INEQ. J. 25, 81 (1997).

62. Some of the comments in the following pages are based on my presentation at LatCrit IV on the panel on "Mestizaje, Identity and the Power of Law in Historical Context: LatCrit Perspectives."

63. See ACUNA, *supra* note 28, at 133 (summarizing coalitions between Asian and Chicano/a workers).

64. See F. ARTURO ROSALES, CHICANO! THE HISTORY OF MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT 135-37 (1997).

65. See generally Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 HARV. L. REV. 1843 (1994) (analyzing relationship between geography and race relations).

66. See OSCAR MARTINEZ, BORDER PEOPLE: LIFE AND SOCIETY IN THE U.S.-MEXICO BORDERLANDS 325 n. 5 (1994).

67. See [Loving v. Virginia](#), 388 U.S. 1, 11 (1967) ("The fact that Virginia

prohibits only interracial marriages involving white persons demonstrates that [they are measures designed to maintain White Supremacy."] (footnote omitted); Akhil Reed Amar, [Attainder and Amendment 2: Romer's Rightness](#), 95 MICH. L. REV. 203, 205 n. 7 (1996) ("[The social meaning of miscegenation laws was the legal enactment of racial hierarchy ...]"). Some today hope that racial mixture will have precisely this impact. See Jim Chen, [Unloving](#), 80 IOWA L. REV. 145, 167-72 (1994); Alex M. Johnson, [Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law](#), 84 CAL. L. REV. 887, 925-31 (1996).

68. See, e.g., JOSE VASCONCELOS, *RAZA COSMICA* (1925) (viewing racial mixture in Mexico as creating a "cosmic race" (raza cosmica)).

69. JUAN GOMEZ QUINONES, *ROOTS OF CHICANO POLITICS*, 1600-1940, at 11 (1994).

70. See ROXANNE DUNBAR ORTIZ, *ROOTS OF RESISTANCE: LAND TENURE IN NEW MEXICO, 1600-1980*, at 50 (1980) (A "caste system, pervaded Spanish colonial societies, little different from the racism which modern colonialism has bred wherever it has become rooted.").

71. Keith Aoki, (Re)Presenting Representation, 2 HARV. LATINO L. REV. 247, 247 (1997).

72. Compare Elizabeth M. Iglesias & Francisco Valdes, Afterword -- [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, 511-46 (1998) (calling for critical scrutiny by LatCrits of how Catholicism has contributed to subordination), Margaret E. Montoya, [Religious Rituals and LatCrit Theorizing](#), 19 CHICANO-LATINO L. REV. 417, 427-29 (1998) (same), and Nancy Ota, [Falling From Grace: A Mediation on LatCrit II](#), 19 CHICANO-LATINO L. REV. 437 (1998) (describing her experiences and feelings with religious symbols at LatCrit IV and about Catholicism generally), with Emily Fowler Hartigan, [Disturbing the Peace](#), 19 CHICANO-LATINO L. REV. 479 (1998) (offering wholly different perspective on religion and events at LatCrit IV), and Reynaldo Anaya Valencia, [On Being an "Out" Catholic: Contextualizing the Role of Religion at LatCrit II](#), 19 CHICANO-LATINO L. REV. 449, 458-66 (1998) (articulating his views on Catholicism from working class Chicano perspective).

73. See Elvia Arriola, Foreword -- [March!](#), 19 CHICANO-LATINO L. REV. 1, 43-53 (1998).

74. See ACUNA, *supra* note 39, at 431-37; ROSALES, *supra* note 64, at 138-42; see also GARCIA, *supra* note 37, at 61-63 (discussing ambivalence about Catholic Church among Chicano/a activists in 1960s and 1970s).

75. See Iglesias & Valdes, *supra* note 72, at 511-46.

76. See, e.g., **Guadalupe T. Luna**, *On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sandford*, 53 U. MIAMI L. REV. 691 (1999); **Guadalupe T. Luna**, *Chicana/Chicano Land Tenure in the Agrarian Domain: On The Edge of a "Naked Knife"*, 4 MICH. J. RACE & L. 3 (1998);

Guadalupe T. Luna, [En el Nombre de Dios-Poderoso: The Treaty of Guadalupe Hidalgo and Narrativos Legales](#), 5 SW. J.L. & TRADE AM. 45 (1998); **Guadalupe T. Luna**, ["Agricultural Underdogs" and International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy](#), 26 N.M.L. REV. 9 (1996) [hereinafter Luna, *Agricultural Underdogs*. See generally THE LEGACY OF THE MEXICAN AND SPANISH-AMERICAN WARS: LEGAL, LITERARY, AND HISTORICAL PERSPECTIVES (Gary D. Keller & Cordelia Candelaria eds., 2000) (compiling readings on legal history of Treaty of Guadalupe Hidalgo); Symposium, [Understanding the Treaty of Guadalupe Hidalgo on Its 150th Anniversary](#), 5 SW. J.L. & TRADE AM. 5 (1998) (collecting essays analyzing legal and other implications of lack of enforcement of Treaty of Guadalupe Hidalgo) [hereinafter Symposium, *Understanding the Treaty of Guadalupe Hidalgo*].

77. See **Guadalupe T. Luna**, [Gold, Souls, and Wandering Clerics: California Missions, Native Californians, and LatCrit Theory](#), 33 U.C. DAVIS L. REV. 921 (2000).

78. [Id.](#) at 925.

79. [Id.](#) at 935-36.

80. See Iglesias & Valdes, *supra* note 72, at 511-40.

81. See Terry Rey, "The [Virgin's Slip is Full of Fireflies](#)": The Multiform Struggle over the Virgin Mary's Legitimierende Macht in Latin America and Its Diasporic Communities, 33 U.C. DAVIS L. REV. 955 (2000).

82. [Id.](#) at 956; see also Linda L. Ammons, [What's God Got to Do with It? Church and State Collaboration in the Subordination of Women and Domestic Violence](#), 51 RUTGERS L. REV. 1207 (1999) (analyzing role of Christianity in subordination of women and condoning domestic violence).

83. Rey, *supra* note 81, at 957-58.

84. See, e.g., Laura M. Padilla, [Social and Legal Repercussions of Latinos' Colonized Mentality](#), 53 U. MIAMI L. REV. 769 (1999); Laura M. Padilla, [Single-Parent Latinas on the Margin: Seeking a Room with a View, Meals, and Built-In Community](#), 13 WIS. WOMEN'S L.J. 179 (1998); Laura M. Padilla, [Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue](#), 66 FORDHAM L. REV. 843 (1997).

85. See Laura M. Padilla, [Latinas, and Religion: Subordination or State of Grace?](#), 33 U.C. DAVIS L. REV. 973 (2000).

86. [Id.](#) at 974; see also JEANETTE RODRIGUEZ, OUR LADY OF GUADALUPE: FAITH AND EMPOWERMENT AMONG MEXICAN-AMERICAN WOMEN (1994) (analyzing religious symbols as source of hope and power for Mexican American women).

87. See Padilla, *supra* note 85, at 976-79.

88. See *id.* at 987 n. 72.

89. See Valencia, *supra* note 72, at 451-53.

90. RICHARD RODRIGUEZ, HUNGER OF MEMORY (1981).

91. See *supra* text accompanying note 74.

92. See Iglesias & Valdes, *supra* note 72, at 535-45 (investigating liberation theology's relevance to LatCrit theory).

93. See, e.g., Anthony E. Cook, [Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.](#), 103 HARV. L. REV. 985 (1990).

94. See Michael Scaperlanda, [Who Is My Neighbor? An Essay on Immigration, Welfare Reform, and the Constitution](#), 29 CONN. L. REV. 1587 (1997).

95. See, e.g., Berta Esperanza Hernandez-Truyol, *Las Olvidadas -- Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 IOWA J. GENDER, RACE & JUSTICE 353 (1998); Margaret E. Montoya, *Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 15 CHICANO-LATINO L. REV. 1 (1994).

96. See Kimberle Crenshaw, [Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color](#), 43 STAN. L. REV. 1241 (1991); Angela P. Harris, [Race and Essentialism in Feminist Legal Theory](#), 42 STAN. L. REV. 581 (1990). Intersectionality analysis has been expanded to apply to other groups and to emphasize the multi-dimensionality of identity. See, e.g., Darren Lenard Hutchinson, [Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics](#), 47 BUFFALO L. REV. 1 (1999); Francisco Valdes, [Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex", "Gender," and "Sexual Orientation" in Euro-American Law and Society](#), 83 CAL. L. REV. 1 (1995).

97. See Donna Coker, [Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color](#), 33 U.C. DAVIS L. REV. 1009 (2000); see also Donna Coker, [Enhanced Autonomy for Battered Women: Lessons from Navajo Peacemaking](#), 47 UCLA L. REV. 1 (1999); Jenny Rivera, [Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials](#), 14 B.C. THIRD WORLD L.J. 231 (1994).

98. See generally CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997) (collecting essays on Critical Race Feminism).

99. See, e.g., MARY ROMERO, *MAID IN THE U.S.A.* (1992); Maria L. Ontiveros, [To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII](#), 20 N.Y.U. REV. L. & SOC. CHANGE 607 (1993-94).

100. See Janet Calvo, [Spouse Based Immigration Laws: The Legacy of Coverture](#), 28 SAN DIEGO L. REV. 593 (1991); Cecelia Espenosa, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 MARQUETTE L. REV. 163 (1999); Lee J. Teran, [Barriers to Protection at Home and Abroad: Mexican Victims of Domestic Violence and the Violence Against Women Act](#), 17 B.U. INT'L L.J. 1 (1999); see also Virginia P. Coto, [LUCHA, The Struggle for Life: Legal Services for Battered Immigrant](#)

[Women](#), 53 U. MIAMI L. REV. 749 (1999) (summarizing difficulties facing organizations providing legal services to poor, battered immigrant women).

101. See Rachel F. Moran, [Foreword -- Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond](#), 8 LA RAZA L.J. 1, 10 (1995) (noting that Latinas/os "often have been attuned to questions of class, rather than race or ethnicity, in formulating a reform agenda"); see also Mary Romero, [Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: "Where Can You Find Good Help These Days!"](#), 53 U. MIAMI L. REV. 1045 (1999) (analyzing issues of race and class implicated for Latinas in domestic service industry).

102. See **Kevin R. Johnson**, Some Thoughts on the Future of Latino Legal Scholarship, 2 HARV. LATINO L. REV. 101, 129-38 (1997). This focus on Latina/o diversity at LatCrit I provoked critical response. See Michael Luis Principe, A Reason for LatCrit Unification: Reflections on Comparative Efforts to Curtail Political Opposition and Terrorism, 2 HARV. LATINO L. REV. 297, 298 (1997); Ediberto Roman, Common Ground: Perspectives on Latino-Latina Diversity, 2 HARV. LATINO L. REV. 483, 483-84 (1997).

103. Iglesias, *supra* note 7, at 664-72.

104. See **Tanya K. Hernandez**, ["Multiracial Discourse": Racial Classifications in an Era of Color-Blind Jurisprudence](#), 57 MD. L. REV. 97 (1998); **Tanya K. Hernandez**, The [Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws](#), 76 OR. L. REV. 731 (1997).

105. See **Tanya K. Hernandez**, An [Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context](#), 33 U.C. DAVIS L. REV. 1135 (2000). For analysis of the place of Cubans in a Latina/o coalition, see Max J. Castro, Making Pan Latino: Latino Pan-Ethnicity and the Controversial Case of the Cubans, 2 HARV. LATINO L. REV. 179, 191-96 (1997).

106. See Gloria Sandrino-Glasser, [Los Confundidos: De-Conflating Latino/as' Race and Ethnicity](#), 19 CHICANO-LATINO L. REV. 69, 89-90 & n. 81 (1998).

107. Hernandez, *supra* note 105, at 1167.

108. See Leonard M. Baynes, [Who Is Black Enough for You? The Stories of One Black Man and His Family's Pursuit of the American Dream](#), 11 GEO. IMMIGR. L.J. 97 (1996); Hope Lewis, [Lion-heart Gals Facing the Dragon: The Human Rights of Inter/National Black Women in the United States](#), 76 OR. L. REV. 567 (1997).

109. See Lolita K. Buckner Inniss, [Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness](#), 49 DEPAUL L. REV. 85 (1999); see also Berta Esperanza Hernandez-Truyol, [Building Bridges III -- Personal Narratives, Incoherent Paradigms, and Plural Citizens](#), 19 CHICANO-LATINO L. REV. 303, 322 (1998) (observing that Black immigration includes "not only [that from many different African countries ..., but also from the Caribbean countries. Such increased diversity increases the commonality and intersection of issues of Blacks

with those facing Latina/o and Asian/Pacific groups ...").

110. For example, at the LatCrit IV conference, on the plenary panel entitled "The Meanings and Particularities of Blackness: Latina/o Identities and LatCrit Theory," Professor Taunya Lovell Banks and Charles Venator Santiago, as well as Professor Hernandez, presented papers on the Afro-Latina/o experience. These panelists also presented these papers on a panel on "Afro Latina/os and Racial Formation" at the 1999 Annual Meeting of the American Society of Legal History in Toronto in October 1999. See American Society for Legal History, Twenty-Ninth Annual Meeting, Oct. 21-23, 1999, at 19 (1999).

111. See Christopher David Ruiz Cameron, [The Rakes of Wrath: Urban Agricultural Workers and the Struggle Against Los Angeles's Ban on Gas-Powered Leaf Blowers](#), 33 U.C. DAVIS L. REV. 1087 (2000); see also Christopher David Ruiz Cameron, [The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers](#), 53 U. MIAMI L. REV. 1089 (1999) (contending that future of organized labor in United States rests on Latina/o workers).

112. See MARY S. PARDO, MEXICAN AMERICAN WOMEN ACTIVISTS: IDENTITY AND RESISTANCE IN TWO LOS ANGELES COMMUNITIES (1998); Luke W. Cole, [Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law](#), 19 ECOLOGY L.Q. 619 (1992); Eileen Gauna, [The Environmental Justice Misfit: Public Participation and the Paradigm Paradox](#), 17 STAN. ENVTL. L.J. 3 (1998); Olga L. Moya, [Adopting an Environmental Justice Ethic](#), 5 DICK. J. ENVTL. L. & POL'Y 215 (1996).

113. See Richard J. Lazarus, [Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection](#), 87 NW. U.L. REV. 787, 850-52 (1992).

114. See **Kevin R. Johnson** & George A. Martinez, [Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education](#), 33 U.C. DAVIS L. REV. 1227 (2000).

115. See, e.g., Robert S. Chang & Keith Aoki, [Centering the Immigrant in the Inter/National Imagination](#), 85 CAL. L. REV. 1395 (1997), 10 LA RAZA L.J. 309 (1998); **Kevin R. Johnson**, ["Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons](#), 28 U. MIAMI INTER-AM. L. REV. 263 (1997).

116. See, e.g., Steven W. Bender, Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience, 2 HARV. LATINO L. REV. 145 (1997); Christopher David Ruiz Cameron, [How the Garcia 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), 10 LA RAZA L.J. 261 (1998); Iglesias, *supra* note 7, at 646-59; Madeleine Plasencia, ["Suppressing the Mother Tongue" -- Anti-Subordination](#)

and the Legal Struggle over Control of the Means of Communication, 53 U. MIAMI L. REV. 989 (1999); Yvonne A. Tamayo, ["Official Language" Legislation: Literal Silencing/Silenciando La Lengua](#), 13 HARV. BLACKLETTER J. 107 (1997); John Hayakawa Torok, [Finding Me in LatCrit Theory: Thoughts on Language Acquisition and Loss](#), 53 U. MIAMI L. REV. 1019 (1999); see also Drucilla Cornell & William W. Bratton, [Deadweight Costs and Intrinsic Wrongs of Nativism: Economic, Freedom and Legal Suppression of Spanish](#), 84 CORNELL L. REV. 595 (1999) (raising philosophical and economic arguments against English-only regulations).

117. We both built on past work related to the topic. See **Kevin R. Johnson**, [An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race](#), 70 WASH. L. REV. 629, 650-61 (1995) (studying anti-Mexican undercurrent to initiative campaign); George A. Martinez, [Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980](#), 27 U.C. DAVIS L. REV. 555 (1994) (considering limited litigation successes of Mexican-Americans).

118. Laura E. Gomez, [Constructing Latina/o Identities](#), 19 CHICANO-LATINO L. REV. 187, 187 (1998).

119. See Johnson & Martinez, *supra* note 114, at 1231-47.

120. See Smith, *supra* note 18.

121. See *id.* at 1130-31.

122. See, e.g., Larry Cata Backer, [The Many Faces of Hegemony: Patriarchy and Welfare as a Woman's Issue](#), 92 NW. U.L. REV. 327 (1997); Larry Cata Backer, [Welfare Reform at the Limit: The Futility of "Ending Welfare as We Know It"](#), 30 HARV. C.R.-C.L. L. REV. 339 (1995).

123. See Larry Cata Backer, [Measuring the Penetration of Outsider Scholarship in the Courts: Indifference, Hostility, Engagement](#), 33 U.C. DAVIS L. REV. 1173 (2000).

124. See Paul Butler, [Racially Based Nullification: Black Power in the Criminal Justice System](#), 105 YALE L.J. 677 (1995).

125. See Martinez, *supra* note 117 (analyzing pattern of state, as well as and federal, court decisions denying civil rights to Mexican Americans).

126. Cf. Michael A. Olivas, [Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications](#), 35 VA. J. INT'L L. 217 (1994) (defending federal preemption of any state regulation of immigration in part because of possibility that states might attack immigrants).

127. See, e.g., William R. Tamayo, [When the "Coloreds" Are Neither Black Nor Citizens: The United States Civil Rights Movement and Global Migration](#), 2 ASIAN L.J. 1 (1995).

128. See William R. Tamayo, [The Role of the EEOC in Protecting the Civil Rights of Farmworkers](#), 33 U.C. DAVIS L. REV. 1075 (2000).

129. See *id.* at 1080-82.

130. See, e.g., CLETUS E. DANIEL, BITTER HARVEST: A HISTORY OF CALIFORNIA FARMWORKERS, 1870-1941 (1981); Harvest of Shame (CBS television broadcast, Nov. 11, 1960).

131. See Francisco Valdes, Foreword -- Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment, 2 HARV. LATINO L. REV. 1, 53 (1997).

132. See Sumi Cho & Robert Westley, Historicizing Critical Race Theory's Cutting Edge: [Key Movements that Performed the Theory](#), 33 U.C. DAVIS L. REV. 1377 (2000).

133. See KIMBERLE CRENSHAW ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xx-xxii (1995).

134. See Cho & Westley, *supra* note 132, at 1408 n. 67.

135. See Anne Salzman Kurzweg, [Live Art and Audience: Toward a Speaker- Focused Freedom of Expression](#), 34 HARV. C.R.-C.L. L. REV. 437, 446-47 (1999); see also Anthony Chase, [Toward a Legal Theory of Popular Culture](#), 1986 WIS. L. REV. 527 (considering political nature of popular culture).

136. See Malavet, *supra* note 18, at 1324-31.

137. See *id.* at 1297-1306.

138. See Nicholas A. Gunia, [Half the Story Has Never Been Told: Popular Jamaican Music as Antisubordination Praxis](#), 33 U.C. DAVIS L. REV. 1333 (2000).

139. See, e.g., EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1976).

140. See Regina Austin, "The [Black Community,](#)" [Its Lawbreakers,](#) and [a Politics of Identification](#), 65 S. CAL. L. REV. 1769, 1812-14 (1992); Theresa A. Martinez; [Embracing the Outlaws: Deviance at the Intersection of Race, Class, and Gender](#), 1994 UTAH L. REV. 193, 198-203. For chilling accounts of Chicano/a gang culture, see YXTA MAYA MURRAY, LOCAS (1997), which offers a fictional account of Chicana gang members in Los Angeles, LUIS J. RODRIGUEZ, ALWAYS RUNNING: LA VIDA LOCA: GANG DAYS IN L.A. (1993), and MONA RUIZ, TWO BADGES: THE LIVES OF MONA RUIZ (1991).

141. See **Kevin R. Johnson** & Amagda Perez, [Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory](#), 51 SMU L. REV. 1423 (1998).

142. See, e.g., ALFREDO MIRANDE, HOMBRES Y MACHOS: MASCULINITY AND LATINO CULTURE (1997); ALFREDO MIRANDE GRINGO JUSTICE (1987); ALFREDO MIRANDE & EVANGELINA ENRIQUEZ, LA CHICANA: THE MEXICAN AMERICAN WOMAN (1981).

143. See Alfredo Mirande Gonzalez, [Alfredo's Jungle Cruise: Chronicles on Law, Lawyering, and Love](#), 33 U.C. DAVIS L. REV. 1347 (2000).

144. See, e.g., DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

145. See, e.g., RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995).

146. See, e.g., Anthony V. Alfieri, [Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative](#), 100 YALE L.J. 2107 (1991); Ruth Buchanan & Louise Trubek, *Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 NYU REV. L. & SOC. CHANGE 687 (1992).

147. See, e.g., Mirande, *supra* note 143, at 1355 n. 10 (stating that Fermina "looks great in her Black Charra outfit").

148. See *infra* note 178 (citing authorities).

149. See, e.g., Chang & Aoki, *supra* note 115 (analyzing how international developments shaped the evolution of Asian American community in Monterey Park, California).

150. See Colloquium, [International Law, Human Rights and LatCrit Theory](#), 28 U. MIAMI INTER-AM. L. REV. 177 (1997).

151. See Elizabeth M. Iglesias, [Human Rights in International Economic Law: Locating Latina/os in the Linkages Debates](#), 28 U. MIAMI INTER-AM. L. REV. 361 (1997); see also Jose E. Alvarez, [Critical Theory and the North American Free Trade Agreement's Chapter 11](#), 28 U. MIAMI INTER-AM. L. REV. 303 (1996-97) (suggesting that investment chapter of NAFTA might well injure Mexican citizens and spur migration to United States); George A. Martinez, [Dispute Resolution and the Treaty of Guadalupe Hidalgo: Parallels and Possible Lessons for Dispute Resolution](#), 5 SW. J.L. & TRADE AM. 147, 157-75 (1998) (analyzing how dispute resolution mechanisms under NAFTA are anti-Mexican).

152. Iglesias, *supra* note 7, at 631-46.

153. See, e.g., Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87 (1993).

154. See, e.g., Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. STATE U. L. REV. 1 (1998); Ediberto Roman, [Empire Forgotten: The United States' Colonization of Puerto Rico](#), 42 VILL. L. REV. 1119 (1997) [hereinafter Roman, *Empire Forgotten*].

155. VDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY OF NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* (1999).

156. See Tayyab Mahmud, [Race, Reason, and Representation](#), 33 U.C. DAVIS L. REV. 1581 (2000).

157. See Timothy A. Canova, [Global Finance and the International Monetary Fund's Neoliberal Agenda: The Threat to the Empowerment, Ethnic Identity, and Cultural Pluralism of Latina/o Communities](#), 33 U.C. DAVIS L. REV. 1547 (2000) [hereinafter Canova, *Global Finance*]. This article builds on Professor Canova's previous international finance scholarship, including Timothy A. Canova, [Banking and Financial Reform at the Crossroads of the Neoliberal Contagion](#), 7 U.S.-MEXICO L.J. 85 (1999), and Timothy A. Canova, [Banking](#)

[and Financial Reform at the Crossroads of the Neoliberal Contagion](#), 14 *AM. U. INT'L L. REV.* 1571 (1999).

158. See, e.g., *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 3d ed. 1998); RICHARD DELGADO & JEAN STEFANCIC, *FAILED REVOLUTIONS: SOCIAL REFORMS AND THE LIMITS OF THE LEGAL IMAGINATION* (1994); Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 *ST. LOUIS L.J.* 425 (1990).

159. Canova, *Global Finance*, *supra* note 157, at 1549 (footnote omitted).

160. See Enrique R. Carrasco, *Opposition, Justice, Structuralism, and Particularity: Intersections Between LatCrit Theory and Law and Development Studies*, 28 *MIAMI INTER-AM. L. REV.* 313 (1996-97); see also Enrique R. Carrasco & Randall Thomas, [Encouraging Relational Investment and Controlling Portfolio Investment in Developing Countries in the Aftermath of the Mexican Financial Crisis](#), 34 *COLUM. J. TRANSNAT'L L.* 539 (1996) (analyzing how certain foreign investment might benefit developing nations); Enrique R. Carrasco, [Law, Hierarchy, and Vulnerable Groups in Latin America: Towards a Communal Need of Development in a Neoliberal World](#), 30 *STAN. J. INT'L L.* 221 (1994) (articulating communal model of development designed to improve vulnerable groups in Latin America).

161. See Canova, *Global Finance*, *supra* note 157, at 1568-71.

162. See Chantal Thomas, [Globalization and the Reproduction of Hierarchy](#), 33 *U.C. DAVIS L. REV.* 1451 (2000) [hereinafter Thomas, *Globalization*. Professor Thomas's previous scholarship has considered the effects of the changing international economy on developing nations. See Chantal Thomas, [Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development](#), 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 1 (1999); Chantal Thomas, [Transfer of Technology in the Contemporary International Order](#), 22 *FORDHAM INT'L L.J.* 2096 (1999); Chantal Thomas, [Does the "Good Governance Policy" of the International Financial Institutions Privilege Markets at the Expense of Democracy](#), 14 *CONN. J. INT'L L.* 551 (1999).

163. Thomas, *Globalization*, *supra* note 162, at 1451 (footnote omitted).

164. *Id.* at 1499.

165. See *supra* text accompanying notes 19, 101-30, 149-53.

166. See Thomas, *Globalization*, *supra* note 162, at 1456-76. For analysis of the conflicts between immigrants and established U.S. residents of Mexican ancestry, see Kevin R. Johnson, [Immigration and Latino Identity](#), 19 *CHICANO-LATINO L. REV.* 197 (1998).

167. See VERNON M. BRIGGS, JR., *MASS IMMIGRATION AND THE NATIONAL INTEREST* (1992).

168. See, e.g., PHILIP L. MARTIN & DAVID A. MARTIN, *THE ENDLESS QUEST: HELPING AMERICA'S FARM WORKERS* 174-77 (1994).

169. See, e.g., Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, 40 B.C. L. REV. 179, 19 B.C. THIRD WORLD L.J. 179 (1998).

170. See Gil Gott, [Critical Race Globalism?: Global Political Economy and the Intersections of Race, Nation, and Class](#), 33 U.C. DAVIS L. REV. 1503 (2000).

171. See Ediberto Roman, [A Race Approach to International Law \(RAIL\): Is There a Need for Yet Another Critique of International Law?](#), 33 U.C. DAVIS L. REV. 1519 (2000) [hereinafter Roman, RAIL; see also Ediberto Roman, *Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm*, 53 U. MIAMI L. REV. 943 (1999) (criticizing role of positivist theory in international law)].

172. See Steven R. Ratner & Anne-Marie Slaughter, [Appraising the Methods of International Law: A Prospectus for Readers](#), 93 AM. J. INT'L L. 291 (1999); Elizabeth M. Iglesias, [Out of the Shadow: Marking Intersections In and Between Asian Pacific American Critical Legal Scholarship, and Latina/o Critical Legal Theory](#), 40 B.C. L. REV. 349, 372 n. 65 (1998), 19 B.C. THIRD WORLD L.J. 349, 372 n. 65 (1998); David Kennedy & Chris Tennant, *New Approaches to International Law -- A Bibliography*, 35 HARV. J. INT'L L. 417 (1994).

173. See Roman, RAIL, *supra* note 171.

174. See, e.g., Christopher David Ruiz Cameron, [One Hundred and Fifty Years of Solitude: Reflections on the End of the History Academy's Dominance of Scholarship on the Treaty of Guadalupe Hidalgo](#), 5 SW. J.L. & TRADE AM. 83 (1998).

175. See *supra* notes 46-47 (citing authorities).

176. See *supra* text accompanying note 19.

177. See *supra* note 19 (citing authorities).

178. See, e.g., DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON* (1997); Matthew W. Finkin, [Quatsch!](#), 83 MINN. L. REV. 1681 (1999); Chen, *supra* note 67; Anne M. Coughlin, [Regulating the Self: Autobiographical Performances in Outsider Scholarship](#), 81 VA. L. REV. 1229 (1995).

179. See Angela P. Harris, [Foreword: The Jurisprudence of Reconstruction](#), 82 CAL. L. REV. 741, 744-45 (1994).

180. See Arriola, *supra* note 73, at 14 (observing that "conflicts [at LatCrit II centered on everything from the personal to the political, and from the personal which became political"] (footnote omitted)).

181. Iglesias, *supra* note 7, at 578.

182. See Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467, 1471 (1996).

183. See Johnson & Martinez, *supra* note 22, at 1155-57 (calling for specific exploration of Chicano/a experience).

184. See, e.g., *supra* text accompanying notes 157-61.

185. See Francisco Valdes, "Criminality, Accountability and Reparations: Post-Pinochet Extrapolations," at *The Spanish Legal System and LatCrit Theory: A Dialogue*, Presentation at the University of Malaga, Malaga, Spain (June 30, 1999).

186. See LATINO/A CONDITION, *supra* note 2; *supra* note 2 (citing various symposia and colloquium).

187. See, e.g., Iglesias, *supra* note 172; Luna, *Agricultural Underdogs*, *supra* note 76; Hernandez-Truyol, *supra* note 95; Montoya, *supra* note 95; Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503 (1998); Olivas, *supra* note 158; Roman, *Empire Forgotten*, *supra* note 154; Symposium, *Understanding the Treaty of Guadalupe Hidalgo*, *supra* note 76; Sylvia R. Lazos Vargas, *Deconstructing Homogenous Americanus: The White Ethnic Immigrant and Its Exclusionary Effect*, 72 TUL. L. REV. 1493 (1998); see also Johnson & Martinez, *supra* note 22, at 1159-61 (contending that much Chicano/a Studies scholarship is relevant to LatCrit theory). LatCrit scholarship need not necessarily be published in LatCrit annual symposia or other LatCrit conferences. Rather, as the literature expands, we would hope to see LatCrit scholarship in law reviews outside the annual symposia. Similarly, although the movement was officially denominated "LatCrit" in 1995 or thereabouts, see Iglesias, *supra* note 7, at 673, 680-81, critical literature about Latinas/os and the law existed before that date. Careful research requires looking at literature both inside and outside the official symposia and both before and after LatCrit I in 1996.

188. The primer includes a "Fact Sheet: LatCrit" describing the movement and its participants, as well as "LatCrit: A Conceptual Overview," which is excerpted from Francisco Valdes, *Theorizing "OutCrit" Theories: Comparative Antisubordination Experience and Subordination Vision as Jurisprudential Method*, in CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS (Jerome M. Culp, Jr. et al. eds., forthcoming 2001).

189. See Pedro Malavet <<http://nersp.nerdc.ufl.edu/malavet/latcrit/latcrit.htm#anchorlc>> (on file with author).

190. See, e.g., Canova, *Global Finance*, *supra* note 157.

191. See, e.g., Richard Delgado & Vicki Palacios, *Mexican Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME LAW. 393 (1975); Johnson, *supra* note 118; Martinez, *supra* note 117; Montoya, *supra* note 95; Moran, *supra* note 101.

192. See Iglesias, *supra* note 7, at 679-82. See generally Richard Delgado, *The Imperial Scholar: Reflections on a Review of the Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

193. See Francisco Valdes, *Afterword -- Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience -- RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265, 1299-1306 (1999).

194. LatCrit, Inc. is a fictitious name duly registered with the Florida

Secretary of State on behalf of: Latina and Latino Critical Legal Theory, Inc., a non-profit corporation, incorporated under the laws of the State of Florida.

195. This criticism has been leveled at Critical Race Theory. See Richard Delgado & Jean Stefancic, *Critical Race Theory: Past, Present, and Future*, 51 *CURRENT LEG. PROBS.* 468, 490 (1998) ("CRT ... has not changed with the times. It continues focusing on feelings, language, social construction, and the unique multiple consciousness of people of color, while programs vital to the well being and, indeed, survival, of minority communities are being terminated right and left.").

196. Iglesias & Valdes, *supra* note 72, at 533.

2. Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795 (2000)

Racial aliens may undercut us, take away our jobs, surpass us in business competition, or commit crimes against our laws, and we will be only a little harder on them than we would be on aliens from Europe of our own race. But let them start to associate with our women and we see red. n. 1

In 1933 the California Court of Appeals was faced with the following question: should a Filipino be considered a "Mongolian"? n. 2 Salvador Roldan, a Filipino man, and Marjorie Rogers, a white woman, had applied for a license to marry. Was this marriage acceptable under the state's antimiscegenation laws, which prohibited marriages between "whites" and "Mongolians"? n. 3

This Essay examines the legal history of prohibition of the marriages of whites to Filipinos in the State of California. In writing this history, I note that what we call "history" is in fact an interpretation *796 of the past. n. 4 One does not find, or excavate history; rather, one "commits historical acts." n. 5 If the act of writing history is a site for the renegotiation of meanings, n6 this Essay seeks to reshape the terrain of two different areas of inquiry. The first area is the study of antimiscegenation laws. I seek to complicate how we understand antimiscegenation efforts to relate to race, gender, class, and sexuality. The second area is how we conceptualize the relationship of Filipinos to the broader identity-based rubrics of Asian Americans and Latinas/os. n. 7

This Essay probes what this history suggests about such relationships. I reach these questions through examining the history of antagonism directed against Filipinos in the State of California in the 1920s and 30s, which, while

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economic in its roots, reached its most fevered pitch concerning Filipino relations with white women. This anxiety led to various efforts to classify Filipinos under the state's antimiscegenation statute as "Mongolian," so they would be prohibited from marrying whites. I trace these efforts through both public discourse and legal discourse, in the form of advisory opinions of the California State Attorney General and the Los Angeles County Counsel, litigation in Los Angeles Superior Court and the California Appellate Court, and state legislation. We can understand these efforts as attempts to shift the legal entitlements *797 bundled with the marriage contract away from Filipino men, symbolizing the desire to deny Filipinos membership in the national political community.

I want to first mark the paucity of legal writing, n. 8 both about the Filipina/o American community, n. 9 and about miscegenation laws targeting Asian Americans in general. n. 10 Numbers make this lack of academic inquiry especially surprising. Filipinas/os comprise the second largest community of Asian Americans; n. 11 and laws prohibiting Asian Americans from marrying whites were enacted in fifteen *798 states. n. 12 Thus, this Essay seeks to narrate a neglected area of legal history. Due to the space limitations for contributions to this symposium, I do not attempt to do more than interpret this history and raise some suggestions for future work.

The focus for this Essay is the experience of Filipinos in the State of California, although it is important to note what occurred nationally. The first antimiscegenation statute affecting marriage was enacted in 1661 in Maryland. n. 13 The statute did not prohibit marriage between whites and blacks but it enslaved white women that married black men, as well as the couple's children. n. 14 By the time the Supreme Court finally declared antimiscegenation laws unconstitutional in [Loving v. Virginia](#), n. 15 thirty-nine states had enacted antimiscegenation laws; n. 16 in sixteen of these states, such laws were still in force at the time of the decision. n. 17 While the original focus of *799 these laws was primarily on relationships between blacks and whites, also prohibited were marriages between whites and "Indians" (meaning Native Americans), "Hindus" (South Asians), "Mongolians" (into which were generally lumped Chinese, Japanese, and Koreans), and "Malays" (Filipinos). n. 18 Nine states -- Arizona, California, Georgia, Maryland, Nevada, South Dakota, Utah, Virginia, and Wyoming -- passed laws that prohibited whites from marrying Malays. n. 19 The statutes varied in their enforcement *801 mechanisms: some simply declared miscegenous marriages void; others punished them as felonies. n. 20

I. CALIFORNIA: ASIAN INVASIONS

In 1850 California enacted a law prohibiting marriages between "white persons" and "negroes or mulattoes." n. 21 Twenty-eight years later, a referendum was proposed at the California Constitutional Convention to amend the statute to prohibit marriages between Chinese and whites. n. 22 While the so-called

"Chinese problem" was initially conceptualized as one of economic competition, created by the importation of exploitable laborers without political rights, n 23 the issue of sexual relationships between whites and Chinese also functioned as a prime site of hysteria. n. 24

Invoked were fears of hybridity. John Miller, a state delegate, speculated that the "lowest most vile and degraded" of the white race were most likely to amalgamate with the Chinese, resulting in a "hybrid of the most despicable, a mongrel of the most detestable *802 that has ever afflicted the earth." n. 25 Miscegenation was presented as a public health concern, for Chinese were assumed by most of the delegates to be full of filth and disease. n. 26 Some argued that American institutions and culture would be overwhelmed by the habits of people thought to be sexually promiscuous, perverse, lascivious, and immoral. n. 27 For example, in 1876, various papers stated that Chinese men attended Sunday school in order to debauch their white, female teachers. In response to the articulation of these fears, in 1880 the legislature prohibited the licensing of marriages between "Mongolians" and "white persons." n. 28

The next large group of Asian immigrants -- those from Japan -- was also the subject of antagonism, leading to further amendment of the antimiscegenation laws. While the impetus for tension was, again, economic, two prime sites of expressed anxiety were school segregation n. 29 and intermarriage. Those who sought school segregation depicted the Japanese as an immoral and sexually aggressive group of people, and disseminated propaganda that warned that Japanese students would defile their white classmates. n. 30 The Fresno Republican described miscegenation between whites and *803 the Japanese as a form of "international adultery," n 31 in a conflation of race, gender, and nation. n. 32 In 1905, at the height of the anti-Japanese movement, the state legislature sealed the breach between the license and marriage laws and invalidated all marriages between "Mongolian" and white spouses. n. 33

II. "LITTLE BROWN MEN"

Tension over the presence of Chinese and Japanese had led to immigration exclusion of Chinese and Japanese laborers through a succession of acts dating between 1882 and 1924. Because industrialists and growers faced a resulting labor shortage, they began to import Filipinos to Hawaii and the mainland United States. n. 34 Classified as "American nationals," because the United States had annexed the Philippines following the Filipino-American War, Filipinos *804 were allowed entry into the country. n. 35 On the mainland, a majority of Filipinos resided in California, with sizable numbers also in Washington and Alaska. n. 36 By 1930, the number of Filipinos on the mainland reached over 45,000. n. 37 During the winter, they stayed in the cities -- working as domestics and gardeners, washing dishes in restaurants, and doing menial tasks others refused. In the summer they moved back to the fields and harvested potatoes,

strawberries, lettuce, sugar beets, and fruits. n. 38 Filipinos were kept segregated from other immigrant groups in an attempt to prevent the formation of multiethnic labor unions, n. 39 but ended up spearheading labor organizing in Hawaii and on the mainland. n. 40 Subsequently, the same economic antagonism that was at the base of the anti-Chinese and anti-Japanese movements was turned against Filipinos. But the primary source of antagonism appeared to be linked, even more dramatically, to sex.

On the mainland, ninety-three percent of all who emigrated from the Philippines were males, the vast majority between sixteen and thirty years of age. n. 41 While some scholars have focused on patriarchal Asian values as the reason for early Asian migration being an almost exclusively male phenomenon, others have pointed to labor recruiting patterns and the specifics of the immigration laws themselves as restricting the immigration of Asian women. n. 42 *805 United States capital interests wanted Asian male workers but not their families, because detaching the male worker from a heterosexual family structure meant he would be cheaper labor. n.43

The Filipinos lived in barracks, isolated from other groups, allowed only dance halls, gambling resorts, and pool rooms of Chinatown as social outlets. They led ostracized lives punctuated by the terror of racist violence. Many restaurants and stores hung signs stating "Filipinos and dogs not allowed." n. 44 Anxiety about what was called the "Third Asian invasion" was expressed primarily around three sites. n. 45 first, the idea that Filipinos were destroying *806 the wage scale for white workers; second, the idea that they were disease carriers -- specifically of meningitis, and; n. 46 third, the idea that they were sexually exploiting "American and Mexican" girls. n. 47

The dance halls where Filipinos could pay ten cents to dance for one minute with hired dancers -- usually white women -- were the one location where Filipinos could mingle socially with white women. n. 48 Filipinos were conceptualized as sexually attractive to vulnerable girls, due to their willingness to spend their wages on their natty appearance. One active member of the movement to *807 exclude Filipinos from the United States described them as "little brown men attired like 'Solomon in all his glory,' strutting like peacocks and endeavoring to attract the eyes of young American and Mexican girls." n. 49 In response to the dance halls, white male violence erupted in several locations. n. 50 The most publicized of these riots took place in Watsonville, California, where a mob of five hundred white men raided nearby farms, killing one Filipino and beating several. n. 51

*808 The tenor of the times is made apparent in the report of a trial of a Filipino man, Terry Santiago, who had stabbed Norma Kompisch, a white dance hall girl, twenty-two times. n. 52 The judge hearing the case, Judge Lazarus, hurled "a vehement condemnation of dance hall operators who make white girls dance with Filipinos." Judge Lazarus referred to his desire to "bring to public attention this very real evil. I once referred to Filipinos as savages. There was

never a more typical case than this to justify my statement." n. 53

Police conducted raids on parties at which white women and Filipino men intermingled. As one article reported, these parties "were brought out of the realm of conjecture into stern reality" when police arrested five Filipino men on vagrancy charges in San Francisco. The police chief instructed officers to take into custody all "white girls" seen in company with Filipinos, together with their escorts. n. 54 Newspapers reported "shocking conditions" resulting from this intermingling. The concern appeared to be equally divided between the mere fact of these associations and the "trouble," in the form of shootings and knifings, that grew out of these associations. n. 55

***809** Anti-Filipino spokesmen also raged about the evils of intermarriage. The Northern Monterey Chamber of Commerce charged, "[if the present state of affairs continues there will be 40,000 half-breed[s] in California before ten years have passed." n. 56 Two representatives from the Commonwealth Club and the President of the Immigration Study Commission warned of "race mingling" which would create a "new type of mulatto," an "American Mestizo." n. 57

There appears to have been a greater level of tension felt about Filipino male sexuality than for Chinese and Japanese. The President of the University of California testified before the House Committee on Immigration and Naturalization in 1930 that Filipino problems were "almost entirely based upon sexual passion." n. 58 While Chinese and Japanese were also considered sexually depraved -- and, perhaps, more sexually perverse -- Filipinos appeared to be specifically characterized as having an enormous sexual ***810** appetite, as more savage, as more primitive, as "one jump from the jungle." n. 59 Their sexual desires were thought to focus on white women. n. 60

A possible reason for any sexual differentiation of Filipino men from Chinese or Japanese men was the link to Spanish colonialism. One contemporary writer referred to "the Latin attitude of Filipinos toward the opposite sex: he is assertive and possessive; she is his and his alone." n. 61 E. San Juan, Jr. has also argued that the myth of Filipino sexuality was a departure from the "Anglo Saxon conception of the Oriental male," which he links to the media and popular identification of Filipinos with blacks during the Filipino-American War of 1898-1903. n. 62 Yet it is important to point out here ***811** that, as Ronald Takaki has documented, in the late 1800s, Chinese were also ascribed both physical attributes and "racial qualities" that had been assigned to blacks. n. 63 Further complicating this analogy is the fact that one contemporary observer argued that blacks, unlike Filipinos, caused less tension because they knew they were not supposed to intermarry with whites. n. 64

As pointed out by Bruno Lasker, writing in 1931, there appeared to be a repeating pattern of targeting immigrants as sexual threats, with a concomitant forgetting of this targeting:

When the Chinese drew upon themselves popular antagonism on the Pacific Coast, there developed a view of Chinatown as essentially an abode of

vice, which is still perpetuated in our moving pictures and cheap fiction magazines. The Japanese were accused widely of taking advantage of the custom to admit picture brides to bring to this country women for immoral purposes ... *812 [There was a repetition of what was said about the Japanese, expressions of the "general feeling that those who begin in an inferior economic position should remain in it and that [they are 'cocky.' ... They frequently spend over much on dress. When they appear in up-to-date suits and possibly patent leather shoes, they at once are said to be 'cocky.'" The statement was frequently made that the presence of Japanese boys in the public schools was creating a moral problem.

Not only Orientals but many other immigrant groups have in the early stage of their residence ... given rise to unfavorable judgments This has especially been the case when a new immigration movement was composed of young men without women of their own nationality. n. 65

Some contemporary writers suggested that there was greater focus on Filipino male sexuality than that of the Chinese and Japanese populations because of the skewed sex ratio in who immigrated: with few Filipinas around, Filipino men turned to dance halls and dance girls for company. But while more Japanese women were able to immigrate to the United States, the Chinese population was also heavily male. n. 66 What may have been different between the Chinese and Filipino male immigrant populations was their behavior: Chinese men did not set up dance halls with white taxi dancers, perhaps reflecting a change in what hovered at the limits of tolerable behavior between 1880 and 1920, both for Asian men, and for white women. n. 67 Filipinos may also have spurred controversy due to a stronger sense of entitlement to their rights and a greater willingness to engage in confrontation, stemming from *813 their identity as colonial subjects, schooled in the idea that they were "nationals" of the United States. n. 68

This history suggests there were and are qualitative differences in racial sexualization among Asian Americans. What is clear is that lumping diverse experiences together is too limited. The dominant contemporary discourse depicts Asian American men across time and space as solely effeminized. n. 69 This is clearly not the case for Filipinos -- nor, as this Essay sketches, has it been the case for Chinese or Japanese men

III. LEGAL CHALLENGES

The right of Filipinos to intermarry was not seriously challenged in California until the early 1920s. As Filipino immigration increased, county clerks were faced with the question of deciding whether to issue marriage licenses to Filipinos, in essence choosing whether or not to classify Filipinos as "Mongolians." The County Counsel of Los Angeles advised in 1921 that Filipinos were not "Mongolians." The opinion reasoned that at the time of enactment of antimiscegenation legislation, there was a "Chinese problem," and that the statutory inclusion of "Mongolian" was intended to refer only to the "yellow" and

not the "brown" people. n. 70 The *814 opinion further noted that choosing not to classify Filipinos as Mongolians rested on the assumption that the problem under consideration involved a Filipino that belonged to one of the Malay tribes, and who was not "a Negrito or in part Chinama" n. 71 This opinion letter appears to have been followed by the Los Angeles County Clerk, L.E. Lampton, in granting marriage licenses, until 1930.

In the meantime, tension over relationships between Filipinos and white women was heightened due to the Yatko case, which took place in 1925 in Los Angeles. n. 72 Timothy Yatko, a Filipino waiter, had married Lola Butler, a white woman, in San Diego. The couple had met at a dance hall in Los Angeles and lived together after their marriage until Butler left Yatko. She worked as a singer and a dancer in a girl show where Harry Kidder, who was white, also worked as a substitute piano player. Yatko spotted the two together and when he saw Kidder kissing his wife in Kidder's apartment, he stabbed Kidder, who died. n. 73 In the murder trial, the state collaterally attacked the legality of the marriage in order to permit Lola Butler to testify against Yatko. n. 74 Counsel for the state contended that the marriage was void because Yatko was Filipino, and therefore "Mongolia" The court was asked to rule on the racial classification of Filipinos because there was no earlier decision on the *815 subject. n. 75 Contemporary accounts referred to the antimiscegenation statute as what was, at that point in time, "an old and almost forgotten State law." n. 76

In arguing the point of whether or not Yatko should be considered a "Mongolian," counsel cited ethnologists, the encyclopedia, and various federal decisions in naturalization cases. Counsel for the state discussed the evil effects of miscegenation generally, and pointed to Mexico as a specific example of the effects of race mixture. "We see the result that the Mexican nation had not had the standing, had not the citizens as it would otherwise if it had remained pure." n. 77 This reference to purity, not surprisingly, was intended to describe the Spanish colonizers, not indigenous people, for counsel went on to state that "when the white people, or the Caucasians, came to the United States they did not intermarry with the Indians, they kept themselves pure." n. 78

The judge agreed. He stated:

The dominant race of the country has a perfect right to exclude all other races from equal rights with its own people and to prescribe such rights as they may possess Our government is in control of a large body of people of the insular possessions, for whom it is acting as a sort of guardian and it has extended certain rights and privileges to them Here we see a large body of young men, ever-increasing, working amongst us, associating with our citizens, all of whom are under the guardianship and to some extent the tutelage of our national government, and for whom we feel the deepest interest, of course, naturally ... the question ought to be determined whether or not they can come into this country and intermarry with our American girls or bring their Filipino girls here to intermarry with our American men, if that situation should arise. n. 79

The judge alluded several times to his long residence in the South, and shared his "full conviction" that:

***816** [The Negro race will become highly civilized and become one of the great races only if it proceeds within its own lines marked out by Nature and keeps its blood pure. And I have the same feeling with respect to other races I am quite satisfied in my own mind ... that the Filipino is a Malay and that the Malay is a Mongolian, just as much as the white American is of the Teutonic race, the Teutonic family, or of the Nordic family, carrying it back to the Aryan family. Hence, it is my view that under the code of California as it now exists, intermarriage between a Filipino and a Caucasian would be void. n. 80 Accordingly, the court allowed Lola Butler to testify. She represented Yatko "as the aggressor and Kidder as her chivalric defender." n. 81 Yatko was convicted and sentenced to serve a life sentence in San Quentin. n. 82

IV. LOS ANGELES CIVIL CASES AND LEGISLATIVE RESPONSE

The opinion of the judge in the Yatko case, that Filipinos, or Malays, were Mongolian, was shared by the Attorney General of the State of California, U.S. Webb. n. 83 In 1926 Webb authored an opinion letter stating that "Malays belong to the Mongoloid race." n. 84 The letter was in response to an inquiry from the District Attorney of San Diego County, who wondered whether the San Diego County Clerk should issue marriage licenses to "Hindus and white ***817** persons and to Filipinos and white persons." n. 85 Webb called this "more a question of fact than one of law," noted that he was unable to find any judicial determination of these questions, and proceeded to share the prevailing ethnology of the day. While "the Hindu," reported Webb, generally did not appear ethnologically to be a member of the Mongolian race, n. 86 "Malays" were indeed so classified. While the first "great ethnologist," Blumenback, had divided the human race into five classes (the white, black, yellow, brown and red), the "most recent and best recognized variation" reduced the classification to three divisions by combining brown and red with the Mongolian in a division generally referred to as "Mongolian-Malay or yellow- brow" n. 87 While Webb's letter was ***818** written to influence the action of counties, it was not binding, and the reaction of county clerks appears to have been mixed. n. 88

The analysis in Webb's letter was embraced by a Los Angeles superior court judge, who issued the first of five decisions on this question. These five cases appear to be the only litigation -- other than as collaterally raised in Yatko -- on this issue in the State of California. n. 89 In this first case, a white woman, Ruby F. Robinson, sought to wed a Filipino named Tony V. Moreno. Robinson's mother filed a suit against Los Angeles County and secured first a temporary, and later a permanent, injunction against L.A. County Clerk Lampton to restrain him from issuing a marriage license. n. 90 Evidence as to Moreno's race adduced by the county's counsel and by the attorneys representing the mother

"ranged over the whole of anthropological literature, from Linnaeus and Cuvier in the eighteenth century down to recognized textbook writers of today." n. 91 The county argued that according to the best authorities, ***819** Filipinos are Malays, and that Malays are not Mongolians; the mother's counsel, assisted by expert testimony, argued that all the brown races are Mongolia Judge Smith ruled in favor of Robinson's mother, that Filipinos were Mongolians. n. 92 The decision was followed by protest in the Filipino community. n. 93

Following the Robinson case, L.A. County Clerk Lampton appeared to begin to deny marriage licenses to Filipinos seeking to marry white women In 1931, Gavino C. Visco petitioned to marry Ruth M. Salas. n. 94 Lampton denied this petition on the grounds that Visco was a Mongolian, and that Salas was white. The couple appealed, and Superior Court Judge Guerin ordered Lampton to issue a license. But the case did not turn on Visco's Filipino identity, but rather on the identity of Salas. The court held that Salas was "not a person of the Caucasian race." n. 95 Salas, born in Mexico, had a mother born in Los Angeles and a father born in Mexico. n. 96 As a nonwhite, Salas was not barred from marrying a Filipino, no matter whether Visco was classified as Mongolian, or otherwise nonwhite. Nellie Foster, a contemporary writer, reported that the judge asserted that he would have granted the marriage license, even if Salas had been white, which suggests that Judge Guerin did not think that Filipinos should be classified as "Mongolians." n. 97

***820** The third and fourth cases in which this issue surfaced involved attempts at annulments of marriage. Estanislao P. Laddaran sought an annulment of his marriage to Emma F. Laddaran, on the basis that the marriage had been in violation of the law, because he was "of the Filipino race" and his wife was "of the Caucasian race." n. 98 The court refused. n. 99 Shortly thereafter, in the Murillo case, Judge Gould also refused to annul a marriage, this time on the wife's petition that her Filipino husband was a member of the Mongolian race. n. 100

In Murillo, Judge Gould noted that, while it was true that modern ethnologists had limited the number of racial groups to the white, the black and the yellow, "these writers warn us that there is no fixed line of demarcation, that these classifications are simply loose fitting generalizations, that the races are still differentiating, and that the race divisions are simply convenient terms as an aid in classification." n. 101 The judge rejected the modern day scientific definition of Mongolian in favor of what the state legislature had in mind when it enacted the law. He asserted that if the legislators had anticipated modern scientific classifications, not only would whites be prohibited from marrying "Chinese, Japanese and Koreans (who are popularly regarded as Mongolians)," and "not only with Filipinos and Malays," but also "Laplanders, Hawaiians, Esthonians, Huns, Finns, Turks, Eskimos, American Indians, native Peruvians, native Mexicans and many other peoples, all of whom are ***821** included within the present day scientist's classification of 'Mongolia'" n. 102

The fifth case before the Superior Court was Roldan v. Los

Angeles County. n. 103 Roldan, an "Illocano in whose blood was co-mingled a strain of Spanish," sought to marry Marjorie Rogers, a "Caucasian" from England. Los Angeles County Clerk Lampton refused. Ruling that neither Rogers nor Roldan were Mongolians, Judge Gates approved the marriage petition n. 104 The state appealed the case to the California Appellate Court, which in a divided opinion (3-3) upheld the superior court decision, holding that there was no legislative intent to apply the name Mongolian to Malays when the statute had been enacted and amended. As in the Murillo case, the opinion, written by Judge Archbald, expressly followed not the scientific, but the common understanding of what Mongolian meant at the enactment of the antimiscegenation statute. The opinion noted that the classification of races into the five grand subdivisions of white, black, yellow, red, and brown was commonly used in 1880 and 1905, the dates when the statute was amended to cover "Mongolians." n. 105 Because Salvador Roldan was Malay, and not a Mongolian, the L.A. County Clerk was forced to issue him a marriage license. n. 106

***822** In most of these opinions, the judges were careful to note that they were not addressing the "social question" of these marriages, and suggested that if the "common thought" of today required, the legislature should address the issue. n. 107 The legislature complied.

Nine days before the Roldan decision was issued, State Senator Herbert Jones, an exclusionist, introduced senate bills to amend the antimiscegenation statute to include "Malays." n. 108 On the same day, the Secretary of the California Joint Immigration Committee requested its sponsoring organizations, the American Legion, the Native Sons and Daughters of the Golden West, and the California State Federation of Labor, to ask members to urge adoption of the bills. Two months later, both bills passed the Senate unanimously. n. 109 The only dissenting voice in the Assembly was a Los Angeles County representative whose district included a large Filipino community. In April, Governor James Rolph, a prominent member of the Native Sons, signed the bills into law, effectively retroactively voiding and making illegitimate all previous Filipino/white marriages by defining any marriage of Caucasians with ***823** "negroes, Mongolians, members of the Malay race, or mulattoes to be illegal and void." n. 110

The 1934 passage of the Tydings-McDuffie Act n. 111 promising eventual independence to the Philippines effectively halted Filipino immigration n. 112 -- and indeed was successfully enacted because of the efforts of those seeking to exclude Filipinos from the United States. n. 113 Exclusion led to the dissipation of obsessive anxiety over Filipino sexuality. n. 114 While California subsequently became the first ***824** and only state after Reconstruction to rule that its state's antimiscegenation laws were unconstitutional in the 1948 case [Perez v. Sharp](#), n. 115 in 1948, the legislature refused to expunge the invalidated laws from the California Civil Code until 1959. n. 116

***825 V. HISTORY LESSONS**

What questions does this history raise? First is the question of what it tells us about the study of antimiscegenation laws, and what more complicated stories emerge about the relationship of these laws to race, gender, class, and sexuality. Second is the question of what this history reveals for the relationship of the Filipino community to other identity-based rubrics.

A. Complicating Antimiscegenation Narratives

In terms of the first area of inquiry, this history suggests that antimiscegenation efforts targeting Filipinos demonstrate a differing history of racialization. Eva Saks has described miscegenation laws legislating the sexuality of blacks and whites as functioning to govern the marriage contract, with legal implications for inheritance and legitimacy. She has also asserted that these laws created a property in white blood, and upheld the purity of the body politic, in which the human and national body stood in for each other and in which blacks were considered to pollute the pure white national body. n. 117 Robert Chang has suggested that miscegenation laws functioned as racial-sexual policing to discipline the transgressive sexuality of whites and people of color in order to preserve the proper racial, national, and familial order. He has argued that with regard to laws restricting Asian miscegenation, racial and economic preservation were linked so that we can see the accompanying of antimiscegenation ***826** statutes by immigration and naturalization restrictions, and alien land laws. n. 118

We can glimpse the trace of differing racializations relating to antimiscegenation efforts that could be described as connected to slavery, foreignness, n. 119 or colonization. n. 120 Miscegenation laws directed against excludable "racial aliens" -- whether Chinese, Japanese, or Filipino -- were sharply linked to both sex specific patterns of migration and calls for expulsion. Where racialization of Chinese and Japanese may have diverged from Filipinos is in the history of U.S. colonization. The colonization of Filipinos, accompanied by Americanization projects, may have facilitated a racialization that differentiated Filipinos from Chinese and Japanese through the perception of Filipinos as less foreign. n. 121 While there was enormous uproar over miscegenous interactions between Filipinos and white women, the uproar was nonetheless ambiguous. For example, certain commentators seem to have understood why some white women would see Filipino men as desirable objects of affection, which contrasts with a seemingly greater repugnance directed against Chinese and Japanese men.

Second, it is important to examine what this history of antimiscegenation laws tells us about gender. Peggy Pascoe has done significant research analyzing the manner in which the campaign to prohibit interracial marriage reflects U.S. gender, as well as racial, hierarchies. She has examined miscegenation laws that

were sex specific in their enumeration of prohibited arrangements, and has *827 also examined gender hierarchies structured by miscegenation laws that were formally gender neutral. Pascoe has found that in the western United States, laws were applied more stringently to groups whose men were thought likely to marry white women, and less stringently to groups whose women were thought likely to marry white men. n. 122 Gender also inflected why individuals chose to cross racial boundary lines and get married, as well as shaped when cases would be brought. n. 123

The history of Filipinos in California makes vivid the gendered relationship between racial identity and the marriage contract. In addition to cases in which Filipino/white couples sought to marry and who therefore asserted that Filipinos were not "Mongolians," the racial classification of Filipinos was put at issue in the case of a mother seeking to stop her daughter's marriage, in two cases where annulment of marriage was sought, one by a white woman, the other by a Filipino man, and in one case in which a prosecutor sought to void a marriage so a white wife could testify against her Filipino husband. These parties all argued that Filipinos fell under the jurisdiction of the antimiscegenation statute, because they sought a basis on which to alter legal entitlements and to shape behavior.

We could look to the manner in which gender has historically been bound up with race through the linkages of manhood, citizenship, *828 and whiteness. n. 124 The history of antimiscegenation laws targeting Filipinos in California reveals a complicated desire to protect white women from "brown men." This desire must be understood as being shaped by class. White women that associated with Filipino men appear to have been largely working class women -- and not women considered deserving of greater protection because of middle class status.

The research of Rhacel Salazar Parrenas indicates that there were actually several distinct opinions among whites concerning these relationships: upper-class white women that formed commissions to control "promiscuity" in the dance halls, white working-class men that initiated anti-Filipino race riots to protect white women's purity from Filipino men, and upper-class white men who enacted legislation to protect white purity. But, significantly, Parrenas has added that there were some upper class white men that saw the working class women that would associate with Filipinos as so "cheap" and "inferior" that they tainted innocent Filipino men. n. 125

The concern to protect "women" was of course also racialized. While young Mexican women were also thought to be the target of Filipino male affection, interactions among Mexican women and Filipino men did not appear to incite any uproar beyond occasional rhetorical inclusion as subjects in need of protection. In fact, in the Visco case, Ruth Salas, as Mexican, was quite literally thrust out of the category "white" that the state sought to protect from marriage to Filipinos.

While scholars writing about miscegenation law have recognized the bundle of legal entitlements associated with the marital contract that women in miscegenous relationships lost if their marriages ***829** were declared void, what has not been examined by these scholars is the relationship of interracial marriages to immigration consequences. n. 126 As of 1790, only whites, and after 1870, only whites and those of African descent or nativity, were allowed to naturalize to become United States citizens. n127 Thus, anyone not considered to fall within one of those two categories was considered ineligible to naturalize as a United States citizen. Filipinos were considered racially ineligible to naturalize, n128 and, as "nationals" of the United States, were not citizens.

In 1907, Congress passed the Expatriation Act, which provided that any American woman who married a foreigner was automatically denaturalized. n129 Congress partially repealed the law in 1922, but continued to require that any woman who married a man ineligible to naturalize -- in other words, one racially barred from doing so -- would lose her citizenship. This provision remained law until 1931. n. 130 Thus, a white U.S. female citizen who married a Filipino could face a catch-22. If her marriage was seen as violating an antimiscegenation statute, the marriage would be void. However, if it was upheld as a legitimate marriage, that marriage could subject her to expatriation. It is not clear whether any woman who married a Filipino was, in fact, subject to denaturalization, although reportedly, the federal district director of naturalization stated this would take place. n. 131

***830** Considering the relationship of gender to miscegenation law requires a recognition of the manner in which the control of women and their sexuality is understood as necessary to maintaining and reproducing the identity of communities and nations. n. 132 Women are thought to guard the purity and honor of communities. Nationalism entwines with race so that women are subjected to control in order to achieve the aim of a national racial purity. This is visible in the history described here. Filipino male sexual engagement with white women was considered a national threat, requiring the literal expulsion of Filipino men from the body politic, accomplished through the simultaneous granting of independence to the Philippines, and the revocation of "national" status which had formerly allowed Filipinos to freely travel to the United States.

Finally, we should examine the extent to which scholarship on miscegenation laws has shaped our understandings of male and female sexuality, and specifically, shaped them through the lens of presumptive heterosexuality. For example, to what extent does the lament over the all male, so-called bachelor societies in Asian communities -- communities thought to be damaged by their lack of access to women -- deny the reality and nondeviancy of same sex sociality and sexuality of various forms? n. 133 Along the same lines, there are few exceptions to the conflation of interracial with heterosexual in this field. n. 134 The bulk of contemporary legal writing on miscegenation seeks to demonstrate an analogy between prohibiting marriage on the basis of race to prohibiting marriage

on the basis of sexual orientation. n. 135 This literature generally unreflectively *831 analogizes the presumptively heterosexual interracial miscegenous relationship to the contemporary same sex one. n. 136

B. Filipina/o Identities

A second locus of inquiry is to explore what this sketch of Filipino history tells us about identity categories. Specifically, this history raises the question of the relationship of Filipinas/os to the Asian American identity category. We have here a very real rupture of Mongolian with Malay, of East Asian with Filipino, made manifest in legal history. Does this mean anything more than antiquated notions of ethnology? Well, yes -- this rupture is something that is continually perpetuated. n. 137 One critic has called the continued inclusion of Filipinas/os within the term "Asian American" a form of semiotic violence inflicted on Filipinas/os, when *832 Asian American is translated as Chinese or Japanese American by Asian American activists or legal scholars. n. 138

We know that stretching identity categories is not without risk. n. 139 Always the increasing heterogeneity of what we put within a particular larger identity category risks obliterating the experiences of those who take up its margins and are not conceptualized at its center. n. 140 There are internal hierarchies within identity categories that need to be recognized. n. 141 Failure to recognize these risks in the form of the continued occlusion of the Filipina/o within the Asian American category reflects political expediency -- but may also reflect more complicated issues. Oscar Campomanes has made the point that the invisibility of the Philippines in American history reflects the constitutional and cultural difficulties posed by its annexation by the United States and the discomfort associated with the United States as an imperial power. n. 142 We could posit that this discomfort is mirrored in the invisibility of Filipinas/os within the Asian American identity category, which often presumes a domestic *833 and national, rather than an imperialist, construction of "America."

And what does this historical narrative tell us about the Latina/ o identity category? The impetus for centering the experience of Filipinas/ os at the Fourth Annual LatCrit conference was the suggestion of conference organizers to place Filipinas/ os within the rubric of Latinas/ os, primarily because of a shared legacy of Spanish colonization. If we were to consider Filipinas/ os as Latinas/ os, then the claim that "Latinas/ os were not subjected to miscegenation laws" would be incorrect, factually. n. 143 But the idea of calling Filipinas/ os "Latinas/ os" seems primarily an interesting theoretical proposition at this point, although there may be suggestive similarities to the racialization of Filipinas/ os and some Latina/ o communities. n. 144

As important as Spanish colonialism to the Filipino experience may be the experience of U.S. colonialism. This does not deny links between Filipinas/ os and Latinas/ os, but merely suggests the links may be ones we have

not generally recognized. One undertheorized connection is between the experience of Puerto Ricans, Filipinas/ os, and Hawaiians as official colonial possessions of the United States. n. 145 Puerto Rico and the Philippines share histories of Spanish, and then U.S. colonialism. That these connections are ***834** undertheorized may be connected to two different factors. One is that we are still prey to the systems of racial classification propagated by the ethnographers of a previous century, which restricts the linkages we make between identity based categories. The second is the general failure to focus on the history of U.S. imperialism and the role of the United States as a colonial power. n. 146

CONCLUSION

This Essay focuses on a community whose legal history has been sorely neglected. In interpreting the history of antimiscegenation efforts prohibiting Filipinos from marrying whites in the State of California, I have sought to complicate our narration of miscegenation laws. Generalizations about miscegenation laws or about the impetus for them do not do justice to the specific histories that have impacted particular communities. For Filipinos in California, antimiscegenation efforts seeking to regulate sexual relationships between Filipino men and white women were clearly connected to white anxiety about the concrete display of this desire in the space of the dance hall. As the legislature had already forbidden marriage licenses from being granted to "Mongolians" who sought to marry whites, and had also declared such marriages void, anxiety about Filipino/ white sexual relations was made manifest in legal efforts to group Filipinos under the rubric of "Mongolia" While the Attorney General of the State of California sought to control the sexual activity of Filipinos through so labeling them, many jurists resisted, looking both to ethnology and legislative intent.

Identity is central to the writing of history -- communities are named and name themselves within the narratives of the past. n. 147 The positioning of Filipinos as "Mongolian," or the positioning of Filipinos in opposition to Mongolians, as the ethnologically different ***835** Malay," provides a narrative within which the contemporary identity of Filipinos is created. The historical question of whether to group Filipinos with Chinese and Japanese as "Mongolian" for purposes of miscegenation laws is echoed in the contemporary quandary about positioning Filipinas/ os as Asian American, when the center of that identity category is clearly occupied by Chinese and Japanese Americans.

The relationship between contemporary identity and historical narrative is not monolithic or static, but should be seen as multiple and fluid. The history presented in this Essay suggests that greater attention should be paid to the role of U.S. colonialism in shaping racialization and connections we might make between different communities. Choosing to position Filipinas/ os within the rubric of Latinas/ os at the LatCrit conference exemplifies the willingness to break beyond perceived historical borders and recognize new linkages that can be made.

This history demonstrates the manner in which racial identity is created. There is nothing natural or preordained about the classification of Filipinos as "Malay" or as "Mongolian" -- or as any other identity. Racial identity is shaped in relation to other forces. Here, such forces include assumptions about racialized sexuality, colonial relations between the United States and the Philippines, the importation of exploitable laborers without political rights, and the intertwining of gender and nationalism. The legal history of the shifts in racial classification of Filipinos in California, between "Mongolian" and "Malay," underlines the manner in which race is made.

NOTES:

1. BRUNO LASKER, FILIPINO IMMIGRATION TO CONTINENTAL UNITED STATES AND TO HAWAII 92 (1931) (quoting San Francisco Chronicle article written by Chester H. Rowell on Feb. 10, 1930).

2. [Roldan v. Los Angeles County, 129 Cal. App. 267, 268, 18 P.2d 706, 707 \(1933\)](#). While Roldan's first name was spelled "Solvador" in the legal proceedings, his signature in the case file spells his name "Salvador."

3. See [Cal. Civ. Code § 69 \(1906\)](#) (amended 1937, 1959) (prohibiting issuance of license authorizing marriage of "a white person with a negro, mulatto, or Mongolian. "); [Cal. Civ. Code § 60 \(1906\)](#) (amended 1937, repealed 1959) (making marriages of "white persons with negroes, Mongolians, or mulattoes ... illegal and void"); [Roldan, 129 Cal. App. at 268, 18 P.2d at 707](#).

4. See Nayan Shah, Sexuality, Identity, and the Uses of History, in Q & A: QUEER IN ASIAN AMERICA 141, 148 (David L. Eng & Alice Y. Hom eds., 1998).

5. ANTOINETTE BURTON, BURDENS OF HISTORY: BRITISH FEMINISTS, INDIAN WOMEN, AND IMPERIAL CULTURE, 1865-1915, at 23 (1994) (citing CHRISTINA CROSBY, THE ENDS OF HISTORY: VICTORIANS AND "THE WOMAN QUESTION" 151 (1991)).

6. See *id.*

7. Whether to use the term Asian American or Asian Pacific American is a question fraught with political significance. See J. Kehaulani Kauanui & Ju Hui "Judy" Han, "Asian Pacific Islander": Issues of Representation and Responsibility, in THE VERY INSIDE: AN ANTHOLOGY OF WRITING BY ASIAN & PACIFIC ISLANDER LESBIAN AND BISEXUAL WOMEN 37 (Sharon Lim-Hing ed., 1994) (cautioning against irresponsible uses of "Asian Pacific" or "Asian Pacific Islander" that engulf concerns of Pacific Islanders within those of Asian Americans). Following this caution, because I am not examining the concerns of Pacific Islanders, I use the term Asian American here. While Filipinas/os are commonly thought to fall under the Asian American rubric, identifying Filipinas/os as Latinas/os is a more novel claim. The organizers of the Fourth Annual LatCrit conference chose to make such a claim, recognizing that this is a connection newly forged, rather than one commonly perceived. The impetus for this connection was the shared experience of Spanish colonialism.

8. I note this, both to point out that I am writing this history into what is a law review void, and to encourage others to write about what is an astonishingly

fertile and interesting site.

9. The law review articles that focus to any extent on Filipina/o Americans concern either naturalization of Filipino World War II veterans, the responsibility of the United States government towards Filipino Amerasians, or employment discrimination based on accent discrimination. See, e.g., Mari J. Matsuda, [Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction](#), 100 YALE L.J. 1329, 1334 (1991); Kevin Pimentel, To Yick Wo, Thanks for Nothing! Citizenship for Filipino Veterans, 4 MICH. J. RACE & LAW 459, 461 (1999); Eugenio A. Cruz, Note, [Unprotected Identities: Recognizing Cultural Ethnic Divergence in Interpreting Title VII's "National Origin" Classification](#), 9 HASTINGS WOMEN'S L.J. 161, 180 (1998); Maria B. Montes, Note, [U.S. Recognition of Its Obligation to Filipino Amerasian Children Under International Law](#), 46 HASTINGS L.J. 1621, 1621 (1995).

10. This Essay should be considered part of a larger project examining antimiscegenation laws targeting Asian Americans generally. There are a handful of articles that touch on miscegenation laws and Asian Americans. See, e.g., Robert S. Chang, [Dreaming in Black and White: Racial-Sexual Policing in the Birth of a Nation, the Cheat, and Who Killed Vincent Chin?](#), 5 ASIAN L.J. 41, 44 (1998); Peter Kwan, [Invention, Inversion and Intervention: The Oriental Woman in the World of Suzie Wong, M. Butterfly, and the Adventures of Priscilla, Queen of the Desert](#), 5 ASIAN L.J. 99, 102 (1998). However, there is surprisingly little that has been specifically written on this topic. Four notable exceptions are Nellie Foster, Legal Status of Filipino Intermarriage in California, 16 SOC. & SOC. RES. 441 (1932), reprinted in ASIAN INDIANS, FILIPINOS, OTHER ASIAN COMMUNITIES AND THE LAW 5 (Charles McClain ed. 1994), Megumi Dick Osumi, Asians and California's Anti-Miscegenation Laws, in ASIAN AND PACIFIC AMERICAN EXPERIENCE: WOMEN'S PERSPECTIVES 1 (Nobuya Tsuchida ed., 1982), UCLA Asian American Studies Center, Anti-Miscegenation Laws and the Pilipino, in LETTERS IN EXILE: AN INTRODUCTORY READER ON THE HISTORY OF PILIPINOS IN AMERICA 63 (1976) [hereinafter Anti-Miscegenation Laws and the Pilipino], and Henry Yu, Mixing Bodies and Cultures: The Meaning of America's Fascination with Sex Between "Orientals" and "Whites," in SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY 444 (Martha Hodes ed., 1999) [hereinafter SEX, LOVE, RACE]. Osumi's piece remains a foundational work of legal scholarship examining antimiscegenation legislation directed against Chinese, Japanese, and Filipinos in the state of California. Nellie Foster's article is also extraordinarily valuable. Writing in the 1930s, she documented information in her article from sources that at this point in time are no longer accessible. See Letter from Nellie Foster to Mr. L. E. Lampton, County Clerk of Los Angeles (Nov. 7, 1930) (in People v. Yatko microfilm file). The letter was written on the letterhead of the Inter-Racial Council of San Diego, and requests more information on particular cases.

11. See George F. Will, *They Fought for Freedom, Not for Money*, *Y. POST*, Aug. 16, 1998, at 53.

12. These states were Arizona, California, Georgia, Idaho, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, Oregon, South Dakota, Utah, Virginia, and Wyoming.

13. See *Proceedings of the General Assembly, 1637-1664*, at 533-34, cited in EDWARD BYRON REUTER, *RACE MIXTURE: STUDIES IN INTERMARRIAGE AND MISCEGENATION* 78 (1969).

14. See *id.* at 79.

15. [388 U.S. 1 \(1967\)](#).

16. See Note, *Constitutionality of Anti-Miscegenation Statutes*, 58 *YALE L.J.* 472, 480-82 (1949) [hereinafter *Constitutionality*]. The states with antimiscegenation laws were Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Washington, and Wyoming. See *id.* (providing specific statutory cites). Bills to prohibit intermarriage were introduced, but failed, in the District of Columbia, New York, Pennsylvania, Illinois, Wisconsin, Connecticut, and Minnesota. See REUTER, *supra* note 13, at 103; Irving G. Tragen, Comment, *Statutory Prohibitions Against Interracial Marriage*, 32 *CAL. L. REV.* 269, 270 6 (1944) (citing REUTER, *supra* note 13, at 103). In the words of Edward Reuter:

The fact that a number of states have no legislation forbidding marriage between persons of different racial origin should not be taken as evidence that such unions are approved or even that there is a general popular indifference to them. The absence of such legislation is rather an expression of the fact that Negroes and Orientals are such a negligible part of the population of several states and intermarriages are so very few that the question can be ignored. REUTER, *supra* note 13, at 101.

17. The states that still maintained antimiscegenation laws in 1967 were Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. See [Loving v. Virginia, 388 U.S. 1, 7 5 \(1967\)](#). Maryland only abandoned its antimiscegenation statute a few days before the *Loving* decision. See *id.*

18. See Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, in *SEX, LOVE, RACE*, *supra* note 10, at 464, 468. Regarding South Asians, Arizona passed laws restricting marriage between whites and "Hindus." See *Ariz. Rev. Stat. An* § 3092 (1901). Georgia only allowed white persons to marry those with "no ascertainable trace of ... Asiatic Indian ... blood in their veins." See *Ga. Code. An* § § 53-106, 53-312 (1937) (repealed 1979)). The following states passed laws restricting marriage between whites and "Mongolians," "Chinese," "Japanese," or "Koreans": Arizona, California, Georgia, Idaho, Mississippi, Missouri, Montana, Nebraska, Nevada, Oregon, South Dakota, Utah, Virginia, and Wyoming. See *Ariz. Rev. Stat. An* §

3092 (1901) (referring to "Mongolians"); [Cal. Civ. Code § § 60, 69](#) (Deering 1937) ([§ 60](#) repealed 1959, [§ 69](#) amended 1959) (referring to "Mongolians"); Ga. Code An § § 53-106, 53-312, 53-9002, 53-9003, 79-103 (referring to "Mongolians"); [Idaho Code § 32-206 \(1947\)](#) (repealed 1959) (referring to "Mongolians"); Miss. Code An § 459 (1942) (amended 1987) (referring to "Mongolians"); Mo. An Stat. § 3361 (West 1939) (repealed 1969) (referring to "Mongolians"); Mont. Code An § § 5701-5702 (1935) (repealed 1953) (referring to "Chinese person" and "Japanese person"); [Neb. Rev. Stat. § 42-103 \(1943\)](#) (repealed 1963) (referring to "Japanese or Chinese blood"); Nev. Rev. Stat. § 6514 (1912) (referring to "Mongolian or yellow race"); Or. Rev. Stat. An § § 23-1010, 63-102 (1940) (referring to "Chinese persons"; also referring to "Mongolians") (amended 1959); S.D. Codified Laws § 14.0106(4) (1939) (repealed 1957) (referring to "Korean" and "Mongolian races"); [Utah Code An § 40-1-2 \(1943\)](#) (amended 1963) (referring to "Mongolians"); Va. Code An § § 5087, 5099a(5) (Michie 1942) (repealed 1968) (referring to "colored persons"; whites could only marry whites or those with 1/16 or less American Indian blood); Wyo. Rev. Stat. An § 68-118 (1931) (repealed 1965) (referring to "Mongolians").

19. Note that, despite reports to the contrary, it is not clear whether all of these nine states had miscegenation statutes that can be accurately described as specifically mentioning "Malays." See Pascoe, *supra* note 18, at 485 13 (listing Virginia and Georgia as having statutes that "mentioned 'Malays.'").

Georgia's statute stated: "It shall be unlawful for a white person to marry anyone except a white person Any marriage in violation of this section shall be void." Ga. Code An § 53-106 (1933) (repealed 1979). The statute shifted over time, in which groups were excluded in defining a "white person," at one point mentioning those without "Mongolian, Japanese, or Chinese blood in their veins," and at another point entirely omitting these groups from the list. But at no point were "Malays" enumerated as part of this list. However, "Malay" was included on the list of groups that should register with the State Registrar of Vital Statistics, separately from "Caucasians," suggesting that in Georgia "Malays" were considered nonwhite persons. See Ga. Code An § § 53-312, 79-103 (1933). Section 53-312 of the 1933 Georgia code states:

The term "white person" shall include either only persons of white or Caucasian race, who have no ascertainable trace of either [sic Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins. No person, any one of whose ancestors has been duly registered with the State Bureau of Vital Statistics as a colored person or person of color, shall be deemed to be a white person

Ga. Code An § 53-312. In contrast, section 79-103 stated:

All Negroes, mulattoes, mestizos, and their descendants, having any ascertainable trace of either Negro or African, West Indian, or Asiatic

Indian blood in their veins, and all descendants of any person having either Negro or African, West Indian, or Asiatic Indian blood in his or her veins, shall be known in this State as persons of color.

Ga. Code An § 79-103 (1929); see also 1927 Ga. Laws 272 ("[The State Registrar of Vital Statistics ... shall prepare a form for the registration of individuals, whereon shall be given the racial composition of such individual, as Caucasian, Negro, Mongolian, West Indian, Asiatic Indian, Malay or any mixture thereof, or any other non-Caucasian strains, and if there be any mixture, then the racial composition of the parents and other ancestors in so far as ascertainable, so as to show in what generation such mixture occurred.").

In Virginia, while not specifically enumerated in the statute, "Malays" were covered by the text of the statute by implication, like any other "colored person":

All marriages between a white person and a colored person ... shall be absolutely void, without any decree of divorce, or other legal process For the purpose of this act, the term "white person" shall apply only to the person who has no trace whatsoever of any blood of Causasian [sic; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic [sic blood shall be deemed to be white persons.

Va. Code An § § 5087, 5099a(5) (Michie 1942) (repealed 1968). The statute listed "Malay" as a separate group from "Caucasian" in the section on "Preservation of racial integrity" where the state registrar of vital statistics was to document the "racial composition" of individuals. See id. § 5099a ("The State registrar of vital statistics may ... prepare a form where on the racial composition of any individual, as Caucasian, Negro, Mongolian, American Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasic [sic strains ... may be certified").

Arizona, California, Maryland, Nevada, South Dakota, Utah, and Wyoming had clear and specific statutory prohibitions on marriages between whites and "Malays." See Ariz. Rev. Stat. An § 3092 (1901) ("All marriages of persons of Caucasian blood, or their descendants with ... members of the Malay race ... shall be null and void."); [Cal. Civ. Code § § 60, 69](#) (Deering 1937) (§ 60 repealed 1959, § 69 amended 1959) (prohibiting marriages between white persons and "a member of the Malay race"); [Md. An Code art. 27, § 365 \(1935\)](#) (repealed 1967) ("All marriages ... between a white person and a member of the Malay race ... are forever prohibited, and shall be void."); Nev. Rev. Stat. § 6514 (1912) ("It shall be unlawful for any person of the Caucasian or white race to intermarry with any person of the ... Malay or brown race ... within the State of Nevada"); S.D. Codified Laws § 14.0106(4) (1939) (repealed 1959) ("The following marriages are null and void from the beginning: ... (4) The intermarriage or illicit

cohabitation of any person belonging to the ... Malayan ... race with any person of the opposite sex belonging to the Caucasian or white race."); [Utah Code An § 40-1-2 \(1943\)](#) (amended 1963) ("The following marriages are prohibited and declared void: ... (6) Between a ... member of the malay race ... and a white person"); Wyo. Stat. An § 68-118 (Mitchie 1931) (repealed 1965) ("All marriages of white persons with Negroes, Mulattoes, Mongolians, or Malays hereafter contracted in the state of Wyoming are and shall be illegal and void.").

20. See generally Constitutionality, *supra* note 16, at 472.

21. See Act Regulating Marriages, ch. 140, 1850 Cal. Stat. 494 (codified as CAL. CODE § 35 (1853)) ("All marriages of white persons with negroes or mulattoes are declared to be illegal and void."). On California's prohibitions against interracial marriage, see Tragen, *supra* note 16, at 269.

22. See Osumi, *supra* note 10, at 5-6.

23. See RONALD TAKAKI, *IRON CAGES: RACE AND CULTURE IN 19TH CENTURY AMERICA* 215-49 (1990) (1979). Takaki describes the role of industrialists in creating a "permanently degraded caste labor force" and the response by the labor movement in California that fostered the anti-Chinese movement. See *id.*

24. See *id.* at 217-19. In the words of Henry Yu:

The "yellow peril" rhetoric that infused pulp magazines and dime novels did not try to rationalize unfair labor competition or overly efficient farming practices; it dwelled instead upon "Oriental" men preying on helpless "white" women. Perhaps best realized in Sax Rohmer's fictional character in *Fu Manchu*, pulp magazines and novels depicted "Orientals" as scheming men with long fingernails, waiting in ambush to kidnap "white" women into sexual slavery. Yu, *supra* note 10, at 449-50.

25. Osumi, *supra* note 10, at 6 (citing *I DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF CALIFORNIA, 1878-79*, at 632 (Sacramento State Office, 1880)).

26. See generally NAYAN SHAH, *LIVES AT RISK: EPIDEMICS AND RACE IN SAN FRANCISCO'S CHINATOWN* (forthcoming 2000) (on file with author).

27. See Chang, *supra* note 10, at 57-58; Osumi, *supra* note 10, at 7.

28. See 1880 Cal Stat. Ch. 41, Sec. 1, p. 3; Osumi, *supra* note 10, at 8.

29. The San Francisco School Board in 1905 had passed a resolution classifying Japanese school children as "Mongolian" and therefore subject to segregated education facilities under state law. The resolution was never carried out after intervention by President Theodore Roosevelt and two lawsuits filed by the United States government against the San Francisco School Board, which were withdrawn after a deal was brokered, whereby the School Board would withdraw the resolution in exchange for Roosevelt's promise to work to end the immigration of Japanese laborers into California. For an excellent history of Japanese Americans in California see Keith Aoki, [No Right to Own? The Early](#)

[Twentieth Century "Alien Land Laws" as Prelude to Internment, 40 B.C. L. REV. 37 \(1998\).](#)

30. See Osumi, *supra* note 10, at 13. Osumi has written that anti-Japanese spokesmen warned that Japanese students knew "no morals but vice, who sit beside our sons and daughters in our public schools that they may help to debauch, demoralize and teach them the vices which are the customs of the country whence they come." *Id.* One Republican testified before the California Assembly that he was appalled at the sight of white girls "sitting side by side in the schoolroom with matured Japs, with base minds, their lascivious thoughts. ..." *Id.*

31. *Id.*

32. For theorizing on the relation between race, gender, and the nation state see ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW AND THE NATION STATE* 123-35 (1999).

33. See [Cal. Civ. Code § 60 \(1906\)](#) ("All marriages of white persons with negroes, Mongolians, or mulattoes are illegal and void.")

34. Filipinos are believed to have first immigrated to the United States during the period of the Manila Galleon Trade (1593-1815) on Spanish ships. There is evidence that Filipino sailors settled in Louisiana in the 1830s and 1840s. See LUCIANO MANGIAFICO, *CONTEMPORARY AMERICAN IMMIGRANTS: PATTERNS OF FILIPINO, KOREAN, AND CHINESE SETTLEMENT IN THE UNITED STATES* 31 (1988).

Following this, the first wave of migration came in 1903 after United States colonization of the Philippines. Students were sponsored to study in the United States. Called "pensionados" because their expenses were paid by the colonial government, most returned to the Philippines, although some stayed in the United States and worked as unskilled laborers. See *id.* at 32. This was part of a broader American policy that introduced public education in English as the medium of instruction in the colony. This trained the Filipinos to be "citizens of an American colony The ideal colonial was the carbon copy of his conqueror The new Filipino generation learned of the lives of American heroes, sang American songs, and dreamt of snow and Santa Claus." Renato Constantino, *The Miseducation of the Filipino*, in *THE FILIPINOS IN THE PHILIPPINES AND OTHER ESSAYS* 39 (1966), excerpted in *THE PHILIPPINES READER: A HISTORY OF COLONIALISM, NEOCOLONIALISM, DICTATORSHIP, AND RESISTANCE* 45, 47 (Daniel B. Schirmer & Stephen Roskamm Shalom, eds. 1987) [hereinafter *THE PHILIPPINES READER*].

The recruiting of Filipino laborers also bore a relation to labor disputes with other workers. For example, the Hawaii Sugar Planters Association stepped up their recruiting when Japanese plantation workers in Hawaii went on strike in 1909. See MANGIAFICO, *supra* at 34. During the 1920s more than 65,000 men, 5000 women and 3000 children came to Hawaii under contract. By the mid 1920s Filipinos comprised half of all

plantation workers in Hawaii and 75% by 1930. With the Great Depression many of these workers were repatriated to the Philippines. See *id.*

35. President William McKinley, in explaining how he made the decision to approve the annexation of the Philippines, said that he had gone down on his knees to pray for "light and guidance from the 'ruler of nations'" and had been told by God that it was America's duty to "educate" and "uplift" the Filipinos. RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 324 (1989).

36. Between 1910 and 1930 the Filipino population in California jumped from five to 30,470. See *id.* at 315.

37. See MANGIAFICO, *supra* note 34, at 35.

38. See *id.*

39. See *id.* at 36.

40. See TAKAKI, *supra* note 35, at 321-24.

41. See YEN LE ESPIRITU, *ASIAN AMERICAN WOMEN AND MEN: LABOR, LAWS, AND LOVE* 21 (1996). The sex ratios of those who immigrated from China and Japan was also similarly skewed, less dramatically for the Japanese. In 1890, the sex ratio among Chinese immigrants was 27:1. Among the Japanese, in 1910 the sex ratio was 6:5:1. See SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 103-09 (1991).

42. See ESPIRITU, *supra* note 41, at 17-18 (stating that United States industrialists and growers aggressively recruited male workers, while United States immigration policies barred entry of most Asian women); Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, in *ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943*, at 94, 95 (Sucheng Chan ed., 1991) (stating that most significant factor in creating gender imbalance in immigration was action by American government to restrict immigration of Chinese women); GEORGE ANTHONY PEFFER, *IF THEY DON'T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION* 9-11 (1999) (arguing that United States immigration policies were highly significant in shaping gender ratio).

On the tendency to simultaneously overemphasize the patriarchy of Asian cultures and thus elide over other causal factors in shaping behavior and underemphasize the patriarchy of Western cultures, see **Leti Volpp**, [Talking "Culture": Gender, Race, Nation and the Politics of Multiculturalism](#), 96 *COLUM. L. REV.* 1573 (1996), and **Leti Volpp**, [\(Mis\)Identifying Culture: Asian Women and the "Cultural Defense,"](#) 17 *HARV. WOMEN'S L.J.* 57 (1994).

43. See ESPIRITU, *supra* note 41, at 17 ("Detaching the male worker from his household increased profit margins because it shifted the cost of reproduction from the state and the employer to the kin group left behind in Asia."); Lucie Cheng & Edna Bonacich, *Introduction: A Theoretical Orientation to International Labor Migration*, in *LABOR IMMIGRATION UNDER CAPITALISM: ASIAN WORKERS IN THE UNITED STATES BEFORE WORLD WAR II* 32 (Lucie

Cheng & Edna Bonacich eds., 1984) ("Immigration law can select for ablebodied young men while excluding all dependent populations, such as women, children, the elderly, the sick, and paupers."). A Californian grower told an interviewer in 1930 that he preferred to hire Filipinos because they were without families: "These Mexicans and Spaniards bring their families with them and I have to fix up houses; but I can put a hundred Filipinos in that bar" TAKAKI, *supra* note 35, at 321. Note that the young single male immigrant is still seen as the ideal worker by agribusiness. See Peter Brownell, Commentary, A License to Exploit Farm Workers, WASH. TIMES, Sept. 23, 1998, at A17 (quoting Georgia onion grower that told Chicago Tribune that "the [foreign workers we have now, they come and they work. They don't have kids to pick up from school or to take to the doctor. They don't have child support issues. They don't ask to leave early for this and that.").

44. See MANGIAFICO, *supra* note 34, at 35.

45. For an expression of these three arenas of concern, see THE PHILIPPINES READER, *supra* note 34, at 59-60 (quoting Resolution of Northern Monterey Chamber of Commerce). The Resolution states:

The charges made against the Filipinos in this Resolution were as follows: (1) Economic. They accept, it is alleged, lower wages than the American standards allow. The new immigrants coming in each month increase the labor supply and hold wages down. They live on fish and rice, and a dozen may occupy one or two rooms only. The cost of living is very low, hence, Americans cannot compete with them. (2) Health. Some Filipinos bring in meningitis, and other dangerous diseases. Some live unhealthily. Sometimes fifteen or more sleep in one or two rooms. (3) Intermarriage. A few have married white girls. Others will. "If the present state of affairs continues there will be 40,000 half-breed[s] in California before ten years have passed," -- is the dire prediction

The Resolution continued: "We do not advocate violence but we do feel that the United States should give the Filipinos their liberty and send those unwelcome inhabitants from our shores that the white people have inherited this country for themselves and their offspring might live." *Id.* at 60. The author of the Resolution, Judge Rohrback, stated that this was "but the beginning of an investigation of a situation that will eventually lead to the exclusion of the Filipinos or the deterioration of the white race in the state of California." *Id.* at 59.

46. See HERMAN FELDMAN, RACIAL FACTORS IN AMERICAN INDUSTRY 100 (1931). Feldman reports that antagonisms had arisen because of the belief that Filipinos brought meningitis into the country, a belief that was acknowledged as false by some of those who first set it in circulation. Lasker has ascribed this to a mistaken early statement of a public health officer in San Francisco, to the effect that immigrant Filipinos were responsible for the cerebrospinal meningitis epidemic of the spring of 1929, that attracted the attention of circles hostile to the Filipinos coming to the United States and was widely diffused throughout the country. See LASKER, *supra* note 1, at 106.

47. See H. BRETT MELENDY, *ASIANS IN AMERICA: FILIPINOS, KOREANS AND EAST INDIANS* 46 (1977); see also FELDMAN, *supra* note 46, at 100 ("Filipinos have in many sections offended local sentiment by appearing over-aggressive in their attention to women who are not of their race ..."). "American" was presumably intended to mean "white."

48. See MELENDY, *supra* note 47, at 68; KEVIN J. MUMFORD, *INTERZONES: BLACK/WHITE SEX DISTRICTS IN CHICAGO AND NEW YORK IN THE EARLY TWENTIETH CENTURY* 53-71 (1997); *THE PHILIPPINES READER*, *supra* note 34, at 60-61; Constantine Panunzio, *Intermarriage in Los Angeles, 1924-33*, 47 *AM. J. SOC.* 690, 695-96 (1942); Rhacel Salazar Parrenas, "White Trash" Meets the "Little Brown Monkeys": The Taxi Dance Hall as a Site of Interracial and Gender Alliances Between White Working Class Women and Filipino Immigrant Men in the 1920s and 30s, 24 *AMERASIA J.* 115 (1998); *Ministers Protest Filipino Dance Hall*, *S.F. CHRO.*, Oct. 5, 1934 at 21 (reporting protest in San Jose of dance hall allegedly threatening morals of neighborhood); see also *Dancing Partners May Be Had at One Dime per Dance*, *L.A. TIMES*, May 10, 1925 (describing dance halls where women dance from eight until midnight and engage in from sixty to one hundred dances each night; out of the 10-cent ticket purchased for each short whirl around the floor, "the girl receives five cents"). Women that worked as taxi dancers were largely economically struggling young women, who had come to Los Angeles to try their chance in the movie industry. See Panunzio, *supra* at 696.

49. This quote was attributed to Justice of the Peace D.W. Rohrback, a leader of the Northern Monterey County Chamber of Commerce. See MELENDY, *supra* note 47, at 55.

50. Anti-Filipino riots took place in Yakima, Washington in 1928, and in four locations in California: Exeter in 1929, Watsonville in 1930, Salinas in 1934, and Lake County in 1939. See LASKER, *supra* note 1, at 36.

51. See MELENDY, *supra* note 47, at 55; *THE PHILIPPINES READER*, *supra* note 34, at 61-62; LASKER, *supra* note 1, at 358-65. Lasker and Emory Bogardus have provided a detailed report of tensions that led up to this incident. While there was severe competition for jobs in Watsonville, that was not considered the cause for the outbreak of the violence. Rather, the immediate cause was the denunciation of Filipinos as a race by Justice of the Peace D.W. Rohrback of Pajaro township, who proposed a successful resolution to this effect adopted by the Chamber of Commerce of Northern Monterey County on Jan 7, 1930. See *THE PHILIPPINES READER*, *supra* note 34, at 59. Bogardus stated that the antecedent to the resolution was the few cases of Filipinos who had been brought into court, primarily for reckless driving of automobiles. See *id.* Lasker said that the resolution was founded on allegations of Filipinos interacting with young teenaged white girls. For example, there was a Filipino boy found occupying a room in a Filipino rooming house with "two little girls of [German stock," 16 and 11 years old. In fact, the boy was engaged to the older girl with parental consent

and was found to have harmed neither of them. See LASKER, *supra* note 1, at 361. Both Lasker and Bogardus have agreed that Filipinos responded to the resolution with leaflets. See *id.*; THE PHILIPPINES READER, *supra* note 34, at 60. Subsequently, Filipinos opened a club on the beach and engaged white girls to entertain as professional dancing partners. One resident told Bogardus:

Taxi dance halls where white girls dance with Orientals may be all right in San Francisco or Los Angeles but not in our community. We are a small city and have had nothing of the kind before. We won't stand for anything of the kind. THE PHILIPPINES READER, *supra* note 34, at 61.

Tensions escalated, but the police failed to protect Filipinos from the local residents. Autos crowded with youths toured the district, shooting stones or bullets into passing autos which were supposed to contain Filipinos and into farm buildings supposed to house Filipinos. Mobs in the hundreds clubbed Filipinos and destroyed property. See *id.* at 61. Eventually, Fermin Tobera, 22, was shot and killed. See LASKER, *supra* note 1, at 362-63. This incident was quickly used by Filipinos to bolster claims for Filipino independence, and by California agribusiness to call for increased immigration of Mexican labor to replace Filipinos. Filipino regional and national organizations spread the message: "Give the Philippine Islands their promised independence; and we shall go home to prevent the occurrence of such events as these." See LASKER, *supra* note 1, at 364. The Agricultural Committee of the Chamber of Commerce of California used the incident to repeat its plea for Mexican labor and against its further restriction See *id.*

52. Filipinos were generally characterized as criminals. The United States Commission on Law Observance and Enforcement reported the views of San Francisco authorities in 1931: "The Filipino is our greatest menace. They are all criminally minded These Filipinos are undesirable nationals because there is not one of them but who is not a potential criminal." MELENDY, *supra* note 47, at 65-66 (citing U.S. COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIME AND THE FOREIGN BORN, REPORT NO. 10, June 24, 1931, at 362). This characterization persisted despite the fact that the felony conviction rate for Filipino males compared favorably with that of white males. According to the Bureau of Census of Crimes, the number of felony commitments per thousand of the population between 1910 and 1940 was 4.4% for native whites and one percent for Filipinos. See TAKAKI, *supra* note 35, at 325.

53. Yet he "did not blame" the Filipinos. "They are vainly attempting to adjust themselves to civilization, but haven't the training or education. They are only one jump from the jungle. It is our fault for bringing them here." Dance Halls Hit: White Girl Tells of Filipino Attack, S.F. CHRO, May 17, 1936, at 3. Judge Lazarus had previously characterized Filipinos as "scarcely more than savages." *Id.* In response, more than 200 Filipinos adopted a resolution protesting this, forwarded to the Judge and to the Filipino Resident Commissioner in

Washington, D.C. See Filipinos Protest "Savage" Statement, S.F. CHRO, Feb. 23, 1936, at 16.

54. See Five Filipinos Admit Mixed Race Parties, S.F. CHRO, Feb. 23, 1936 at 2.

55. One "white girl" testified that the social contacts of hundreds of San Francisco girls were restricted to "flashily dressed 'little brown me'" See Filipinos' White Girls: Waitress Tells of Mixed Race Parties,. S.F. CHRO, Feb. 22, 1936, at 13. Judge Lazarus "blew up." Id. He noted that if a girl is of age and wanted to associate with these men, there was nothing that could be done. See id. But "girls of tender years are being ruined and led astray by the strange influence these men seem to have on women of a certain type." Id. He attributed this to the Filipinos driving flashy cars and spending money on white girls, while hundreds of "decent white youths can't find a job for love or money It's enough to make a man's blood boil, and mine is boiling at this minute!" Id. It was also alleged that Filipino men attended church for the opportunity to "meet white girls." See Church Closed by Elopements of Mixed Races: Filipino Marriages to White Girls Cause of Breach, S.F. CHRO, Apr. 10, 1933, at 3 (minister closed church when he discovered "five mixed elopements between whites and Filipinos and general unconventional relations between whites and Filipinos" in congregation).

56. See THE PHILIPPINES READER, supra note 34, at 59-60.

57. See Osumi, supra note 10, at 18 (citing COMMONWEALTH CLUB, TRANSACTIONS 24, at 341 (1929), and C.M. Goethe, Filipino Immigration Viewed as Peril, Current History 353-36 (1931)). Note that in the Philippines the word mestizo has its own meaning, which is someone with Spanish ancestry.

58. Hearings Before the Comm. On Immigration and Naturalization, 71st Cong. 35 (1930) (statement of Dr. David Barrows of the University of California), cited in LASKER, supra note 1, at 98.

Their [the Filipinos' vices are almost entirely based on sexual passion The evidence is very clear that, having no wholesome society of his own, he is drawn into the lowest and least fortunate associations. He usually frequents the poorer quarters of our towns and spends the residue of his savings in brothels and dancehalls, which in spite of our laws exist to minister to his lower nature. Everything in our rapid, pleasure-seeking life and the more or less shameless exhibitionism which accompanies it contributes to overwhelm these young men who, in most cases, are only a few years removed from the even, placid life of a primitive native barrio. Id.

59. Melendy reports that the prevalent white view was that Filipinos were savages, not far removed from the tribal state. See MELENDY, supra note 47, at 59. He notes that the reports of missionaries, who recounted primitive conditions of rural tribes furthered public apprehension of Filipinos, thought of as "cannibalistic" and "savage-like." See id. at 59-60. The President of the Immigration Study Commission stated: "These men are jungle folk, and their primitive moral code accentuates the race problem even more than the economic

difficulty." TAKAKI, *supra* note 35, at 325-26. One contemporary observer has queried:

But what of these people, whom we have placed beneath the Stars and Stripes, both by the right of capture and purchase of their land? ... Most persons know very little of them, except that they are a half-civilized lot of people, at best, and the lowest order of barbarians, at worst.

And this general impression is almost correct; civilization is at a very low ebb in the Philippines. Of course, the Spaniards who have settled there, the Europeans who carry on business dealings on the islands, some of the Chinese merchants, and even some of the high-caste natives, are people of culture; but the great overwhelming mass of residents on the island are in low stages of savagery. ALDEN MARCH, *THE HISTORY AND CONQUEST OF THE PHILIPPINES AND OUR OTHER ISLAND POSSESSIONS* 169 (1970) (1899).

60. See *Free Blames Sex in Filipino Row*, S.F. CHRO, Sept. 16, 1930, at 3. Representative Arthur Free of San Jose explained that resentment against Filipinos in California was not because they worked for lower wages, but because "the aliens mix with white women Most of them come here without their women, and the real cause for resentment against them is that they attract white girls to their club houses and other places of resort." *Id.*

61. See MELENDY, *supra* note 47, at 69.

62. See E. San Juan, Jr., *Configuring the Filipino Diaspora in the United States*, 3 *DIASPORA* 117, 120 (1994) [hereinafter San Juan, Jr., *Configuring the Filipino Diaspora*. This racialization is evident in contemporary reports of the Filipino-American War, described by one participant as "a hot game of killing niggers." See E. SAN JUAN, JR., *FROM EXILE TO DIASPORA: VERSIONS OF THE FILIPINO EXPERIENCE IN THE UNITED STATES* 20 (1998) [hereinafter SAN JUAN, JR., *FROM EXILE TO DIASPORA*; see also George Lipsitz, "Frantic to Join ... the Japanese Army": The Asia Pacific War in the Lives of African American Soldiers and Civilians, in *THE POLITICS OF CULTURE IN THE SHADOW OF CAPITAL* 324, 328 (Lisa Lowe and David Lloyd eds., 1997). Lipsitz notes that white American soldiers called Filipinos "niggers," "black devils," and "gugus." See *id.* Filipinos fighting the United States occupation made explicit appeals to Black troops on the basis of "racial solidarity," offering posts as commissioned officers to members of the rebel army who switched sides. See *id.*; see also MUMFORD, *supra* note 48, at 63, 68 (describing perception of Filipinos as black); **Tanya Kateri Hernandez**, [*The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*](#), 76 *OR. L. REV.* 731, 737 (1997) (describing congressional debate on citizenship status of Filipinos and concern that Filipinos had African attributes). One representative described them as "physically weaklings of low stature, with black skin, closely curling hair, flat noses, thick lips, and large, clumsy feet"; another said "How different the case of the Philippine Islands The inhabitants are of wholly different races of people from ours -- Asiatics, Malays, negroes and

mixed blood. They have nothing in common with us and centuries can not assimilate them." *Id.*

63. See TAKAKI, *supra* note 23, at 217-19. White workers referred to Chinese people as "nagurs," Chinese features were described as "but a slight removal from the African race," and as described by Ronald Takaki, the "'Negroization' of the Chinese reached a high point when a magazine cartoon depicted them as a bloodsucking vampire with slanted eyes, a pigtail, dark skin, and thick lips." *Id.* at 219.

The blurring of Chinese with blacks was also apparent in a 1854 case where Chinese people were prohibited from testifying against whites under a statute that provided that "no Black, or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a White man" [*People v. Hall*, 4 Cal. 399, 399 \(1854\)](#). The court's rationale was twofold: the word "Indian" referred to "not alone the North American Indian, but the whole of the Mongolian race," and "[the word 'Black' may include all Negroes, but the term 'Negro' does not include all Black persons." [Id. at 402-03](#). "Black" meant "every one who is not of white blood" and "White" excluded "all inferior races." [Id. at 403, 404](#).

64. See TAKAKI, *supra* note 35, at 330. A letter to the Dinuba Sentinel stated: "Negroes usually understand how to act," but "these Fils" think they have "a perfect right to mingle with the white people and even to intermarry." *Id.*

65. LASKER, *supra* note 1, at 96. He also noted that Greek and Russian immigrants to the United States and West Africans in English port cities had been similarly described. See *id.* at 97.

66. See CHAN, *supra* note 41, at 103-09. In 1890, the sex ratio among Chinese immigrants was 27:1 and continued to be skewed into the mid-1920s. Among the Filipinos, the sex ratio in 1920 was roughly 19:1. Among the Japanese, however, the sex ratio in 1910 was 6.5:1 and the disparity had lessened further by 1920. See *id.* The 1908 Gentlemen's Agreement halting Japanese immigration had exempted family members and wives from exclusion See TAKAKI, *supra* note 35, at 337.

67. Ronald Takaki asserts that men from the Philippines seemed to seek out white female companionship and to be attractive to white women, to a greater degree than men from China, Japan, Korea, and India. See TAKAKI, *supra* note 35, at 328.

68. I am indebted to Rachel Moran for this suggestion

69. For an examination of Asian male sexuality, see Richard Fung, *Looking For My Penis: The Eroticized Asian in Gay Video Porn*, in *HOW DO I LOOK?*, QUEER FILM AND VIDEO 145 (Bad Object-Choices ed., 1991), Daniel M. Kim, *The Strange Love of Frank Chin*, in *Q & A: QUEER IN ASIAN AMERICA*, *supra* note 4, at 270, and Peter Kwan, *supra* note 10, at 123-24.

70. Foster, *supra* note 10, at 448. "In this opinion, Edward T. Bishop, assistant county counsel, advised L.E. Lampton, County Clerk, as to 'classifying the Filipino under the proper one of the four races mentioned in [Section 69 of the](#)

[Civil Code](#)." Id. at 447. He stated that "an examination of seven or eight authorities, encyclopedias, etc., reveals that scientists are not agreed upon the divisions of mankind into races," and concluded:

While there are scientists who would classify the Malaysians as an offshoot of the Mongolian race, nevertheless, ordinarily when speaking of "Mongolians" reference is had to the yellow and not to the brown people and we believe that the legislature in [Section 69](#) did not intend to prohibit the marriage of people of the Malay race with white persons. We are further convinced of the correctness of our conclusion when we regard the history of the situation. In 1880 [Section 69](#) was amended so as to prevent the marriage of a white person with a Negro, mulatto, or Mongolian. It was about this time that there was a Chinese problem in California At that time the question of the marriage of white persons with members of the brown or Malayan races was not a live one, and there was no call for a solution We are assuming that the problem under consideration involves a Filipino who belongs to one of the Malay tribes. If, as is not at all impossible, he be a Negrito or in part Chinaman, another question is presented and another answer give Id. at 447-48. The County Counsel opinion was written at a time when the number of Filipinos in the United States was small, fewer than 6000.

71. See id. at 448. It is important to point out here that Filipinas/ os are a diverse community formed through mixing of different "races." See, e.g., Napoleon Lustre, Conditions (an unrestricted list), 24 AMERASIA 111 (1998) (describing racial mixtures that make Filipinos). Jurists and county officials were attentive to this fact in choosing to label Filipinos as Mongolian when they were part Chinese. See id.

72. See Foster, *supra* note 10, at 444-45 (citing *California v. Yatko*, No. 24795, Superior Court of Los Angeles County, May 11, 1925); Filipino Pleads Unwritten Law in Murder Case, L.A. TIMES, May 4, 1925, at 18 [hereinafter Unwritten Law]. Foster's article contains significant material not contained in the Los Angeles County records of the case.

73. See Unwritten Law, *supra* note 72, at 18.

74. See Old Law Invoked on Yatko, L.A. TIMES, May 6, 1925, at 5 [hereinafter Old Law; Unwritten Law, *supra* note 72, at 2.

75. See Old Law, *supra* note 74, at 5.

76. Id.

77. Foster, *supra* note 10, at 445.

78. Id.

79. Id. at 446.

80. Id. While mention was made of the fact that Yatko's paternal grandfather was half Chinese, in other words, that Yatko was one-eighth Chinese, this did not lead the judge to rule on that basis that Yatko was "Mongolia" See id. at 445-46.

81. Unwritten Law, *supra* note 72, at 2. Counsel for the state had called attention to the homicidal mania of Malays, called "running amuck," which he stated was a "neuropathic tendency imbuing them without any reason or motive to

kill persons of other races." See Foster, *supra* note 10, at 445.

82. See Foster, *supra* note 10, at 444; Life Sentence to Be Imposed on Yatko Today, L.A. TIMES, May 11, 1925, at 17; Life Term for Filipino Slayer, L.A. TIMES, May 9, 1925, at 2. Yatko appealed his conviction, principally on the grounds of the decision to allow Lola Butler to testify. The appeal was denied. See Deny Filipino New Trial in Kidder Murder, L.A. TIMES, May 12, 1925, at 5.

83. Webb subsequently testified for Filipino exclusion in 1929 Commonwealth Club forums and the 1930 Congressional hearings. See Osumi, *supra* note 10, at 18.

84. Letter from Attorney General U.S. Webb to the Honorable C.C. Kempley, District Attorney of San Diego County 6 (June 8, 1926) [hereinafter Letter from Webb (on file with author)].

85. See *id.*

86. Webb noted that the term "Hindu" was somewhat misleading because it was generally used to describe a native of India, which was inhabited by seven races. See *id.* Of these seven, two were "mongoloid": the Mongolo-Dravidian type of Bengal and Orissa, and the Mongoloid type of the Himalayas, Nepal, Assam, and Burma. See *id.* These individuals would not be permitted to marry white persons in California, so there would be a question of fact in each case to determine to which race the specific native of India belonged. See *id.*

How "Hindus" (or South Asians) were understood in relation to California's miscegenation laws is another site for further inquiry. While South Asian immigrants to California -- predominantly Sikhs from Punjab -- were not in a class enumerated under the state statute, there were nonetheless instances where county clerks refused to issue marriage licenses when there was "too much" differentiation in skin color between bride and groom, when she was labeled "white," and he was labeled "black" or "brown" This raises the important point that how race is understood, acted upon, and also created often diverges from what is presented as the official classification of race. There was little opposition to South Asian men marrying Mexican women, who were usually judged to be racially similar, and there were an estimated 500 such marriages. For a description of how South Asians were classified under California's miscegenation laws, and the development of the Mexican-Punjabi community in Imperial Valley, California, see Bruce La Brack, *The Sikhs of Northern California, 1904-1975*, at 172-76 (1988), and Karen I. Leonard, *Making Ethnic Choices: California's Punjabi Mexican Americans* 62-78 (1992).

87. Webb noted that Ales Hrdlicka, "probably the best known and ablest anthropologist in the United States," had testified at a hearing before the House of Representatives in 1922 that Filipinos and Malays belonged to the "mongoloid race." Letter from Webb, *supra* note 84. Webb also noted that the population of the Philippines, according to the Encyclopedia Britannica, is "7,635,626 of which 7,539,632 belong to the Malay race, 42,097 yellow of which 97.5% are from China; 24,016 blacks; 14,271 whites and 15,419 mixed, Chinese with Malays and

Spanish with Malays." See *id.* His conclusion that the Filipinos, being Malays, were properly classed as Mongolians, included an exception for "the inhabitants belonging to the black race and the whites constituting a negligible proportion of the population" See *id.* Presumably, the "inhabitants belonging to the black race" would also be prohibited from marrying white persons in California under the statute. See *id.*

88. Confusion among county clerks on this issue was the norm. Bruno Lasker reported that:

Sometimes the Filipino's status in a California county changed overnight as new county clerks were appointed whose anthropological ideas differed from those of their predecessors. Thus in Santa Barbara, county clerk D. F. Hunt, several years ago, decided that Filipinos were Mongolians and has consistently held to this decision in the face of heated arguments and of the fact that many couples which first presented themselves before him later secured marriage licenses in some other county The majority of officials seem, without any recourse to science at all, to have married Filipinos indiscriminately with white and with Japanese and Chinese girls, thus exposing themselves to the possible charge that if Filipinos should through some court decision be declared to be white, then their marriages to the Asiatic girls would be illegal. LASKER, *supra* note 1, at 118.

89. See Foster, *supra* note 10, at 448-52; Racial Divorce Plea Rejected: Judge Rules Law Needed to Bar Filipino Weddings; White Girl Denied Freedom on Skin Color Basis, L.A. TIMES, Oct. 11, 1931, at 5 [hereinafter Racial Divorce Plea Rejected].

90. See Foster, *supra* note 10, at 448 (describing Petition for Writ of Prohibition, Robinson v. Lampton, No. 2496504, Superior Court of Los Angeles County). Unfortunately, the case number Foster gives, cited by other scholars, is incorrect, and I was unable to locate the decision. Happily, the decision was excerpted in contemporary newspaper reports. As Rhacel Salazar Parrenas has written, the Robinson case signifies the loss of community and alienation from their families that white women faced for their involvement with Filipino men. See Parrenas, *supra* note 48, at 129.

91. LASKER, *supra* note 1, at 118.

92. See *id.* at 119.

93. See S.F. Filipinos Oppose Ruling, S.F. CHRO, Feb. 27, 1930 at 6. The article reported that four Filipino representatives were interviewed, all of whom emphatically declared they were Malaysians and not Mongolians. But they differed on the "ethics" of intermarriage with whites: one representative, while agreeing that the Filipinos were not of the Mongolian race, backed Judge Smith's ruling, stating that "all the recent race trouble was directly due to Filipinos aspiring to marry white girls." *Id.*

94. See Foster, *supra* note 10, at 449 (citing Visco v. Lampton, No. C319408, Petition for Order of Alternative Mandamus (June 3, 1931), Superior Court of Los

Angeles County, Judge Walter Guerin).

95. See *id.*

96. While not apparent from the record of the case proceedings, Foster asserted that Salas was classified as a Mexican India See *id.*

97. See *id.* ("[The judge stated he would have decided in favor of Mr. Visco had Miss Salas been a white person. "). In advance of the Visco decision, circulars had been distributed in the Filipino community to garner support. The circular read, in part:

The fundamental issue involved in this case is, that Filipinos are not Mongolians. Are you willing to stand and defend your right UNDER GOD-GIVEN PRINCIPLE OF MARRIAGE AND HAPPINESS? Or shall we allow ourselves to be restrained by laws motivated by unjust discrimination, in defiance of the laws of God and reason?

NOW, FILIPINOS, DO YOU WANT TO BE CALLED MONGOLIAN? IF YOUR ANSWER IS "NO" SUPPORT THE FIGHT OF GAVINO C. VISCO BY SUBSCRIBING TO HIS LEGAL FUND LIBERALLY. Foster, *supra* note 10, at 450 (quoting FILIPINO HOME CLUB CIRCULAR).

98. See Foster, *supra* note 10, at 450 (discussing Petition for Annulment of Marriage, Laddaran v. Laddaran, No. D95459 (Los Angeles Super. Ct. 1931)). The complaint stated that "[plaintiff is of the Filipino race and as such is prohibited from marriage with Defendant who is of the Caucasian, or white race." Complaint for Annulment of Marriage at 2, Laddaran v. Laddaran, No. D95459.

99. See Foster, *supra* note 10, at 450.

100. See *id.* at 451 (discussing Murillo v. Murillo, No. D97715 (October 10, 1931), Superior Court of Los Angeles County, Judge Thomas C. Gould).

101. *Id.*

102. *Id.*; see also Racial Divorce Plea Rejected, *supra* note 89, at 5. The Judge also noted that the court was aware that the federal naturalization bureau included Filipinos and Malays generally in its general classification of "Mongolian Grand Division" See Murillo v. Murillo, No. D97715 (1931); Foster, *supra* note 10, at 451.

103. See Foster, *supra* note 10, at 452.

104. See Roldan v. Los Angeles County, No. C326484, Findings of Fact and Conclusions of Law (Los Angeles Super. Ct., Apr. 8, 1932).

105. See *id.* at 268-69. Ian Haney Lopez has documented a general shift from consideration of scientific evidence to common-sense understandings of race in naturalization cases. This shift coincided with the growth of scientific evidence supporting the idea that groups such as Indians, Persians, and Armenians should be considered "Caucasian," and therefore eligible to naturalize under the law. Shifting towards the "common sense" understanding allowed courts to deny these groups citizenship in the United States. See generally IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

106. See [Roldan, 129 Cal. App. at 272-73, 18 P.2d at 708-09](#). In concluding that a Malay is not a Mongolian, the judge relied heavily on the definition of a "Mongolian" from the encyclopedia and on the original legislative intent of enacting laws restricting marriages between whites and Mongolians. The decision concluded by stating:

[In 1880 ... there was no thought of applying the name Mongolian to a Malay; ... the word was used to designate the class of residents whose presence caused the problem at which all the legislation was directed, viz., the Chinese, and possibly contiguous peoples of like characteristics; ... the common classification of the races was Blumenbach's, which made the "Malay" one of the five grand subdivisions, i.e., the "brown race," and ... such classification persisted until after [section 60 of the Civil Code](#) was amended in 1905 to make it consistent with [section 69](#) of the same Code. [Roldan, 129 Cal. App. at 272-73, 18 P.2d at 709](#). Attorney General U.S. Webb and Los Angeles County Counsel Everett Mattoon petitioned for a rehearing before the State Supreme Court, which was denied on March 27, 1933. See *Supreme Court Removes Ban on Filipino, White Marriages*, S.F. CHRO, Mar. 30, 1933, at 1.

107. See, e.g., [Roldan, 129 Cal. App. at 273, 18 P.2d at 709](#) (deferring to legislature).

108. See Osumi, *supra* note 10, at 20; see also *Bill Opposes White, Filipino Marriages*, S.F. CHRO, Mar. 14, 1933, at 1 (noting that Senate Judiciary Committee reported that two bills voiding marriage between Malayan and white will likely pass Senate).

109. See 1905 Cal. Stat. 104 (amending [section 60 of Civil Code](#) to read: "All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void"); 1905 Cal. Stat. 105 (amending [section 69 of Civil Code](#) to read: "no license must be issued authorizing the marriage of a white person with a negro, mulatto, Mongolian or member of the Malay race"); Osumi, *supra* note 10, at 20 (recognizing that amended statute included Malays); *Bill Forbids White, Filipino Marriages*, S.F. CHRO, Apr. 1, 1933, at 1 (stating that Assembly committee approved the bills introduced by Senator Jones). The San Francisco Chronicle reported the marriage of one couple, Magno Basilides Badar and Agnes Regina Peterson -- described as "an attractive blonde" -- who would probably be among the few couples of Caucasian and Filipino nativity to be married in California, because they slipped between the window of the Roldan decision and the new law. See *White Girl, Filipino Ask Permit to Wed*, S.F. CHRO Apr. 6, 1933, at 1.

110. See [Cal. Civ. Code § 69 \(1937\)](#) (amended 1959 to exclude race as a criterion for legal marriage); [Cal. Civ. Code § 60](#) (Deering 1937) (repealed 1959); see also Osumi, *supra* note 10, at 20-21; *Recent Decisions: Marriage: Miscegenation*, 22 Cal. L. Rev. 116-17 (1934) (criticizing passage of legislation); *White Girl, Filipino Ask Permit to Wed*, *supra* note 109. Filipino- white couples could still go to neighboring states to be lawfully married. See [People v. Godines](#),

[17 Cal. App. 2d 721, 723, 62 P.2d 787-88 \(1936\)](#) (holding that Filipino-white marriage in New Mexico, where it was legal, was also valid in California). The ability of couples to travel to another state where Filipino-white marriages were permitted obviously depended on their financial situation, something made more difficult by the Great Depression. Because of agitation about the practice of couples traveling to other states for this purpose, the California Assembly and Senate passed a resolution requesting Utah to prohibit Filipino-white marriages, which Utah did in 1939. South Dakota, Nevada, Arizona, and Wyoming had already done so. See Osumi, *supra* note 10, at 22.

111. Tydings-McDuffie Act, Pub. L. No. 73-127, 48 Stat. 456 (1934). As increasing concern about competition from the Philippines arose in the 1920s, the independence movement in the United States started to gain support. By the late 1920s, the anti-Philippine sentiment was strongly articulated by dairy organizations, general farm groups, domestic sugar producer and cordage manufacturers; in 1932 Congress approved the Hare-Hawes-Cutting Act. The Hares- Hawes-Cutting Act provided for a 10-year transitional period of free trade, imposition of quotas on Philippine products, immigration restrictions limiting entry of Filipinos to 50 persons a year, and presence of permanent American military bases in the Philippines. The Philippine legislature or a constitutional convention had to agree to the act for it to take effect. It was slightly amended, eliminating the reference to permanent military bases, except naval stations, and was approved as the Tydings-McDuffie Act in 1934. It is generally understood that the Filipinos agreed to the terms of the Tydings- McDuffie Act because they believed the act was the best possible at the time and implied future review of the provisions. See *id.*; THE PHILIPPINES READER, *supra* note 34, at 56-58; H. Brett Melendy, The Tydings-McDuffie Act of 1934, in ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY 283-96 (Hyung-Chan Kim ed., 1996).

112. Even after the Tydings-McDuffie Act was passed, there was unabated pressure from labor groups, so in 1935 Congress passed the Repatriation Act, providing free transportation for Filipinos returning home -- but with the catch that re-entry was subject to the new annual quota of 50. Only a small minority agreed. See MANGIAFICO, *supra* note 34, at 37.

113. See BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990, at 35 (1993).

114. E. San Juan has suggested that this obsessive anxiety only temporarily lived an underground existence, but metamorphized into anxiety over G.I. brides at the end of WWII, and now has manifested in anxiety over the so-called mail-order bride syndrome. See San Juan, Jr., Configuring the Filipino Diaspora, *supra* note 62, at 120. I am indebted to Sherene Razack for the point that this anxiety should not really be considered a generalized anxiety about Filipino sexuality, but that it has differently gendered roots and trajectories. We can see the contemporary anxiety about "mail-order brides" as described in Peter Kwan's

work on the film *Priscilla, Queen of the Desert*, in which the Filipino woman character is presented as a grotesque sexual figure, motivated solely by her desire to sexually perform. She is referred to by others in the film as a "mail-order bride," even though she is not one. See Kwan, *supra* note 10, at 106-07. Often, Filipina is equated with a "mail-order bride," even though many women involved in the "mail-order bride" business are not Filipina. It is important to point out here that "mail-order bride" is considered by many to be a derogatory term. See **LETI VOLPP, WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES ACCESSIBLE** 8 (1995). I would argue that there are significant similarities between some relationships that are formed through the "mail-order" bride business and the everyday United States practice of placing and answering personals ads. A similar point could be made about comparing the United States practice of using personal ads with arranged marriages. What leads, in part, to the failure to understand the significant similarities between what "they" do and what "we" do is the prevalent conceptualization of United States dating and marriage as purely romantic, in contrast to what is conceptualized as the unromantic nature of family members or written advertisements facilitating marriages or the unromantic idea of finances playing a role in marriages.

Describing the Australian context, Jan J. Pettman writes that "many Filipinas married to Australian men bitterly resent those who see them as 'mail-order brides,' a stereotype that encourages their treatment as exotic and available Asian women or as passive victims." JAN J. PETTMAN, *WORLDING WOMEN: A FEMINIST INTERNATIONAL POLITICS* 194-95 (1996). Some women did enter Australia as part of the trade in wives, in order to make what they could of their options, leading to arrangements that sometimes ended satisfactorily but sometimes did not, due to the situation of acute dependence that can result. See *id.* Since 1980, 18 Filipina women and four children have died at the hands of Australian men, and four women and one child have disappeared in Australia. See *id.*

In the United States, there has also been violence directed against women that came to the United States through these mechanisms. Timothy Blackwell of Seattle, Washington, shot and killed his pregnant Filipina wife, Susana Blackwell, whom he met and married through a matchmaking service, while she sat outside the courtroom that was to determine whether there should be an annulment of marriage or a divorce. See Thomas W. Haines & Neil Gonzales, *Third Shooting Victim Dies*, *SEATTLE TIMES*, Mar. 3, 1995, at A1.

115. [32 Cal. 2d 711, 198 P.2d 17 \(1948\)](#). In *Perez*, a divided majority agreed the statute was unconstitutional. Roger Traynor and two other justices wrote a lengthy opinion asserting that racial categories regarding marriage are irrational and violate the equal protection clause. A separate concurrence called antimiscegenation laws unconstitutional because they were color conscious. Finally, an additional concurrence stated that the freedom of religion is one of the

liberties encompassed in the Fourteenth Amendment and the antimiscegenation statutes were too vague and uncertain to regulate a fundamental right.

116. I will note here that Alabama currently still has, as part of its constitution, an antimiscegenation provisio See [Ala. Const. art. IV, § 102](#). The proposal to eliminate the antimiscegenation provision was approved by the House in April 1999 and by the Senate in June 1999 without dissent. The proposal was expected to be on the ballot on October 12, 1999, when Alabama voters were to cast ballots for two other statewide referendums. However, due to the failure of the legislature to pass a resolution setting the antimiscegenation issue for the October ballot, the expected amendment may have to wait until the general elections in November 2000. See Alabama Interracial Nuptial Ban Nears End, L.A. Times, June 3, 1999, at A13; Phillip Rawls, Goof Keeps Interracial Marriage Issue Off Oct. 12 Ballot, Associated Press Newswires, June 18, 1999, at 03:06:00. In November 1998, South Carolina voters approved an initiative to remove the ban of interracial marriages from their state constitutio Although this has been reported as a victory, it is important to note that the repeal was opposed by 38% of those who voted. See Richard Reeves, Editorial, Jefferson's Pessimism Proved Wrong, Star-Ledger (Newark J.), Nov. 20, 1998, at 031; Editorial, Wonders About Interracial Vote Result, Augusta Chro, Nov. 24, 1998, at A4.

117. See Eva Saks, Representing Miscegenation Law, 8 RARITAN 39, 40-42, 64 (1988). The Yale Law Journal reported in 1949 that evidence deduced in support of the statutes consisted largely of biological reports of "Negro mental and physical inferiority" and "the allegedly disastrous results of miscegenation," namely "race crossing" leading to inferior progeny, and sociological considerations that miscegenation occurs among the "dregs of society" and that miscegenous marriages "increase animosity towards racial minorities." See Constitutionality, *supra* note 16, at 473-79. While the note describes all of the existing antimiscegenation laws, its focus is on miscegenation between whites and blacks.

118. See Chang, *supra* note 10, at 59-60.

119. See Neil Gotanda, Asian American Rights and the Miss Saigon Syndrome, in ASIAN AMERICANS AND THE SUPREME COURT 1087, 1095-99 (Hyung-Chan Kim ed., 1992); Neil Gotanda, "[Other Non-Whites](#)" in [American Legal History: A Review of Justice at War](#), 85 COLUM. L. REV. 1186, 1190-91 (1985) (book review).

120. While Vietnam and Korea were, unlike the Philippines, not official United States colonies, another question that should be contemplated is the manner in which the experiences of war and colonialism or neocolonialism have shaped the recialization of communities such as Vietnamese Americans and Korean Americans. For examples of this work, see generally WATERMARK: VIETNAMESE AMERICAN POETRY & PROSE (Barbara Tran et al. eds., 1998), and JeeYuen Lee, Toward a Queer Korean American Diasporic History, in Q & A: QUEER IN ASIAN AMERICA, *supra* note 5, at 185.

121. Kevin Mumford suggests that Filipinos were probably less stigmatized than Chinese and Japanese men, and that they were seen as more like whites, perhaps because of the history of Spanish colonialism. See MUMFORD, *supra* note 48, at 67.

122. See Peggy Pascoe, *Race, Gender, and Intercultural Relations: The Case of Interracial Marriage*, 12 *FRONTIERS* 5, 7 (1991). She has put Chinese, Japanese, and Filipinos in the former category and Native Americans and Hispanics into the latter. The differing understanding of miscegenation regulation depending on whether the prohibited relationships involved white men or white women, has been furthered by the work of Adrienne Davis. She has argued that shifting the focus from miscegenation regulation of black men and white women to that of white women and black men changes the understanding of what miscegenation regulation sought to accomplish. While regulation of the black man/white woman is correctly understood as prohibitory and repressive to both sides of the dyad, regulation of the white man/black woman must be understood as operating within the context of laws and norms of slavery that intervened to provide systematic access to black women's sexuality, trumping formal antimiscegenation statutes. See Adrienne Davis, *Loving and the Law: The History and Jurisprudence of Interracial Sex* (unpublished manuscript on file with author); see also ANGELA DAVIS, *WOMEN, RACE, AND CLASS* 172-201 (1983) (arguing that access of white men to women of color was never blocked with threat of lynching or ability of women of color to testify against whites in court).

123. In her article, Pascoe found that cases were frequently *ex post facto* attempts to invalidate interracial marriages in order to take what had been a white man's estate away from the inheritor, who was a woman of color. See Pascoe, *supra* note 122, at 7-8.

124. Emily Field Van Tassel has examined this relationship in the context of the post-Civil War South, which sought to maintain an economy of racialized dependency. See Emily Field Van Tassel, ["Only the Law Would Rule Between Us": Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War](#), 70 *CHI.-KENT L. REV.* 873, 878-905 (1995). I agree with her criticism that as an explanation for white antipathy towards interracial marriage "racial purity" or the maintenance of "white supremacy" as explanation does no more than rephrase the question. See [id.](#) at 926.

125. See Parrenas, *supra* note 48, at 116, 124-28. For example, academic Emory Bogardus is so identified. See *id.*

126. For a discussion of these consequences, see generally CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* (1998).

127. Act of March 26, 1790, ch. 3, 1 Stat. 103; Act of July 14, 1870, ch. 255, section 7, 16 Stat. 254.

128. See, e.g., [Morrison v. California](#), 291 U.S. 82, 85-86 (1934) ("White persons' within the meaning of the [Naturalization Law of 1790 are members of

the Caucasian race, as Caucasian is defined in the understanding of the mass of me The term excludes the Chinese, the Japanese, the Hindus, the American Indians and the Filipinos."); see also [Toyota v. United States, 268 U.S. 402, 410-12 \(1925\)](#).

129. Act of March 2, 1907, Pub. L. 193, ch. 2534, section 3. This provision was upheld as constitutional in [Mackenzie v. Hare, 239 U.S. 299, 311-12 \(1915\)](#), in which the Supreme Court upheld the power of Congress to expatriate a female United States citizen that obtained foreign nationality by marriage to a foreign national during the period of coverture because such action was a "necessary and proper" implementation of the inherent power of sovereignty in foreign relations.

130. See Act of Sept. 22, 1922, ch. 411, section 3, 42 Stat. 1022; Act of March 3, 1931, ch. 442, secs 4(a),(b), 46 Stat. 1511.

131. In 1930, a Salinas Superior Court Judge ruled that a German immigrant who married a Filipino man was not entitled to naturalize. See TAKAKI, *supra* note 35, at 342 (mentioning case involving Mrs. Anne Podien-Jesena, married to Basalico Jesena, and decision of Monterey Superior Court Judge H.C. Jorgenson). Following this ruling came the statement of the district director that United States citizen women marrying Filipinos would be denaturalized. See *id.*; see also Anti-Miscegenation Laws and the Pilipino, *supra* note 10.

132. On the relationship of nationalism, gender, race, and sexuality, see generally **Leti Volpp**, [Blaming Culture for Bad Behavior, 12 YALE J.L. & HUMA 89 \(2000\)](#).

133. See generally SHAH, *supra* note 26 (asking this critical question).

134. For examples of scholarship which do not conflate interracial with heterosexual, see Estelle B. Freedman, The Prison Lesbian: Race, Class, and the Construction of the Aggressive Female Homosexual, 1915-1965, in SEX, LOVE, RACE *supra* note 10, at 423, and Bryant Simon, The Appeal of Cole Blease of South Carolina: Race, Class, and Sex in the New South, in SEX, LOVE, RACE, *supra* note 10, at 373.

135. See e.g., William Eskridge, Jr., [A History of Same-Sex Marriage, 79 VA. L. REV. 1419 \(1993\)](#); Andrew Koppelman, [Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, 69 Y.U. L. REV. 197 \(1994\)](#); Andrew Koppelman, Note, The [Miscegenation Analogy: Sodomy Law as Sex Discrimination, 98 YALE L.J. 145 \(1988\)](#); James Trosino, Note, [American Wedding: Same-Sex Marriage and the Miscegenation Analogy, 73 B.U. L. REV. 93 \(1993\)](#).

136. I recognize that, in this literature, the interracial miscegenous relationship is presumptively heterosexual, because what is at issue is legal marriage. Nonetheless, there is a manner in which many authors frame the inquiry as if same sex relations are never interracial, and as if interracial relationships are always heterosexual. For exceptions to this, see MUMFORD, *supra* note 48, and SHAH, *supra* note 26. Nayan Shah's research into the way that the Chinese were identified as lepers and deported at the height of the Congressional Inquiry into

Chinese immigration in 1876, amidst growing public hysteria about contagion to whites through sex with Chinese, allows us to see the importance of the relation of sexuality and disease to antimiscegenation legislation. At the inquiries, physicians offered stories of young white boys that had become infected by leprous Chinamen that shared their beds. Leprosy was analogized to syphilis; both were thought to originate in Chinese bodies. This necessitated the social and sexual isolation of Chinese lepers from other races. Health officials emphasized the devastating health consequences of illicit interracial sexual relations and identified Chinese lepers as inhuman, calling for the removal of these creatures from society in an attempt to prevent the United States from becoming a nation of lepers. The presumption of Chinese as potential lepers was used to isolate the population and make their integration into American society impossible. Shah explains how the narratives of the transgression of racial boundaries were the material and metaphorical symptoms of the unhealthy fluidity and dangerous freedom in the cities. See generally SHAH, *supra* note 26. Historical research like this, which provides a finely grained analysis of specific sites, pushes our knowledge much further.

137. As an example of the bifurcation between "Asian American" and "Filipino," Peggy Pascoe listed states with miscegenation laws that "mentioned" Asian Americans, and those that "mentioned" Malays. Her "Asian American" is fully occupied by Chinese, Korean, and Japanese Americans, with no room for Filipino/a Americans. See Pascoe, *supra* note 18, at 485 13.

138. See San Juan, Jr., *Configuring the Filipino Diaspora in the United States*, *supra* note 62, at 117.

139. See LISA LOWE, *IMMIGRANT ACTS: ASIAN AMERICAN CULTURAL POLITICS* 68 (1996) (arguing for Asian American necessity to organize, resist, and theorize as Asian Americans, even while being cognizant of risks of cultural politics that rely on construction of sameness and exclusion of differences).

140. An example of this is the numerous "Asian American" or "Asian Pacific American" civil rights and other organizations that are entirely staffed or led by Chinese and Japanese Americans. There are, of course, exceptions to this; for example, Bill Tamayo was Managing Attorney of the Asian Law Caucus in San Francisco for many years.

141. For example, Yen Lee Espiritu examined bibliographies and publications for the period from the 1970s to the 1980s and determined the number of studies for specific Asian American groups: Japanese, 514; Chinese, 460; Filipinos, 96; South Asian, 53; Korean, 32; Pacific Islander, 8; Southeast Asian, 6. See YEN LE ESPIRITU, *ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES* 37 (1992).

As Oscar Campomanes has pointed out, this unevenness can be explained in part by the vagaries of academic production, changing immigration policy and specific demographics. Nonetheless, it is imperative to examine what internal

hierarchy is replicated in the name of a politically efficacious Asian American panethnic identity. See Oscar V. Campomanes, *New Formations of Asian American Studies and the Question of U.S. Imperialism*, 5 *POSITIONS* 523, 528-29 (1997).

142. See Oscar V. Campomanes, *Filipinos in the United States and Their Literature of Exile*, in *READING THE LITERATURES OF ASIAN AMERICA* 49, 53 (Shirley Geok-lin Lim & Amy Ling eds., 1992).

143. See Rachel Moran, [What If Latinos Really Mattered in the Public Policy Debate?](#), 85 *CAL. L. REV.* 1315, 1320 (1997). Moran cites Pascoe, *supra* note 122, as stating that antimiscegenation laws did not cover Latinos. Thinking about who is placed within the Latina/ o rubric raises the important question as to what other communities are elided over in the claim that Latinas/ os were not subjected to the reach of miscegenation laws. The claim replicates the longstanding problem of the disappearance of both Indian and Black identity within what we conceptualize as Latina/ o (not to mention East Asian) -- all groups subjected to the reach of miscegenation laws. See Pascoe, *supra* note 18, at 464-65 (describing specific case where Indian identity of man we would call "Latino" brought him under purview of Arizona's antimiscegenation law); *supra* notes 10-13 and accompanying text (enumerating communities subjected to miscegenation laws).

144. Linking factors might be the experiences of conquest, the Spanish language, and presumptions about heterosexual gendered relationships, for example, the Filipino as a "Latin lover."

145. See generally Efren R. Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 *REVISTA JURIDICA U.P.R.* 225 (1996) (analyzing jurisprudence that was utilized to justify American imperialism); HAUNANI KAY TRASK, *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII* (1993) (discussing United States colonization of Hawaii); Oscar V. Campomanes, *1898 and the Nature of the New Empire*, 73 *RADICAL HIST. REV.* 1 (1998) (discussing United States colonization of Philippines); Ediberto Roman, [Empire Forgotten: The United States' Colonization of Puerto Rico](#), 42 *VILL. L. REV.* 1119 (1997) (discussing United States colonization of Puerto Rico).

146. This is no doubt connected to the image of the origins of the United States as freedom-fighting subject seeking liberation from a colonial power.

147. See Stuart Hall, *Cultural Identity and Diaspora*, in *IDENTITY, COMMUNITY, CULTURE, DIFFERENCE* 222, 225 (Jonathan Rutherford ed., 1990). The cases demonstrate Filipinos arguing both that they were and that they were not "Mongolia" See, e.g., [Roldan v. Los Angeles County](#), 129 *Cal. App.* 267, 268, 18 *P.2d* 706, 707 (1933) (arguing that Filipinos were not Mongolian); *Laddaran v. Laddaran*, No. D95459, (Sept. 4, 1931) (arguing that Filipinos were Mongolian).

3. Víctor C. Romero, “Aren’t You Latino?”: Building Bridges upon Common Misperceptions, 33 U.C. DAVIS L. REV. 837 (2000)

As the United States becomes more and more nonwhite, we (the nonwhite community) must ensure that we do not mimic the same behaviors, paradigms, and traps that we accuse the white majority of engaging in, perpetuating, and setting for us. n. 1 This is not an easy task. From the perspective of the Latina/ o community alone, there are many that view the group not as a unified whole, but as a composite of many smaller communities -- Mexican Americans, Puerto Ricans, Cubans, Dominicans, to name but a few. n. 2 Added to *838 the mix of nonwhite Latinos we have Asian Americans, Native Americans, and African Americans, and we run the risk of forgetting our common bond as part of the current racial, and often powerless, minority group in U.S. society.

Indeed, the problems of miscommunication and noncooperation across different peoples start at the smallest units of ethnicity. For example, Kevin Johnson writes that many long-time Mexican Americans look down upon new arrivals from Mexico, despite their shared heritage. n. 3 This intragroup animosity is evident in the fact that twenty-five percent of all Latina/ o voters voted for Proposition 187, the notorious California initiative that denied public benefits *839 for undocumented immigrants. n. 4 If Mexican Americans turn their noses up at immigrant Mexicans, what hope do we have for coalition building not only within the Mexican community, but within the Latino community at large, or the nonwhite community of Latina/ o, Asian, Native, and African Americans?

While I appreciate that there are legitimate differences in agendas between factions within a racial group as well as between groups, causing both intra- and intergroup conflict, I want to focus on ways in which communities of color can use common misperceptions to their advantage as a bridge to building a larger community. As the projected largest minority population in the next millennium, Latinas/os have a unique opportunity to provide leadership in this area by charting a course toward harmony rather than discord.

Let me explain the problem of what I will term "minority on minority oppression" n. 5 by using one historical and one contemporary example of ways that we people of color sometimes help perpetuate negative racial stereotypes that separate us rather than unify our communities.

First, the historical example: in the early 1900s, the California Civil Code contained a provision that deemed "illegal and void" interracial marriages between whites and "Negroes, Mongolians or mulattoes." n. 6 Needless to say,

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this provision created quite a stir among Filipinos living in California that wanted to marry outside their race. In Los Angeles County alone, different judges in the Superior Court issued conflicting verdicts on the validity of Filipino-white intermarriages depending on whether the Filipino was classified as a "Mongolian" or not. n. 7 The uncertainty in the courts *840 galvanized the Filipino community to take action, albeit not in the way one would have hoped. Instead of calling for the repeal the law, the Filipino Home Club, a local organization, distributed leaflets appealing for funds to support a lawsuit challenging the ban against Filipino mixed marriages by arguing that Filipinos are not Mongolians and therefore not subject to the law. Part of the offensive literature distributed by the group read as follows:

The fundamental issue involved in this case is, that Filipinos are not Mongolians. Are you willing to stand and defend your right UNDER GOD-GIVEN PRINCIPLE OF MARRIAGE AND HAPPINESS? Or shall we just allow ourselves to be restrained by laws motivated by unjust discrimination, in defiance of the laws of God and reason?

NOW, FILIPINOS, DO YOU WANT TO BE CALLED MONGOLIAN? IF YOUR ANSWER IS "NO" SUPPORT THE FIGHT OF GAVINO C. VISCO BY SUBSCRIBING TO HIS LEGAL FUND LIBERALLY. REMEMBER THIS DOES NOT ONLY AFFECT GAVINO C. VISCO, BUT AFFECTS EVERY FILIPINO IN THE STATE OF CALIFORNIA. n. 8

What a shortsighted petition! Could not the Filipino Home Club have had the foresight to declare the California law a blight not only affecting all Filipinos, but all people of color? What of the Chinese, Korean, and Japanese inhabitants of California who more clearly (at least in the eyes of the judges of the time) fit the ethnological description of "Mongolian"? n. 9 Should not the Filipino Home Club have reached across to their Asian brethren -- the *841 Chinese, Japanese, and Koreans (not to mention the Indochinese, the Malays, the Indians, and the Pakistanis) -- to seek an end to this law that, as their own flier so eloquently stated, denied every person rights protected under the "God-given principle of marriage and happiness"? n. 10 Instead of breaking down barriers between people, the Filipino Home Club's actions arguably erected new ones between themselves and other Asian groups.

As the old adage goes, history repeats itself. This intra-Asian conflict I have just described is echoed today between Latina/o groups who voted for Proposition 187, and their largely Mexican brothers and sisters adversely affected by the denial of certain benefits their Latina/o American counterparts take for granted. n. 11

My second, more contemporary example of "minority on minority oppression" comes from my own personal experience. I write about immigrants' rights. My interest in this field stems from my experiences as a Filipino immigrant in this country, having once negotiated the often confusing maze of rules known as the Immigration and Nationality Act en route to U.S. citizenship. The agency

charged with primary enforcement of the immigration code is the Immigration and Naturalization Service ("INS"). While I have always thought that the INS should have as its mission the assistance of immigrants as they work their way towards citizenship, I have been an unfortunate witness to the indignities suffered by many immigrants on a daily basis at the hands of the INS and, sometimes, the people of color that work for that agency.

Let me share with you my recollection of my citizenship interview in 1995. After having received my appointment notice in the mail, I carefully gathered and reviewed the documents that the INS requested that I bring and went to the local office in downtown Los Angeles for my interview, the last step before actually being sworn in as a citizen. I handed my papers to the clerk and took a seat among the many others, the white, black, brown, and yellow faces, some with lawyers, some without, waiting patiently for their names to be called. When I got up to stretch my legs, I overheard one of the INS clerks say to another in disgust, "Can you read this? Can you believe some of these names?," implying that it would have been much easier if everyone had an "American" name like "Mike *842 Smith" or "John Jones," rather than "Guillermo Rodriguez" or "Lee Jee Yoon." n. 12

Finally, my name was called (and thankfully, pronounced correctly) and I was led in to talk to an INS officer who, as best as I could tell, n. 13 was Latina. After I had completed the citizenship test, the examiner reviewed my documents. Because I had obtained my immigrant status through my marriage to a U.S. citizen, the papers I brought were supposed to show that we were still legally married. I made sure to bring copies of my bank account statements and other documents the INS notice requested. The Latina officer took one quick look at my papers and said: "None of these show that you are married to your wife today. Do you have any documentation to prove that you are married to her today?" I told her that I brought what the notice said I should but that I could very easily call my wife to come over because her office was only a few minutes away. "No," she replied, rejecting my suggestion with a huff, "we will not do that."

Trying to keep my composure, I searched my wallet desperately for some piece of information that might satisfy the officer. I produced a State Farm auto insurance card with both my wife's and my name on it and feebly handed it over to the officer. "This will work," she said. Before I knew it, she turned to me with a smile and said, "Congratulations!" as if nothing had happened. As I left the INS office in a daze, my citizenship certificate in hand, I thought to myself sarcastically, "Well, Victor, welcome to America!"

Looking back at that experience, why could not that Latina INS officer have been more sympathetic to me? Why could she not *843 have thought about her own ancestors and many of her Latina/o brothers and sisters, who like me have to deal with "La Migra" n. 14 every day, often under much more stressful and unpleasant circumstances? Why would she treat me as the "other" after I had played by all the rules, after I had carefully reviewed the documents her agency

had required of me and had brought them to the interview? Did she take steps to make sure that the other clerks did not look down upon those with "foreign sounding names" n. 15 or try to help them understand that America should be a celebration of different names, cultures, and peoples? Just as the Filipino Home Club failed to reach out to other Asians and people of color to fight California's ban on interracial marriages almost a century ago, my Latina friend neglected to reach out and make me welcome as I tried to do my best to be worthy of being granted full citizenship.

How do we help correct these instances of "minority on minority oppression"? How do we get different groups to reach out to each other? How do we take advantage of the growing Latina/ o population to create a generation of intergroup leaders in the next century? Fortunately, studies in social psychology help us answer these questions. Social psychologists tell us that outsiders are outsiders because they can be classified as such. Once the in- group realizes that the outsiders are really no different from the insiders, then the once out-group becomes accepted by the in-group. n. 16 This might *844 explain why white suburban kids blast black hip-hop and rap music out of their cars, n. 17 why a world-famous salsa band "Orquesta de la Luz" is comprised of Japanese people, n. 18 and why Elvis impersonators come in all shapes, shades, and sizes! n. 19

In the immigration context, much has been written about how earlier immigrant groups to the United States would mistreat later arrivals until the latter groups assimilated into American society -- the English oppressed the Irish; the whites oppressed the Chinese and the Mexicans. n. 20 As the earlier immigrant groups began to realize that, despite differences in appearance or skin color, they shared common values with the later arrivals, the former began to embrace the latter. n. 21

This history of gradual acceptance should come as no surprise. In two studies conducted in 1994 and 1996, Gregory Maio, David Bell, and Victoria Esses of the University of Western Ontario tested the attitudes of Canadians toward immigration. n. 22 Maio, Bell and *845 Esses found that the study participants were more likely to favor immigration when they were told the proposed immigrant group possessed character traits and values that the participants viewed as positive, such as friendliness, desire to work hard, and honesty. Not surprisingly, the natives were less receptive to the influx of foreigners when they could perceive the latter as different, which occurred when the subjects were given less positive character information about the potential immigrants. n. 23

This breaking down of barriers between the in-group and out-group has worked in the judicial context in instances where experienced counsel have been able to assist juries to overcome their inherent prejudices by helping the jurors walk in the shoes of the accused. The famous lawyer Clarence Darrow once successfully defended several black men tried before an all-white jury through the power of the following closing argument:

I haven't any doubt but that every one of you is prejudiced against colored people. I want you to guard against it. I want you to do all you can to be fair in this case, and I believe you will

Here were eleven colored men, penned up in the house. Put yourselves in their place. Make yourselves colored for a little while. It won't hurt, you can wash it off. They can't, but you can; just make yourself black for a little while; long enough, gentlemen, to judge them, and before any of you would want to be judged, you would want your juror to put himself in your place. That is all I ask in this case, gentlemen. n. 24

But what relevance do Darrow's exploits and Maio, Bell, and Esses' studies have in contemporary society? While certainly dramatic, the opportunity to be a Clarence Darrow and sway what might otherwise be a blatantly racist jury might not come along as often these days. Nor is the current relevance of Maio, Bell, and Esses's experimental findings readily apparent to the average person.

***846** However, there are opportunities daily to turn perceived notions of commonality into bridges for building community. Let me share but two examples from my own experience. As a Filipino with a Hispanic surname and an Asian appearance, I sometimes cause confusion among people that do not know me. My Spanish surname, "Romero," is a legacy of Spanish colonialism, as the Philippines was a colony of Spain for over three hundred years. n. 25 Because of this history, in many ways the Philippines is much more like the Commonwealth of Puerto Rico than an East Asian or Southeast Asian country like Japan, China, or Singapore. The Philippines and Puerto Rico were Spanish colonies that then came into American possession. n. 26 Both are predominantly Catholic, and both are currently populated by many people with Spanish-sounding surnames. It should come as no surprise, therefore, that I occasionally am mistaken for Latino by people that read my name but have yet to meet me. I can recall many a conversation over the phone where the caller might want to speak Spanish with me upon learning my last name is "Romero." I am the recipient of much Latina/o-focused mail as well. I receive solicitations from Latina/ o groups as divergent as the Hispanic Bar Association of Massachusetts and the Columbia House mail order CD group, "Musica Latina," all because I share this Hispanic last name.

I experience a different response when I meet people face to face without telling them my last name. I remember once on the bus to downtown Los Angeles, I started speaking Tagalog n. 27 to one of the other passengers, thinking she was Filipina. Fortunately, I guessed correctly! She shared with me later that she thought that I -- dressed in a suit and tie, horn-rimmed glasses framing my almond-shaped eyes -- was Japanese! My Asian phenotype has been the source of both happiness and sorrow. At my home school, Penn State's Dickinson School of Law, I have found that the Asian students feel comfortable relating to me, in part, perhaps, because ***847** I look like them and share their geopolitical perspective. n. 28 Yet, the one time my wife and I were harassed because of our interracial marriage, our white assailants' racial slur of choice was "you Japanese

sonofabitch!" n. 29

What does any of this have to do with Latina/ o leadership and my desire that we all seek to build bridges across communities? My experience as this socially constructed Latina/ o Asian (or Asian/Latino) person suggests that there are people out there who, operating on stereotypes, assume that I have more in common with them than I might. The Latina/ o groups that want me to join their organizations or buy their products, as well the Asians who feel a shared bond because of my appearance, believe that I belong to their communities. This is a good thing! While one might argue that these persons are acting on not much more than a stereotype -- for example that all "Romeros" must be Hispanic or all persons with almond-shaped eyes must be Japanese -- these misperceptions provide (the misidentified) me with an opportunity to build bridges between communities. The stereotypes provide me with an entry into societies that might not have otherwise considered reaching out to me. This provides the base for building bridges -- in my case, between the Asian and Latina/ o communities.

And building bridges between communities of color is important. As there are more and more attacks against people of color -- from the backlash against affirmative action, to the passing of Propositions 209 and 187, to Initiative 200 in Washington and the Hopwood litigation -- communities of color must seek to coalesce rather than pull apart.

Given demographers' predictions that Latinas/ os will soon become the dominant population in the United States, Latinas/ os are in a unique position to take a leadership role in seeking to forge coalitions where possible. Let me share with you just one recent example of coalition building that moves forward the agenda of all peoples of color. Recently, a broad coalition of civil ***848** rights groups sued the University of California at Berkeley claiming, among other things, that its admissions policy discriminates against certain minority groups by favoring candidates that have taken advanced placement courses. The plaintiffs contended that many high school students of color attend impoverished school districts that do not offer advanced placement courses, and are therefore disadvantaged by the policy. The civil rights groups involved span several ethnic and racial groups -- Latino, black, and Asian. The Mexican American Legal Defense and Education Fund, the NAACP Legal Defense and Educational Fund, and the Asian Pacific American Legal Center of Southern California all jointly filed the suit on behalf of several deserving minority students. n. 30

The Berkeley suit gives me hope. It is a shining example of how different ethnic and racial groups can work together to challenge a practice that many be taken for granted as valid without realizing its discriminatory impact. n. 31 Unlike the Filipinos who distanced themselves from, rather than fighting to repeal, the California antimiscegenation law close to 100 years earlier, the three groups in this present California lawsuit have banded together to reach across racial differences to work toward a common goal, forcing us to think about the validity of the preference for advanced placement courses and its pernicious effect

on hard-working students of color.

The lead plaintiff in the suit, Jesus Rios, the son of immigrant farm workers from rural Hollister, California, said that he was stunned when U.C. Berkeley denied him admission despite his perfect high school grade point average. As quoted in the New York Times, Rios said, "I thought if you do the right things, you get what you want." n. 32

Perhaps we should take our cue from Jesus Rios and realize that "to do the right things" and "to get what we want" takes more than individual effort. It takes a community of leaders, that is Latina/ o, *849 African, Asian, and Native Americans, acknowledging and celebrating their similarities and working together to challenge society's complacency. With perseverance, perhaps we can meet happily in the middle, where our interests converge, and stop perpetuating the "minority on minority oppression" that we have learned from the majority culture.

NOTES:

1. I subscribe to Charles Lawrence's assertion that we are, at some level, all influenced by the majority racist culture and need to be wary of that. See Charles R. Lawrence, III, [The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism](#), 39 STAN. L. REV. 317, 322 (1987). Professor Lawrence has provided:

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. Id. However, I believe, as Jody Armour argues, that we can affirmatively fight through our prejudicial tendencies by consciously appealing to shared notions of the equality of all people. See Jody Armour, [Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit](#), 83 CAL. L. REV. 733, 772 (1995). Professor Armour has stated:

[As Professors Lawrence, Johnson, Davis and others have pointed out, we are all prone to stereotype-congruent or prejudice-like responses to blacks (and members of other stereotyped groups), especially in unguarded moments. But research and experience suggest that, in some circumstances, it is possible to resist falling into the discrimination habit. Further progress in eliminating discrimination will require a deeper understanding of the habitual nature of our responses to stereotyped groups and the development of strategies for helping people inhibit their habitual and activate their endorsed responses to these groups. Id.

2. See RODOLFO O. DE LA GARZA ET AL., LATINO VOICES 39 (1992) (reporting that Latinas/os are more likely to self-identify in national origin terms - Mexican American -- than to use pan-ethnic designations such as Latino,

Hispanic, or Spanish American); see also Max J. Castro, Making Pan Latino: Latino Pan- Ethnicity and the Controversial Case of the Cubans, 2 HARV. LATINO L. REV. 179, 196 (1997) (describing difficulties in seeking Cuban American participation in pan latino identity project); Laura E. Gomez, [Constructing Latina/o Identities](#), 19 CHICANO-LATINO L. REV. 187, 190 (1998). Professor Gomez noted:

At the same time, LatCrit scholars are wary of homogenizing varied experiences under a single "Latino" or "Hispanic" rubric. Even as we embrace an expansive Latino political coalition and recognize points of shared history and contemporary experience, LatCrit scholars should seek to problematize pan-Latino identity. Specifically, we must continue to engage in unpacking differences among those we label "Latinos" in the United States. This involves sensitivity to differences related to such crucial factors as time of immigration/migration, country of origin, and different levels of bilingualism. We also must do more to document the differential access to legal services as well as experience of discrimination of Latinos of diverse social class locations. Id; **Kevin R. Johnson**, [Immigration and Latino Identity](#), 19 CHICANO-LATINO L. REV. 197, 198 (1998) [hereinafter Johnson, Immigration (explaining that national origin allegiances have hindered building pan-Latino identity)]; **Kevin R. Johnson**, ["Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican- American Experience](#), 85 CAL. L. REV. 1259 (1997), 10 LA RAZA L.J. 173, 207- 08 (1998) [hereinafter Johnson, "Melting Pot"]. Professor Johnson states:

Latinos in the United States can trace their ancestry throughout Latin America. Despite this fact, political efforts in recent years have tended to homogenize the Latino experience. Pan-Latino coalition building, however, often confronts national origin allegiances that trump any collective "Latino" identity. Tensions among and between various Latino groups at times run high. Some are political in nature. For example, Cuban-Americans are often said to be more politically conservative than other Latinos. Some tensions are more class-driven, but with a national origin overlay. Because the income distribution of persons of Mexican, Puerto Rican, and Cuban ancestry in the United States varies substantially, one is not surprised to learn of differences in political views among the groups. Id.

3. See Johnson, Immigration, supra note 2, at 201-02 (describing tension between Mexican Americans and recent Mexican immigrants).

4. See id. at 201 (explaining that not all Mexican Americans favor open borders with Mexico); see also **Kevin R. Johnson**, [An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race](#), 70 WASH. L. REV. 629, 658-59 (1995) (reviewing exit poll data).

5. This term is not unlike the phrase "black on black crime." See, e.g., James W. Clarke, Black-on-Black Violence, SOC'Y, July/Aug. 1996, at 46 (describing causes and effects of black-on-black violence); Julie Deardorff, Mentoring Program Targets Black Boys, CHI. TRIB., Dec. 26, 1996, at 1 ("You hear black-

on-black crime. Well, we have to reverse it and have black-on-black love.").

6. See [Cal. Civ. Code § 60](#) (West 1937) (repealed 1959); see also Nellie Foster, Legal Status of Filipino Intermarriages in California, in 4 *Asian Indians, Filipinos, Other Asian Communities and the Law* 5, 7 (Charles McClain ed., 1994) [hereinafter *Asian Indians* (discussing California law that prohibits interracial marriages)].

7. Compare *State v. Yatko*, No. 24795 (Los Angeles Super. Ct. 1925), in *ASIAN INDIANS*, supra note 6, at 8-12 (nullifying Filipino-white marriage on ground that "Filipino is a Malay and that the Malay is a Mongolian"), and *Robinson v. Lampton*, No. 2496504 (Los Angeles Super. Ct. 1930), in *ASIAN INDIANS*, supra note 6, at 12 (refusing to grant marriage license to Filipino-white couple), with *Laddaran v. Laddaran*, No. 095459 (Los Angeles Super. Ct. 1931), in *ASIAN INDIANS*, supra note 6, at 14 (denying annulment of Filipino-white marriage as not illegal under [Cal. Civ. Code § 60](#)).

8. *Visco v. Los Angeles County*, No. 319408 (Los Angeles Super. Ct. 1931), in *ASIAN INDIANS*, supra note 6, at 14.

9. As one judge noted: "Under this division [the older five classifications of race the yellow, or Mongolian race, included the Chinese, Japanese and Koreans, while the native Filipinos, with the exception of the few Negroid tribes, belonged to the brown, or Malay race." *Murillo v. Murillo*, No. 097715 (Los Angeles Super. Ct. 1931) (refusing to annul Filipino-white marriage), in *ASIAN INDIANS*, supra note 6, at 15.

10. See *ASIAN INDIANS*, supra note 6, at 14 (quoting *Visco* case).

11. See supra text accompanying note 4.

12. Much has been written about the perpetual foreignness of Asians and Latinas/ os that immigrate to the United States and become citizens. See, e.g., Neil Gotanda, Asian American Rights and the "Miss Saigon Syndrome," in *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY* 1087, 1096 (Hyung-Chan Kim ed., 1992) (noting that, unlike blacks or whites, Asians are presumed to be foreigners); Natsu Taylor Saito, [Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law](#), 76 *OR. L. REV.* 261, 295 (1997) (stating that Asian Americans are confronted daily with presumptions of foreignness).

13. I am well aware that I may have been mistaken about this assumption. Indeed, I agree with Ian Haney-Lopez, that "[races are not biologically differentiated groupings but rather social constructions." IAN HANEY-LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* xiii (1996). In a recent memoir, law school dean Greg Williams shared his own experiences walking the color line between white and black. See GREGORY HOWARD WILLIAMS, *LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK* (1995). Professor Kevin Johnson has done the same, describing his experiences growing up both white and Mexican. See **KEVIN R. JOHNSON**, *HOW DID YOU GET TO BE*

MEXICAN? (1998).

14. See Elvia R. Arriola, [LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids](#), 28 U. MIAMI INTER-AM. L. REV. 245, 258 n. 41 (1997). Arriola noted:

"La migra" is a well-known southwestern colloquialism among Spanish-speaking Chicanas/ os and Mexicanas/ os referring to the INS. Mention of the term can instill tremendous fear among undocumented workers who fear losing their jobs and being sent far away from their homes. Thus, an employer who knows the impact of the term "la migra" can use it as an effective device for controlling workers' behavior and attitude about wages, terms, and conditions of employment. *Id.*

15. See, e.g., [Orhorhaghe v. INS](#), 38 F.3d 488, 492 (9th Cir. 1994) (holding that arrest of noncitizen based solely on his foreign-sounding name was egregious violation of Fourth Amendment); Joseph J. Migas, Note, [Exclusionary Remedy Available in Civil Deportation Proceedings for Egregious Fourth Amendment Violations](#), 9 GEO. IMMIGR. L.J. 207, 207-11 (1995) (analyzing *Orhorhaghe*).

16. See Gregory R. Maio et al., Ambivalence and Persuasion: The Processing of Messages About Immigrant Groups, 32 J. EXPERIMENTAL SOC. PSYCHOL. 513, 514 (1996) [hereinafter Maio et al., Ambivalence (discussing ambivalence toward minority groups)]; Gregory R. Maio et al., The Formation of Attitudes Toward New Immigrant Groups, 24 J. APPLIED SOC. PSYCHOL. 1762, 1772 (1994) [hereinafter Maio et al., Formation (observing that more favorable attitudes are formed when positive information about minority group is provided)]; see also JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 115-53 (1997) (arguing that individuals must consciously confront their own racial stereotypes); Armour, *supra* note 1, at 772 (arguing that it is possible to resist falling into discrimination habit). On the nature of prejudice generally, Professor Gordon Allport's treatise on the subject is a classic. See GORDON W. ALLPORT, THE NATURE OF PREJUDICE 4 (1954) (explaining that all people are fettered to respective cultures and are bundles of prejudice).

17. See, e.g., Donna Kato, It's Only Rock 'n Roll Despite What Adults Think, Study Shows Music Doesn't Damage Kids, BUFFALO NEWS, Feb. 2, 1998, at A9 ("While rap is most popular among urban, African-American boys, there's a curious phenomenon with rap's crossover popularity among some white suburban boys."); Neil Strauss, Word up! Rap Rules: Juggernaut Genre Grows, PATRIOT LEDGER (Quincy Mass.), Oct. 23, 1998, at 18 (observing that Soundscan found that "[nearly three-quarters of rap albums are sold to white fans]").

18. See Gregory Cerio, Japanese Orchestra Wows Salsa Crowd, WALL ST. J., Oct. 2, 1992, at A12 (noting that all twelve members of band were born, raised, and still live in Japan); Keiko Kambara, Japan's "Hot Salsa" Stirs the US, CHRISTIAN SCI. MONITOR, Jan. 14, 1991, at 10 (observing that band is comprised of all Japanese musicians).

19. Growing up in the Philippines, I remember that there was a famous singer (of course, I've forgotten his name now) whom the popular press had dubbed "the Elvis Presley of the Philippines." My faint recollection is that aside from his hair, girth, and singing voice, he really did not look much like "the King"!

20. See Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425, 430-39 (1990) (describing immigration histories of Native Americans, Chinese, and Mexicans in America); see also **Victor C. Romero**, [Expanding the Circle of Membership by Reconstructing the "Alien": Lessons from Social Psychology and the "Promise Enforcement" Cases](#), 32 U. MICH. J.L. REFORM 1, 8- 15 (1998) (comparing immigration histories of non-English whites, Chinese, and Mexicans).

21. See, e.g., **Romero**, *supra* note 20, at 9-10 (describing assimilation of non-English whites over time).

22. See Maio, *Ambivalence*, *supra* note 16; Maio, *Formation*, *supra* note 16.

23. See Maio, *Formation*, *supra* note 16, at 1772 (observing that more positive information about foreigners' emotions, personality traits, or values helps to form favorable attitude in natives).

24. Armour, *supra* note 1, at 762-63 (citation and text omitted).

25. See TEODORO A. AGONCILLO, *HISTORY OF THE FILIPINO PEOPLE* 102 (8th ed. 1990) (noting that Filipinos resisted Spanish occupation from moment of first permanent settlements in 1565 up until end of Spanish rule in 1898).

26. See WINFRED LEE THOMPSON, *THE INTRODUCTION OF AMERICAN LAW IN THE PHILIPPINES AND PUERTO RICO 1898-1905*, at 23-24 (1989) (describing cession of Puerto Rico and Philippines from Spain to United States under Treaty of Paris); see also AGONCILLO, *supra* note 25, at 212 (observing that Treaty of Paris provided that Spain would cede Philippines to United States for payment of \$20,000,000 from United States).

27. See AGONCILLO, *supra* note 25, at 551 (stating that Tagalog is language of capital region of Philippines and surrounding provinces).

28. I should also note that the Latinas/ os feel close to me because I share a certain Hispanic cultural heritage with them. See *supra* note 25 and accompanying text (showing common background for Spanish colonialism).

29. See **Victor C. Romero**, [Broadening Our World: Citizens and Immigrants of Color in America](#), 27 CAP. U. L. REV. 13, 31 (1998) (detailing my experience regarding this particular racial slur about my interracial marriage). In the interest of full disclosure, I have also been mistaken for a variety of other ethnicities including Eskimo, Chinese, Nepalese, and Thai.

30. See *Minorities File Admissions Suit*, NEWSDAY, Feb. 5, 1999, at A50; Evelyn Nieves, *Civil Rights Groups Suing Berkeley over Admissions Policy*, N.Y. TIMES, Feb. 3, 1999, at A9; Seth Rosenfeld, *UC-Berkeley Sued over Minority Admissions*, S.F. EXAMINER, Feb. 3, 1999, at A7; Kenneth R. Weiss,

UC Berkeley Sued over Admissions Policies Education, L.A. TIMES, Feb. 3, 1999, at A3.

31. This phenomenon of affirming exclusionary practices as valid because "we've always done it this way" has been termed by one set of commentators as "history without evaluation. " LESLIE BENDER & DAAN BRAVEMAN, POWER, PRIVILEGE, AND LAW: A CIVIL RIGHTS READER 266 (1995).

32. Nieves, *supra* note 30, at A9.

4. Guadalupe T. Luna, *Gold, Souls, and Wandering Clerics: California Missions, Native Californians, and LatCrit Theory*, 33 U.C. DAVIS L. REV. 921 (2000)

We came here for the single purpose of doing them good and for their eternal salvation, and I feel that everyone knows we love them. n. 2

"You can take your Christianity I don't want it." -- Cosumne Tribe member Lorenzo Asisara to a Franciscan friar. n. 3

INTRODUCTION

In line with past LatCrit objectives regarding the relationship between our Latina/o communities and religion, n. 4 this Essay considers *922 the role of California missions n. 5 as sacred architectures of conquest and colonization. n. 6 An additional objective is the consideration of whether Native responses specific to the transformation of their religious and social structures can emerge. Whether this history permits lessons toward promoting the sustainability of the LatCrit enterprise comprises the last goal of this Essay. n. 7

Although much is written on Spanish missions, the particularities of Native Californians' responses to the conquest remain primarily obscured. n. 8 In contrast, Catholicism and its theoretical foundation, *923 canon law, dominates Christianity's published record on California missions. n. 9 Textbook dogma, like mission records, also suggests that Native Californians did not resist conversion from their Native religiosity, n. 10 but to the contrary remained passive actors in the conquest of their former territories. n. 11 Notwithstanding this record several key issues surface.

Long before Spanish priests roamed the area in their quest for souls, religion comprised "an integral part of California Indian life" n. 12 with "its own coherent and internal logic." n. 13 The Costanoan, for example, accompanied their prayers by "blowing smoke towards *924 the sky." n. 14 Tribal members, in contrast to Church dogma, recognized men and women with "particularly strong rapport with spirits that in turn imparted distinctive abilities to their human allies, such as the power to cure or to cause illness or death." n. 15 To their detriment, Native religiosity did not correspond with European ideas on religion. Indigenous social and political structures and Native land use practices also clashed with European ideology. The race and culture of tribal groups n. 16 thereby conflicted

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sharply with European notions of white superiority. n. 17

While control of superior weapons offers an "easy" explanation of the Spanish conquest, how did small groups of "traveling clerics" infuse this brand of Roman Catholicism n. 18 and in the process complete so much fragmentation of a distinct ethnicity, culture, and religiosity? What role did law play in ensuring such drastic changes in the Indigenous populations, both in respect to Native society and religious cosmos, not only in California but in Mexico as well? n. 19 Although absolute answers refuse to surface, the role of the state in the conquest of Indigenous America offers a potential "template" for the LatCrit enterprise.

As observed, "the maintenance and regulation of relations of production in the interest of the dominant class is the primary goal of legal ideology in the hands of the holders of state power." n. 20 In *925 looking to Spain's actions in California a template emerges. Outside of European notions of religious and racial justifications of the conquest, Spain feared encroachment from competing European nations. In seeking to protect its hold on the region and keep its rivals at bay, Spain appropriated Native Californians for their labor and land base. In line with past successes of conquest in Mexico Antigua and with very little financial effort, Spain also relied on its crusaders for Christianity. Christian evangelism, with its long history of displacing the spiritual and religious world of Indigenous America and in California allowed Spain to accomplish many of its defined goals.

The friars Spain sent to California were educated men and retrained a world view perspective. When they were converting the Indigenous populations, the Age of Enlightenment had emerged, n. 21 as well as the United States Constitution, allowing individuals "inalienable rights." n. 22 Yet the Spanish friars "saw Indians as errant children who could become model Christians only with stern guidance and constant supervision. " n. 23 This interpretation facilitated their identification of Indians as "heathens" or "subhuman beings who were easily domesticated." n. 24 Saving souls for Christianity, therefore, as apologists of the period argue, did not allow the friars to see the brutality of the whippings, floggings, incarceration and the violence of forced acculturation that erupted with this evangelism. n. 25 The resulting deaths from disease, inhumane treatment and discrimination, nonetheless, provide evidence of the harshness of this form of Catholicism.

*926 During the historical period, the removal of the Jesuits by royal order defined the boundaries of relations between the Franciscan friars and Spain. Notwithstanding the banishment of the Jesuits from New Spain, forced conversion witnessed the friars as active agents of the state in dispossessing Native communities of their material, social, and spiritual world throughout Indigenous America. n. 26 This issue bears directly on the jurisprudence of LatCrit theory.

In connecting this concern to the present, attorneys sign oaths and make ethical promises as conditions subsequent to securing a license that establishes

our relationship with the state. A refusal to obey certain rules brings forth possible state enforced sanctions obligating allegiance. In some instances we are permitted "safe" spaces in our profession only where the status quo remains unchallenged. n. 27 Can this relationship disallow law's impact on the subaltern and also establish reciprocal relationships with those communities held hostage to the arbitrary whims of the state and treatment of the marginalized?

Finally, the effects of blanket essentialism regarding the treatment of Native Californians and in some instances, their Chicana/o descendents, also presents an immediate issue. Specifically, Spain's rivals seeking access to the region condemned the Spaniards for their treatment of Indigenous America. Accordingly critics of Spain "vigorously criticized the most conspicuous institution of their colonization, the mission" n. 28 for their own personal gain. Drawing from the negative stereotypes of Mission Natives and the friars' treatment of them, "La Leyenda Negra" (the Black Legend) allowed such characterizations that marked the "Spaniards and Mexicans as unworthy of California." That a few padres *927 protected some California Natives facilitating their survival underscores this point. n. 29 Nonetheless, a wide realm of negative stereotypes thereafter facilitated the United States conquest of Alta California for the treatment of Indigenous California under Spanish governance and its "failure" to industrialize the region's natural resources. This followed Mexico's independence from Spanish governance. n. 30 Displacement of Native and Chicana/o landowners from their property and ownership of natural resources thereby became grounded in culturally based negative stereotypes.

The primary documents, and more specifically, the narratives of Native Californians, permit Native populations a "space" in the present. Moreover, the "lessons" derived from the experiences of Native Californians allow for the application of LatCrit theory, thus benefiting LatCrit jurisprudence. Accordingly, Part I presents a brief historical overview of Native California. Adversely affected tribal groups in the region witnessed the degradation and loss of their land base and fractionalization of their religious cosmos and societal values. Within the realm of the Hispanic conquest, however, conflicting evidence also shows that several individuals attempted to help the Indigenous population and accordingly introduces a complex array of issues. Part II therefore addresses the impact of Hispanic religious "enthusiasm" and foreign contact with Native California. The consequences of this form of imperialism, however, are not limited to the ancient past. The ongoing struggle over the rich natural resources of Indigenous communities and legal efforts to curtail Native religiosity serve as reminders. n. 31 While *928 the role of missions and their relationship with Native Californians presents a contested paradigm that calls for further critical reflection, Part III contemplates several lessons drawn from mission evangelism.

I. PRECONTACT: INDIGENOUS CALIFORNIA

The Native Californians were not simply in California; they were California. They were an integral and essential agent in the creation of a balance of land, vegetation and animal life. n. 32

Prior to Hispanic entry, estimates of Native Californians range from 310,000 to 700,000 people situated throughout the region. n. 33 With over 1000 individuals occupying the larger locations, Native Californians grouped into villages, rancheria, or as band peoples. n. 34 That Native Californians engaged in a close relationship with their natural surroundings is seen through tribal classifications. The Bullfrog people, for example, identified the Central Sierra Miwok of Tuolumne County, who resided near water. The Bluejay people characterized the Miwok residing away from bodies of water. n. 35

Several tribes occupied various portions of California. The Wintun resided west of the Sacramento River while the Maidu occupied the eastern side of the river. The Cosumnes occupied the Sierra foothills and the Miwok lived in the Merced (except Lake and Coastal Miwoks). The Yokuts resided in the San Joaquin Valley, and the Costanoan tribe inhabited the area south of San Francisco. n. 36 The Pomos, recognized for their basketwork, occupied *929 Sonoma, Lake, and Mendocino counties. n. 37 The Chumash, skilled navigators and fisherman, inhabited the southern Coastal Ranges, and the Yumans the southeastern portion of the state and along the Colorado River. n. 38

The basic unit of political organization encompassed the village community, or tribelet, comprising several small villages, ranging from an acre to two hundred to three hundred square miles. n. 39 Territorial assertions of their geographic land base are also documented. Although principally food-gatherers, several of the tribes relied on fishing and small game hunting for subsistence with others agriculturally based. Throughout the region, Native groups spoke approximately 135 different Indian languages deriving from twenty-one or twenty-two linguistic families. After foreign entry, demands from outsiders sought to eliminate their race, ethnicity, religiosity, and culture. n. 40 What was lost directs the forthcoming lessons for the jurisprudence of the LatCrit enterprise.

II. FOREIGN CONTACT: HISPANIC CONQUEST AND IDEOLOGY: 1769-1821

By the royal order of August 22, 1776, the northern and northwestern provinces of Mexico were formed into a new and distinct organization, called the Internal Provinces of New Spain. This organization included California. n. 41

With over two hundred years of colonial experience during the conquest of Mexican Indians, Spanish law and policy fully prepared its explorers and crusaders heading for the California coast. *930 While external international events mobilized the Spaniards to protect its territories, its invasion of the region also constituted a joint religious/military enterprise as witnessed by Spain's

mission structures. n. 42

A. Mission Evangelism

Catholicism has been the official religion of Spain since time of the Visigoths. As far as the church in Spanish-America was concerned, the King of Spain was supreme patron. n. 43

Considered "reduccion" or "congregacion," mission structures n. 44 adopted from earlier colonization of Indigenous America in the California region extended from the Mexican border to the north. n. 45 Two Franciscan friars headed each mission complex, one charged with temporal affairs, and the second directing spiritual affairs. The theory underscoring the mission complex charged the friars with "training" the Indigenous population "to be good Catholics and loyal subjects of the Spanish crown" n. 46 and holding mission land in trust for the neophytes (converts). Once deemed "acculturated," the friars were to release mission Indians into "white society." The missionization of Native Californians was to last in some cases at least ten years. Thereafter secularization of the missions for distribution to the neophytes subsequent to their "assimilation" into Hispanic culture was to follow next. n. 47 Land *931 awarded for missionary work was thus not made to the "Church per se." n. 48

1. Roman Catholicism and Indigenous California

Not unlike its control of Indigenous communities in ancient Mexico, Spain also depended on the intimate relationship between the soldiers and priests to effectuate its hold of Indigenous California. The use of missions and friars in the conquest "illustrate[s] the unique blend of church and crown, of secular and spiritual matters, in the Spanish empire." n. 49 This relationship, a combination of the spiritual and the military resulted, in part, from the small number of Spaniards compared to the extensive number of Indigenous communities but also from the required use of weapons and military tactics to defend mission holdings. n. 50 Working in conjunction with each other allowed the friars to rely on the soldier and the "edge of his sword" to control dissident tribal groups and hunt down runaways seeking to escape mission evangelism. n. 51

While mission records provide accounts of the large numbers of neophytes converted to Catholicism, the act of conversion did not comprise a meaningful one but consisted in a number of cases of simply sprinkling water on the neophyte. Having baptized the neophytes, the friars changed the names of the neophytes. Losing their independence, freedom, and unique religiosity, the neophytes became the legal wards of the friars. n. 52 Through attendance at religious services, the friars required the neophytes to learn new forms of worship and spirituality. Soldiers with bayonets guarding entryways disallowed the escape of converts from Church rituals. Bailiffs, using whips, canes, and goads "to

preserve silence and maintain order, and what seemed more difficult than either, to *932 keep the congregation in their kneeling posture," n. 53 also held Native Californians hostage to Church rituals. In a number of instances, soldiers physically harmed the neophytes, and accounts of soldiers raping Native women in some missions is well-documented in historical investigations. n. 54 This relationship caused some to assert that the Spaniards offered the neophytes the "crucifix or the lance," leaving them, in the words of an Indian leader, "no room to choose between Christ and death." n. 55 While not all Native Californians experienced conversion and displacement, this Christianity nonetheless also extended beyond mission infrastructures by its effect on tribal society and gender relations. n. 56

2. Labor, Gender, and Mission Structures n. 57

Establishing Spain's colonization of the region required extensive labor and the full force of its statehood on Indigenous California. Spain leaned on former tribal members in a number of instances to erect mission complexes and perform agricultural labor on mission lands adjoining the complexes. The friars, particularly during earlier periods, did not hesitate to employ harsh measures causing injury to the new neophytes. Forced to work from early morning after prayer services until late evening, Native Californians had little time to spend with their families, friends, and former networks. Some historians contend that the "coercive measures *933 that Franciscans employed to enforce their labor regime provided both psychologically and physically damaging" effects and thus rendered much harm to them. n. 58

Threatening tribal survival, Franciscan ideology also contradicted the complementary gender relations practiced by Native Californians. n. 59 Although some women learned other skills, domestic work such as sewing clothing, working in laundry rooms, cooking and cleaning the missions dominated the tasks assigned to Native women. Mission monjerias (nunneries), n. 60 moreover, kept the women apart from men "to preserve their chastity." n. 61 In contrast, with few exceptions, men built the missions, performed fieldwork, became blacksmiths, carpenters, artists, and accomplished training in other trades. Children under this regime also performed tasks such as weeding to ensure that "birds did not damage vegetable gardens." n. 62

Until the population became too large, the complex mission life regulated worship, labor, meals, rest, and play. n. 63 Rather than to *934 honor cycles revolving around nature and life cycles, n. 64 a large bell or bells signaled prayer with smaller bells indicating work periods. n. 65 Failure to perform required tasks resulted in scolding and at times whipping or imprisonment at the hands of Christian friars, with soldiers keeping former tribal members hostage to this Christianity.

3. Catholicism and Restructuring Tribal Societies

We are familiar with the history of California. We fully appreciate that the missions are reminders of a past filled with poesy and romance. n. 66 Regardless of the side of the conquest on which one fell, Christianity introduced significant changes to Native California. In exchange for Catholicism and its attendant forced acculturation, the friars prohibited Native initiation ceremonies, dances, and songs, and, as some assert, "sought to destroy the ideological, moral and ethical systems that defined native life." n. 67 The evidence of such assertions demonstrates the loss of rituals, ceremonies, and other attributes of Native culture and religious cosmos. The transformation in their own beliefs and political and religious systems additionally resulted in a rigid caste system.

As in Mexico, the Spaniards imposed on the Indigenous population a caste system in which they declared themselves purebreds (peninsulares). In this system whites (the Spaniards) self-identified as "gente de razon" (people of reason), and occupied the highest positions of power privileged by their place in society. In contrast, the Spaniards identified those born with a mixture of Indian and Negro blood as castas who, along with imported African slaves, occupied the bottom of Spanish society. n. 68 Mestizaje, yet another *935 Spanish division of the races, resulted from the pairing of Spanish and Indian parents. Notions of cultural superiority facilitated by demands that the Native population assimilate into a Hispanic view of a cultural norm dominated the period. n. 69

Yet another significant change affecting tribal society was a patriarchal ideology in which Catholic rituals and practices redefined social and sexual relations between men and women. n. 70 The ceremony of marriage, for example, introduced sexual repression, and by their division of labor in church rituals, the friars also lowered the status of Indian women. With Hispanic arrival and its emphasis on marriage came heterosexual privilege replacing tribal societal values. In their place, Antonia Casteneda asserted that gender hierarchy, male domination, and heterosexuality became the "exclusive organizing principles of desire, sexuality, marriage and the family." n. 71

The friars also accelerated the demise of former tribal societies by aligning themselves with individuals to control the non-Hispanic population. In Mission San Luis Rey de Francia, Luiseno neophyte Pablo Tac wrote, "the Fernandino Father is like a King, having his pages, Alcaldes Y Mayordomos [Spanish overseers, Musicians, and Soldiers." n. 72 These friars undermined "traditional Indian village chiefs' authority" and "represented a sharp break from the tribal kinship groups." n. 73

En el nombre de Dios, Native cultures witnessed degradation and discrimination with demands of "filial obedience." n. 74 On an 1816 Pacific expedition to a California mission, artist M. Louis Choris wrote: "I have never seen one laugh. I have never seen one look *936 one in the face." n. 75 Gone was their right to own land, self-governance, Native languages, communication, n. 76

and their religious cosmos, which Native polytheism was displaced by a religiosity characterized by Vine DeLoria as an angry theology.

B. Analyzing the Mission Evangelism

What many apologists for the Spanish mission system have in common is an extreme low and disparaging attitude toward the Indians of California. Their reasoning appears to suggest that whatever befell the native peoples of Alta California during the mission era, it was preferable to their native culture, and in fact, somehow uplifting. n. 77

Did the friars succeed in establishing Spain's presence in California with the assimilation of Native tribal members into the dominant group? The mission infrastructure and its economic success provide a measure of the friars' performance. Holding some of the best geographical base in the region, n. 78 the use of Indigenous labor in building and supporting mission infrastructures and its enormous gardens, not only furthered the material and economic success of mission structures but the state as well. n. 79

Together with the production of capital and labor, the friars garnered spectacular economic success for the missions. Mission revenues generated from the production of agricultural commodities and goods such as wool, leather, tallow, beef, wheat, maize, and barley greatly enhanced its economic coffers. Mission surpluses, moreover, facilitated supplies to the Mexican interior and expedited *937 trade and export with foreign nationals. n. 80 Some estimates of mission wealth place their value at \$78 million in 1834 prior to secularization. n. 81 Notwithstanding mission/state wealth, Native Californians did not share equally with the state or the mission friars, much less witness the fruit following secularization of the mission infrastructure. Edward Castillo emphasized that "this end goal was never reached." The denial of their meeting "assimilation standards" led by state and mission definitions as false norms disallowed Native Californians the full attributes of Spanish society.

While some former tribal members received plots of mission land, the majority did not. n. 82 Edward Castillo asserts that:

Despite legal and Christian moral arguments put forward by Franciscan historians and others, the Spanish Crown/Franciscan empire benefited only a handful of natives. The vast majority of California mission Indians were simply laborers in a larger quest for worldwide domination by that eighteenth-century empire. It seems important to the majority of the descendants of these mission Indians that a voice be raised in their defense concerning the alleged benefits Indians received under the empire. n. 83

The friars' declarations that the Indigenous population was not ready to assimilate accordingly disallowed distribution of mission lands to the neophytes.

Beyond these considerations still other external events also impacted Native Californians' status. Led in large part by Padre Hidalgo's grito,

Mexico gained its independence from Spain following three hundred years of Spanish governance. Mexico's independence changed the status of mission Indians by providing them citizenship status and ownership to some land tracts. n. 84 And while Roman Catholicism did not leave with the Spaniards, competition from civilians not benefiting from the natural resources of the region*938 ultimately led to the secularization of the missions. n. 85 Their disbanding also resulted in part from charges that the Franciscans were ineffective in "civilizing" the neophytes, and from the fact that as citizens under Mexican law they were now equal with whites. n. 86

While some Native Californians received land, to the detriment of Native Californians most of the mission's land base was transferred to non-Native groups. n. 87 Many mission Natives left to work on Mexican ranches and with their labor also brought material success to ranch holders and facilitated the settlement of California's major cities. n. 88 With secularization, a number of church officials were also purportedly reduced to impoverished conditions. n. 89 Notwithstanding their changed legal standing under Mexican law as citizens, yet another conquest erupted and confronted Indigenous California.

The United States, seeking to connect its eastern coast with the West and access to California's natural resources initiated, a war with the Mexican Republic. In a number of circumstances, demeaning *939 stereotypes and the Black Legend advanced the conquest of the region. After the conquest, the United States, through the Treaty of Guadalupe Hidalgo, promised to recognize the citizenship of Indigenous groups and protect their property interests. n. 90 Yet even more so than under the Mexican period, the United States by its breach of the Treaty also brought forth additional disbursal and loss of Native land and citizenship status. n. 91 The legal rights permitted pueblos under Mexican law were rejected, with pueblos or individuals losing their land and access to its natural resources. n. 92 Furthermore, judicial actors held that California cities could access the natural resources denied from those previous rejections. n. 93

Benefiting from the Black Legend Native Californians confronted Manifest Destiny resulting in yet further disbursal and harm. n. 94 The American regime's demand for their labor used law to entrench its hold on Native Californians. n. 95 In the early American *940 period, for example, new laws facilitated the use of former tribal members and their descendants as a labor force. In one instance, this even caused an American reverend to observe that: "In the vine-growing districts they were usually paid in Native brandy every Saturday night, put in jail the next morning for getting drunk, and bailed out on Monday to work out the fine imposed upon them by the local authorities." n. 96 The new region also allowed illegal Indigenous ceremonial practices, rituals, and dances. n. 97 Rules, for example, prescribed punishment for certain actions identified as "Indian offenses," constituting in one case, the "sun, the scalp and the war-dance, polygamy," as well as "the usual practices of so-called 'medicine men. '" n. 98

In contrast to the Mexican period, Anglo-American law,

furthermore, denied Native Californians citizenship status and disallowed private ownership of land in a number of repeated circumstances. n. 99 The Black Legend and the demeaning stereotypes it facilitates allowed American settlers to believe that the Natives were neither deserving nor industrious, and stymied the assimilation of Native Californians. n. 100 Courts, moreover, used the status as mission *941 Indians as a false standard in comparing the claims of nonmission Indians reasoning that those not residing in missions were "uncivilized." n. 101 This new "standard" permitted the rejection of claims of land ownership through ever increasing use of shifting and arbitrary definitions of what and who qualified as "civilized." n. 102 Later their disbursal and continued tribal fragmentation resulting from such rejections precluded their meeting ever elusive federal definitions of who qualified for tribal status and federal benefits. For Native Californians, now removed from their natural habitat and former tribal structures, yet greater difficulty and onerous circumstances arrived. Without their land or access to natural resources, and with the fracturing of their previous political and socioeconomic structures, Native Californians were reduced to yet further disintegration.

In sum, Native Californians continued to serve as state forming agents ensuring the economic success of the state but with very little granted in return. Could anything they received in exchange compare to what they lost by way of their land base, natural resources and in many instances, their forced labor? Moreover, the denial of their meeting "assimilation standards" led by state and mission definitions of false norms disallowed the full attributes of Spanish society. By the mid-1900s only 15,000 remained in the former province.

***942 III. "LESSONS"**

The connection between law and the standing of Native Californians obligates us to draw forth several points from the relationship between Indigenous groups and those holding state power. Within this conceptual framework a few "lessons" are considered.

Lesson One: Dr. Jekyll/Mr. Hyde. Throughout history one sees two systems of law -- one applying to "civilized" peoples (Christian-European) and the other applying to the so-called "backwards races." n. 103 Native Californians faced a European dual system in which white Europeans proclaimed themselves gente de razon (people of reason) and further disallowed Native Californians legal authority. Backed by the state, mission evangelism diminished the stature of Natives to "heathen" status and devised tactics that disallowed Native Californians from joining Spanish society. By the interpretations of a select few, the conquest ensured that Native Californians lacked legal standing and real authority. Dating from the earliest of Spanish law, officials selectively ignored a compilation of Spanish laws granting protection to Native peoples. n. 104 The Recopilacion de las leyes de los reinos de las Indias, ("Compilation of the Laws of

the Kingdom of the Indies") disallowed the mistreatment of Indians. n. 105 In New Spain, however, many of its tenets and principles were misapplied and or ignored. n. 106

The lesson underscored here questions Spain's disregard of the Recopilacion's basic tenets, simultaneously telling Native Californians they were not ready to enter white society. Accordingly the neophytes became landless, and the disruption of the regions' *943 natural habitat ultimately harmed their ability to support themselves with a forever changed environment. n. 107

Lesson Two: Siamese Twins. n. 108 While Spain charged the Franciscan order with control of the missions, "every aspect of Spanish activities in California, the structure of the province, and the laws and regulations that controlled her development and functioning, were authorized by the King of Spain, acting through his representative, the viceroy in Mexico City." n. 109 Its consequences yielded a resultant blurring of jurisdiction between religion and civil matters with parallel reasoning in the present. n. 110 Traditionally the dominant society closely identifies with a certain religious form, and by that relationship proscribes the vast range of acceptable differences based on moral, evil, and/or other grounds. n. 111 For religiosity deemed incompatible with those defined norms, history shows law used to facilitate the demise of outsider religiosity.

One example in our time shows politicians and other religious "advocates" arguing for a return to the values, morals, and religious beliefs of the eighteenth and nineteenth centuries. A new law school, for example, declares an emphasis on teaching what the Catholic Church sees as moral truths according to its definitional standards. n. 112 The forces of the extreme religious right and other advocates are also arguing for deference to religious precepts in *944 courts n. 113 closely identified with the interests of the state. These efforts, with striking similarities to the past, obligate closer scrutiny and calls for answers as to the proper relationship between religion, law, and the polity. Spain practiced the antithesis of this with great resultant harm to Indigenous America. Documents exist outside the legal record in which to examine the relevant periods and allow yet further lessons. n. 114

Lesson Three: Historical Amnesia. With the secularization of the missions, critics assert that the friars failed in their efforts to "assimilate" Native Californians. The evidence demonstrates that very little was granted them in exchange for taking their property interests. Further study of Indigenous history therefore obligates us to look not only for those legal forces that disallowed their full integration but also for the mechanisms used that precluded their full participation into Spanish society. n. 115

Additionally, much of the credit for the "founding" of California's cities does not go to the Indigenous population, with distortion of the public record dominating the status quo. n. 116 Narrow readings disregarding the diverse human condition, although quite possibly shaped by the events of the time, also

link the past to the present. Law students are taught the principles of law yet, as others have long emphasized, receive little exposure to "social, religious, historical, and other dimensions." n. 117 The consequences ensure a less than precise history of the country's origins and its legal history.

For example, following the various conquests, several Native members, not unlike the Gabrielenos, married Mexicans with their offspring becoming some of the nation's earliest Chicanas/os. n. 118 *945 Their descendants experienced a number of legal mechanisms that disallowed into the present their full participation in society. The Chicano Blowouts in which the protests against the disproportionate high numbers of Chicanos drafted into the Vietnam combat represents an example. While a large number of Chicanas/os were physically assaulted during the protest, police actions resulted in the death of newspaper reporter Ruben Salazar. Ruben Salazar had authored a number of articles emphasizing the disparate treatment of California Chicanas/os. His death continues to generate much criticism over the use of law in curtailing Chicana/o voices. Without studying our history, other evidence suggests insufficient analysis in demonstrating the extent to which law established our communities as outsiders.

The Black Legend in which conquerors exploited mission actions for their own gain also hinders a precise historical and legal record. Each region throughout the State and the country experienced the conquest in different ways. The effects of California missions differed from Texas missions as in New Mexico and throughout Latin America. Because of the different historical time frame and circumstances, Native experiences confronting them differed. In many instances this facilitated blaming the culture for its purported "failure" to "assimilate" without regard to the direct causation and events leading to that marginalization.

The Black Legend perpetuated simplistic assertions that blamed the friars and/or Roman Catholicism without considering whether some actually protected mission neophytes. n. 119 In the present, priests working in Indigenous communities to protect Native resources and communities and facing death for their efforts emphasizes the complexities of the relationship between the Church and *946 Indigenous peoples. n. 120 Without studying the historical and religious linkages with law our silence accordingly leaves "standard texts" founded on Black Legend stereotypes as privileged, with false records standing as irrefutable universal truths. Accordingly, this lesson requires investigation of the historical and legal record.

Lesson Four: God Is "Red." n. 121 Once "converted" the descendants of Native California could not attend mass without being forced to sit in the back of churches or in basements away from the dominant culture. n. 122 At times when Indigenous ceremonies were recognized and practiced, European priests new to the region disallowed Natives' participation or ordered removal of Native paintings from churches. n. 123 From the colonial period, suppression of

Indigenous religious practices continues, with hostility directed towards ceremonies and rituals. n. 124 This lesson therefore calls for protection of Native religious practices and examining involvement of the Church with state measures that also repress Latina/o communities.

Lesson Five: The Untouchables. Wherever the Spaniards conquered new worlds, legal and religious authority facilitated the transformation *947 from Indigenous communities to Hispanic colonies. n. 125 This left in its wake changed transformation of Native cultures supported by state privileges such as control of education with Spanish friars targeting Native children for conversion, which, in turn, also brought in their parents. Catholic missionaries and the Euro-American educational system went to great lengths to "denaturalize or deculturalize" Native peoples through their children. n. 126

Canon law recognized the personal immunity of ecclesiastics and disallowed remedies for Indigenous groups. Although changed somewhat fueros responded to claims for almost anything deemed "distasteful or injurious to the interests of the Church." n. 127 Three principal fueros included local, real, and personal prerogatives or exemptions, n. 128 from taxation or other forms of contribution, personal service, or public duties. Along with positive immunities the right to trial by ecclesiastical courts permitted privileges to a select few.

Special courts, presided by clerical judges ruled by canon law, heard and tried cases involving clergymen with an end result from very early on leading to abuse and "created a class of untouchables -- a class elevated above the rest, that none of the means of social control or civic sanction could reach." n. 129 The separation of religion from state legal authority in principle disallows the reach of several legal precepts and rules, and must be examined to ensure that subordination of our communities does not linger.

Lesson Six: Monja Alert. In the contemporary period, previous versions of papal privilege exist that continue to marginalize women both within and outside church institutions. For example, the denial of tenure to nuns and others advocating greater freedoms for women creates a special elite by limiting the involvement *948 of women as key principals in Church law and teachings. n. 130 Additionally, the separation of religion from state legal authority in principle disallows the reach of several legal precepts and rules. n. 131

Lesson Seven: Toypurina Alert and Insurgency. Throughout history numerous examples show that with division comes conquest. The Spaniards in the conquest of Mexico benefited from the highly centralized and stratified nature of the Aztec, Maya and Inca Empires. Within tribal society, California Natives did not speak of themselves as "individuals/the self and society" but instead identified as "the self in society." n. 132 Nonetheless, more recent accounts attribute women leaders as seeing more clearly than others exactly what their gender would lose in Spanish civilization, and serves as an example. n. 133 Toypurina, a shaman leader from the Japchavit rancheria, for example, led a pan-tribal movement against Mission San Gabriel. n. 134 At her

trial she declared her purpose was to drive the foreigners from her land. n. 135

***949** Covert actions also show Native resistance against the status quo but which until recently remained hidden history. In the Stations of the Cross in Mission San Fernando for example, the faces of Jesus's tormentors along the Via Dolorosa are Indian faces as carved by Native Californians. Graffiti is also found in early layers of whitewash on mission walls and several altars, choir lofts and opposite the pulpit also containing hidden Indian designs. Native resistance offers viable examples, not only for restoring their role during the period of conquest, but also in managing turbulent times generally, serving as a tool in the present.

First, it shows resistance to inclusion of marginalized groups even when promises were made such as releasing mission lands to the neophytes and or permitting entry into white society. These differing and shifting forms of what qualifies as assimilation arise in cycles through time and demand further study. Second, they offer evidence that the Indigenous population in California resisted against Church structures, and provide immeasurable accounts of their reasoning skills in contrast to monocultural accounts of the conquest.

Lesson Eight: Human Rights. Indigenous groups receive greater recognition of their nation status and assertions of sovereign status outside the realm of domestic law. n. 136 These gains must be studied for application into domestic law. n. 137

Heterosexual privilege arrived with the European conquerors, and the discrimination against gays and lesbian as a primary example requires vigilance. The linkages between law and its use to curtail individual freedoms needs drawing out to ensure women are not further dominated by patriarchy as imposed by this form of Christianity.

Lesson Nine: Environmental Relationships. In contrast to European agricultural practices, Native law, custom and practices, reveal a greater relationship with nature. The resultant environmental ***950** degradation, following the conquest shows the loss of the nation's rich biodiversity and reveals the legacy of those differences. n. 138

Greater study of the Property Clause giving Congress the power "to dispose of and make all needful Rules and Regulations respecting the territory or other Property belonging to the United States" is therefore required in each region throughout the nation. The unlawful takings of Native property and overly intrusive governmental controls offer intellectually challenging constitutional takings questions and analysis regarding the control of the nation's natural resources in the present. This awareness delineates the need to promote local knowledge between states and its impact on Indigenous and Latina/o communities. n. 139

Lesson Ten: Mestizos and Law. The conquest of Indigenous America included the creation of new societies and ethnic groups. n. 140 Colonizing Los Angeles, for example, included a number of mestizos from the

Mexican interior and their role and relationship with the state also remains relatively unknown. n. 141 The intersection of law with identity deriving under and from the mission period thereby calls for further study. n. 142 This links to the methods in which the nation-state identified and labeled the blending of inter alia, Spaniards with Indian, Indian with Black, Indian with other foreign nationals, and accordingly could provide analytical tools to dissect the state's treatment of people of color.

Lesson Eleven: Cultural Memory/Tonantzin Me Socorra! n. 143 The region's history of contradictions and conquest did not eliminate Roman Catholicism in California. To the contrary, it remains a *951 viable institution with much influence over some Native and Latina/o communities. Catholicism in Chicana/o and Native religiosity is heir to Indian and Spanish religious legacies with many practices kept alive from generations past.

One layer of this issue extending into the present includes the rejection by younger generations of the patriarchy imposed on women. They, in a number of instances, are returning to Indigenous interpretations and rejecting the patriarchy of Church structures. Nowhere is this more evident than worship of the Virgen de Guadalupe the Aztec Princess who spoke to Juan Diego following the conquest of the Aztec Nation. n. 144 The "Official/Hispanicized Version" of the Virgen de Guadalupe has long obscured her Indigenous cultural context and was used to promote the subordination of women in church structures.

Her importance in Native cultures is something long passed from generation to generation not only by worship and adoration, but also by tradition. Jeannette Rodriguez, scholar on the Virgen, has told us that cultural memory ensures her Indigenous survival in Latina America. Rodriguez has contended that "the people carry a memory and the memory is also a carrier" not unlike language, images, ideas, ideals and other traditions sustaining culture. While the institutional Church remained a "Spanish Church subjectively for the Indian there was now a Native and national symbol." n. 145

Throughout Native America and in Latina/o communities many are asserting a return to their Indigenous heritage. Newer interpretations of La Virgen are causing some Chicanas of the present to assert that "she represents a blend of culture, nationalism and politics" with deeply non-religious meanings as well as being a symbol." *952 146 Representing the feminism of Catholicism in newer revisions is promoting the rejection of the Church's patriarchal teachings.

The lesson highlighted here emphasizes that, notwithstanding the contradictory role of religion in our cultures, the importance of popular religiosity as different from universal canon law and church dogma cannot be refuted nor denied, and requires yet further investigations in the LatCrit enterprise.

The above lessons are offered as potential corridors through which to examine race, class, gender and other categories of analysis inside a most complex and painful history. They seek to emphasize that in their absence law is constrained and limited by the dominant discourse.

Yet, in a number of instances law has blended various jurisprudential philosophies towards meeting social goals and contemporary values. The integration of three jurisprudential philosophies as found in [MacPherson v. Buick Motor Co.](#), n. 147 and, as Harold Berman emphasized, provides an example as to law's vitality. In *MacPherson*, Justice Cardozo relied on "the holdings of previous decisions (positivism), the equities of the case (natural law), and the social and economic evolution of the United States during the previous half-century (historical jurisprudence)." n. 148 As a form of insurgency this opinion therefore permitted a new doctrine of manufacturers' liability. In short, this demonstrates not only law's capacity but a measure of its ability to promote justice in harsh and inequitable circumstances.

CONCLUSION

We are a people in the making within a larger nation-state. Most of what we produce is taken beyond our reach, and we get back from the larger society much less than what we contribute to *953 it. Law and order are defined and imposed from outside of our culture, communities, and control. n. 149

In introducing this Essay, I included the query as to whether an alternative theoretical lens can provide a protective measure of space regarding a legal and religious relationship long obscured by the writing of the conqueror. n. 150 If so, can a more precise rendering lead to potential legal remedies and relief for long impoverished and marginalized communities? Our relationship with the state as attorneys coupled with the invisibility in law of the Native Californians and in some instances their Chicana/o descendants allows nothing but a response in the affirmative. Within mainstream law, legal theory has advanced jurisprudence on the basis of hybrid cases, thereby revealing that the blending of jurisprudential "thought, process, and reasoning permit integrations" as legal scholar Harold Berman argues are long cloaked with the mantle of "real law." n. 151

Drawing from the lessons of the various periods shows not only what was lost, but also yield evidence of power relations where one voice dictated over the voice of the majority. In spite of the inhumane actions and legal record imposed on Native Californians, the strength of their Native identity and religious identities, and their refusal to disappear make evident their response to aggressive evangelism, the Black Legend, and other forms of conquest. As state-causing actors California's Indigenous population and the country's earliest Chicanas/o received very little in exchange for their labor and immeasurable sacrifices.

The LatCrit enterprise even in its infancy can and should continue in its commitment to change in law. Failing to uncover long neglected truths and inaction allows textbook dogma to stand as a false record, guarantees the continued assault on our culture, religion, ethnicity and other cultural attributes and categories without receiving parity with those holding positions of power.

The task for the LatCrit community is to reach those communities long serving *954 as primary state causing actors, but receiving little in exchange for their labor while losing their land and access to natural resources. Recognizing native resistance against state linked actions imposing false norms of "assimilation standards" beyond their reach while despoiling their land base can influence LatCrit theory in the present and into future generations, therefore allowing one last "lesson. "

"We are a people who honor our dead" n. 152 -- "sangre llama a sangre " (blood cries out to blood) and the legal and historical realities of Native Californians and our antepasados (ancestors) are calling." n. 153 Through the LatCrit enterprise can we do anything but respond?

NOTES:

1. "Gold, then, and souls, were the objective of the vanguard of conquerors. Gold for the chests of their majesties, and for their private pockets; souls of the flock of His Holy See and the Mother Church." ERNESTO GALARZA, *THE ROMAN CATHOLIC CHURCH AS A FACTOR IN THE POLITICAL AND SOCIAL HISTORY OF MEXICO* 17 (1928). Not unlike the conquest of Mexico antigua, Hispanic conquerors sought dominion and control of the California region for its natural resources, labor, access to the souls of the Indigenous population and its territorial land base. For case law reference involving the search for gold and silver and a contested mine encompassing all three periods of the conquest of the region see [United States v. Castillero, 67 U.S. \(2 Black\) 17 \(1862\)](#).

2. JERRY STANLEY, *DIGGER, THE TRAGIC FATE OF THE CALIFORNIA INDIANS FROM THE MISSIONS TO THE GOLD RUSH* 42 (1997) (quoting Father Serra).

3. Mission neophyte Lorenzo Asisara's response to the use of a cuarta de hierros (a horse whip tipped with iron) used by the friars to "control" recalcitrant neophytes. See Steven W. Hackel, *Land, Labor, and Production: The Colonial Economy of Spanish and Mexican California*, in *CONTESTED EDEN, CALIFORNIA BEFORE THE GOLD RUSH* (Ramon Gutierrez & Richard J. Orsi eds., 1998) [hereinafter *CONTESTED EDEN*].

4. See, e.g., Elizabeth Iglesias & Francisco Valdes, [Religion, Gender, Sexuality, Race & Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas](#), 19 *CHICANO-LATINO L. REV.* 503 (1998); Reynaldo Anaya Valencia, [On Being an "Out" Catholic: Contextualizing the Role of Religion at LatCrit II](#), 19 *CHICANO-LATINO L. REV.* 449 (1998).

5. "Mission settlements" were ecclesiastical foundations in California established by "monks or padres of Franciscan Order." [City of San Diego v. Cuyamaca Water Co.](#), 209 cal. 105, 125, 287 P. 475, 485 (1930). While the emphasis here is California missions the Spaniards also established missions

throughout the Americas. There is case law regarding missions in Texas. See, e.g., [Taylor v. Hoya, 29 S.W. 540, 540 \(Tex. Civ. App. 1895\)](#) (referencing 1716 mission in Nacogdoches and discussing its use as presidio during dispute between Spain and France, and, after Louisiana purchase). See generally RANDY LEE EICKHOFF, *EXILED, THE TIGUA INDIANS OF YSLETA DEL SUR* (1996); THE REV. XAVIER DONALD MACLEOD, *HISTORY OF ROMAN CATHOLICISM IN NORTH AMERICA* 147-48 (1866); TIMOTHY M. MATOVINA, *TEJANO RELIGION AND ETHNICITY, SAN ANTONIO, 1821-1860* (1995).

6. The first expeditions in the region took place in 1542. See W.H. HUTCHINSON, *CALIFORNIA, TWO CENTURIES OF MAN, LAND, AND GROWTH IN THE GOLDEN STATE* (1969). There are many accounts of California's early history. See, e.g., E.S. CAPRON, *HISTORY OF CALIFORNIA FROM ITS DISCOVERY TO THE PRESENT TIME* (1854); JAMES J. RAWLS, *INDIANS OF CALIFORNIA, THE CHANGING IMAGE* 25 (1984). There are also instances of case law discussing California history:

Prior to May 14, 1769, the date of the arrival in the territory now comprised in the State of California of one of the first exploring expeditions of the Kingdom of Spain by way of Mexico, the Indians in the state lived in their primitive and aboriginal condition, divided into many separate and distinct bands, tribes and rancherias, enjoying the sole use, occupancy and possession of all the lands in the State of California, undistributed by any European power." [Indians of California v. United States, 98 Ct. Cl. 583 \(1942\)](#).

7. Spain employed a trio of settlements: the presidio (military post), the missions, and civilian settlements in its conquest of Indigenous America. "A mission was more than just a church and included a wide network of outlying structures." WARREN A. BECK & YNEZ D. HAASE, *HISTORICAL ATLAS OF CALIFORNIA* 12 (1974) ("A few friars could erect mission installations and control potentially dangerous natives at far less cost than could the military."). For examples of mission structures, photographs, survey plats, drawings and architectural renditions see Architectural Features, in *MEXICAN CALIFORNIA* 45 (Carlos E. Cortes ed., 1976) [hereinafter Architectural Features].

8. Native Californians confronted three forms of sustained contact. Each moreover, obligating separate investigation and uncloaking. Beginning with Spanish governance, in the late 1700s and lasting until 1821, as the first, and Mexico's independence from Hispanic governance in 1821 comprising the second period of occupation. The United States's invasion and conquest of the Mexican province in 1848 thereafter consisted of the third and last conquest of native California.

9. See James L. J. Nuzzo, *The Rule of Saint Benedict: The Debates over the Interpretation of an Ancient Legal and Spiritual Document*, 20 HARV. J.L. & P. POL'Y 867 (1997) (discussing canon law as subset of civil law system). "Church law is that body of canon law, statutes, and doctrines promulgated by competent

authority within the Roman Catholic Church to govern the social and pastoral activities of the Church and its members." *Id.* Church law encompasses both universal law and particular law. "Unlike church constitutions, charters, and contracts, canon law is unmistakably theological in all its aspects. It represents the codification of church theology into canonical or legal language." Church law in the Americas is differentiated from the type of Christianity practiced in Europe. See generally Florence C. Shippek, *California Indian Reactions to the Franciscans*, in *NATIVE AMERICAN PERSPECTIVES ON THE HISPANIC COLONIZATION OF ALTA CALIFORNIA* 174 (Edward D. Castillo ed., 1992) [hereinafter *NATIVE AMERICAN PERSPECTIVES*]. Finally, canon law is also differentiated from royal law.

10. See generally Rev. Father Juan Caballeria, *History of San Bernardino Valley History of San Bernardino Valley from the Padres to the Pioneers, 1810-1851*, in *MEXICAN CALIFORNIA*, *supra* note 7, at 33. "The mission Indian was naturally docile and submissive. After a few years of training at the mission, the unclothed, degraded savage, living a life of sloth and immorality was transformed into an industrious Christian with fair ideas of religion and morality." *Id.* In California monocultural accounts dominate the literature and are "considered standard works." Edward D. Castillo, Introduction to *NATIVE AMERICAN PERSPECTIVES*, *supra* note 9, at xix. Within the law, the focus of literature on religious and ethnic identities considers primarily European history and identity thereby presenting a false norm. As such it presents incomplete investigations on the role of religion and its relationship with marginalized groups.

11. See [*Arenas v. United States*, 322 U.S. 419 \(1944\)](#). The Arenas Court noted that:

Long ago the Franciscans converted them to Christianity, taught them to subsist by good husbandry and handicrafts. Under the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922, their ancestral lands and their governance passed from Mexico to the United States. During the gold discovery days they were too gentle to combat the ruthless pressures of the whites and came to lead a precarious and pitiable, but peaceful, existence. *Id.* at 427.

12. See, e.g., HENRY K. NORTON, *THE STORY OF CALIFORNIA* (1913); Paul Farnsworth, *The Economics of Acculturation in the California Missions*, at 186 (1987) (unpublished Ph.D. dissertation, University of California (Los Angeles)) (on file with author).

13. Castillo, *supra* note 10, at xxi ("Native religions were not just different religions, but different types of religion. "); see also Raymond White, *Religion and Its Role Among the Luiseno*, in *NATIVE AMERICAN PERSPECTIVES*, *supra* note 9, at 355.

14. Farnsworth, *supra* note 12, at 186.

15. M. Kat Anderson et al., *A World of Balance and Plenty, Land, Plants, Animals, and Humans in a Pre-European California*, in *CONTESTED EDEN*, *supra* note 3, at 16; see also RAWLS, *supra* note 6, at 10.

16. JACK D. FORBES, *APACHE, NAVAHO, AND SPANIARD* (1994).

17. The terms dominant population, Euro-American, and European-American reference individuals of European descent. See generally *In Re Camille*, 6 F. 256, 257 (C.C.D. Or. 1880) (referencing members of the dominant population as "Europeans or white race").

18. See *Caballeria*, supra note 10, at 26 ("In taking up the work in Alta California, these missionaries brought minds single to one purpose, and that purpose the sowing of the seed of Christianity.").

19. Subsequent to their arrival in Mexico the Spaniards stated that "[there are so many Indians that they are like stars of the sky; so that they cannot be counted." Yet in the Mexican interior in one quarter of a century thousands of their temples were reduced to dust (approximately 80,000) and eight million natives converted. See *GALARZA*, supra note 1, at 23.

20. MICHAEL E. TIGAR & MADELEINE R. LEVY, *LAW & THE RISE OF CAPITALISM* 287 (1977). In this Article the definition of law is borrowed from Tigar and Levy's book. See *id.* The authors define law:

As used by the protagonists in the struggle we describe it means at different times (a) the rules made by the powerful; (b) the rules that some group or class thinks ought to be made in a godly, or at least a better, society; (c) the customs and habits of a people, which have been observed immemorially; (d) the manifesto of a revolutionary group; (e) the rules that some group makes for its own internal governance. *Id.* at 6-7.

21. Several friars and priests participated in early expeditions of the region even before establishing formal mission structures. Friars served as mariners, navigators, and joined early explorations charting out passageways into the region. Their diaries are reprinted in a number of texts offering English translations. See generally Junipero Serra Reports on The Missions of California, in *A DOCUMENTARY HISTORY OF THE MEXICAN AMERICANS* 131 (Wayne Moquin & Charles Van Doren eds., 1971).

22. See generally Michael J. Gonzalez, "The Child of the Wilderness Weeps for the Father of Our Country": The Indian and the Politics of Church and State in Provincial California, in *CONTESTED EDEN*, supra note 3, at 153-54.

23. *Castillo*, supra note 10, at xxii.

24. See *id.* at xviii; see also ROBERT F. HEIZER & ALAN F. ALMQUIST, *THE OTHER CALIFORNIANS, PREJUDICE AND DISCRIMINATION UNDER SPAIN, MEXICO, AND THE UNITED STATES TO 1920*, at 5 (1972).

25. See generally *Castillo*, supra note 10, at xxii.

26. "It is important that the development of Spanish California be viewed, not in isolation, as it so often is, but as the final expression of Spanish colonial expansion in the New World." Farnsworth, supra note 12, at 21. The form of Christianity imposed on native groups in North America is differentiated from European Christianity and from popular religiosity. See STANLEY G. PAYNE, *SPANISH CATHOLICISM, AN HISTORICAL OVERVIEW* 3-11 (1984).

(giving historical account of Spanish Catholicism as practiced in Europe).

27. The denial of tenure of several in the LatCrit teaching communities emphasizes this point.

28. RAWLS, *supra* note 6, at 42; see also Deena J. Gonzalez, *The Widowed Women of Santa Fe: Assessments on the Lives of an Unmarried Population, 1850-1880*, in *UNEQUAL SISTERS: A MULTICULTURAL READER IN U.S. WOMEN'S HISTORY* 43 (Ellen Carol Dubois & Vicki L. Ruiz eds., 1990) (commenting on assumptions that U.S. government could relieve Spanish-Mexicans of the pressure and oppression imposed on them by powerful Catholic priests, "a belief uniformly shared by territorial officials").

29. The Bishop Bartolome de Las Casas's criticism of the violent treatment of the Indigenous population in Mexico provides an example. The role of priests in their advocacy for social justice and liberation theology also provides an example of this contradiction. Also, that a number of Native Californians volunteered to join the Spanish missionaries also presents a historical conflict. See MARTHA MENCHACA, *THE MEXICAN OUTSIDERS, A COMMUNITY HISTORY OF MARGINALIZATION AND DISCRIMINATION IN CALIFORNIA* (1995). At least one commentator has addressed the internal struggle of San Franciscan Native Californians regarding whether or not to join the mission complex. See RANDALL MILLIKEN, *A TIME OF LITTLE CHOICE, THE DISINTEGRATION OF TRIBAL CULTURE IN THE SAN FRANCISCO BAY AREA 1769-1810*, at 205 (1995) (explaining that Native Californians "struggled with mixed feelings, hatred and respect, in a terrible, internally destructive attempt to cope with external change beyond their control").

30. See generally **Guadalupe T. Luna**, [Chicana/Chicano Land Tenure in the Agrarian Domain: "On the Edge of a Naked Knife,"](#) 4 MICH. J. RACE & L. 39 (1998) (analyzing property disputes in defense of Mexican owned property deriving from Mexican period).

31. Anderson, *supra* note 15, at 12 (California has environmental diversity and richness unparalleled anywhere in the world."); see also JOSEPH P. SANCHEZ, *SPANISH BLUECOATS, THE CATALONIAN VOLUNTEERS IN NORTHWESTERN NEW SPAIN 1767- 1810*, at 39 (1990) (describing landscape "as arbored and filled with fragrant plants like sage, rosemary, and roses, among other wild plants in flower and animal life"); William Claiborne, *Furor over Hog Farm*, STAR TRIB., Apr. 7, 1999, at A7 (describing story of large agricultural enterprise purportedly seeking to evade federal and state law restrictions on hog farming operations by seeking to erect large hog operation on Native American reservation).

32. Anderson, *supra* note 15, at 16.

33. See RAWLS, *supra* note 6, at 13. While missionaries concentrated their efforts on native groups occupying coastal regions Native Californians, nonetheless, existed throughout the State in various regions. Friars categorized those in missions as "tame" Indians, "useful and hostile Indians" classified some

outside mission walls, while still others were classified as "wild." See *id.*

34. Farnsworth, *supra* note 12, at 25.

35. See *id.* at 67.

36. Some estimate a lower population. See generally BECK & HAASE, *supra* note 7, at 11 (providing 133,000 on low end).

37. To the present, Pomo basket weavers are recognized for their "variety of design and technique" as "unequaled among indigenous peoples." GREG SARRIS, *KEEPING SLUG WOMAN ALIVE, A HOLISTIC APPROACH TO AMERICAN INDIAN TEXTS* 51 (1993).

38. Yet other tribal groups included the Shoshonens, Monos, Tuba-tulabal, the Panamint, Ute, Chemehuevi, Serrano, Gabrielino, Luiseno Cahuilla, the Penutians, and Hokans. BECK & HAASE, *supra* note 7, at 11; see also NATIVE CALIFORNIANS, A THEORETICAL RETROSPECTIVE (Lowell J. Bean & Thomas C. Blackburn eds., 1976) [hereinafter NATIVE CALIFORNIANS].

39. See RAWLS, *supra* note 6, at 9 ("All of the California tribes had complex socio-political systems with numerous specialists or shaman managing specialized knowledge which contributed to the survival and welfare of each band or tribe.").

40. See, e.g., NATIVE CALIFORNIANS, *supra* note 38; THOMAS D. HALL, *SOCIAL CHANGE IN THE SOUTHWEST 1350-1880*, at 37 (1989); ANTONIO RIOS-BUSTAMANTE & PEDRO CASTILLO, *AN ILLUSTRATED HISTORY OF MEXICAN LOS ANGELES, 1781-1985* (1986).

41. [United States v. Peralta, 60 U.S. \(19 How.\) 343 \(1856\).](#)

42. See generally SANCHEZ, *supra* note 31, at 32.

43. [Municipality of Ponce v. Roman Catholic Church in Porto Rico, 210 U.S. 296, 314 \(1908\).](#)

44. RAWLS, *supra* note 6, at 14, 16 ("By various means the Indians were congregated around the missions, where they were 'reduced' from their 'free undisciplined' state to become regulated and discipline members of colonial society.") (citations omitted).

45. The northern section held eleven missions with a land base of approximately 11,000 square miles and an original population of about 26,000. The central section that included four Santa Barbara missions involved a land based of about 5000 square miles and an original population of about 8500. Last the southern section with missions from San Fernando comprised 20,500 square miles with a native population estimated at around 20,000. See BECK & HAASE, *supra* note 7.

46. See, e.g., NATIVE AMERICAN PERSPECTIVES, *supra* note 9, at 117-19; Douglas Monroy, *They Didn't Call Them Padre for Nothing*, in BETWEEN BORDERS: ESSAYS ON MEXICANA/CHICANA HISTORY 435 (Adelaida R. Del Castillo ed., 1990) [hereinafter BETWEEN BORDERS] ("Fearful of encroachment from other powers, especially Russia, Spain sought to transform the native population into loyal subjects of His Catholic Majesty, the King of Spain. ").

47. See RAWLS, *supra* note 6, at 19.

48. For a court's interpretation of this relationship see *Niebili v. Redman*, 6 Cal. 325 (1856), explaining that church structures in California were political establishments.

49. RAWLS, *supra* note 6, at 14.

50. In describing the Spanish conquest of Mexico, Ernesto Galarza asserted that "mailed armour accompanied Gregorian chants." GALARZA, *supra* note 1.

51. The testimony of those who ran away from Mission Dolores in San Francisco in 1797, but were subsequently returned to the missions, informs us that they left because of, among other things, floggings, fear in seeing their friends flogged, hunger, incarceration, and beatings for other infractions. See generally HEIZER & ALMQUIST, *supra* note 24, at 9.

52. See James A. Sandos, *Between Crucifix and Land, Indian-White Relations in California, 1769-1848*, in CONTESTED EDEN, *supra* note 3, at 205-06; see also CYNTHIA RADDING, *WANDERING PEOPLES* (1997).

53. STANLEY, *supra* note 2, at 44 (quoting British scientist Frederick Beechey describing Sunday mass in Mission San Francisco in 1816).

54. Compare Antonia Casteneda, *Engendering the History of Alta California, 1769-1848, Gender, Sexuality, and the Family*, in CONTESTED EDEN, *supra* note 3, at 230, with William Mason, *Indian-Mexican Cultural Exchange in the Los Angeles Area, 1781-1854*, 15 AZTLAN: INT'L J. CHICANO STUD. RES. 123, 124-26 (1984). "Contrary to the opinions of some writers, there was relatively little sexual abuse of Indian women by settlers, if the archival references are any indication. Despite the notoriously lax situation that existed at San Gabriel in 1772-73, when the frequency of rape of Indian women by Spanish Mexican soldiers provoked a revolt, later infractions were punished if discovered." Mason, *supra*, at 126. Nonetheless, the record shows that Native men were killed in defending native women captured by Spanish soldiers. See Monroy, *supra* note 46, at 435 (asserting that "[the Spanish acquired converts at Mission San Gabriel with the soldiers that pursued them to their rancherias, where they lassoed women for their lust and killed such males as dared to interfere]").

55. Sandos, *supra* note 52, at 196, 205.

56. See NATIVE AMERICAN PERSPECTIVES, *supra* note 9, at 27 (providing that even those residing outside of mission structures were required to contribute one-tenth of their agricultural produce to missions).

57. See Caballeria, *supra*, note 10, at 32 ("The missions were conducted on the patriarchal plan. The inmates lived as one large family, their interests general and identical. Separation of the sexes was rigidly enforced from the beginning.").

58. Hackel, *supra* note 3, at 123; see also Shipek, *supra* note 9, at 181 (discussing Kumeyaay responses to Franciscans and narratives of run-a-ways who told of "great grandmothers being whipped if they dallied over the work or were too slow for the overseers").

59. See generally Antonia I. Casteneda, *Engendering the History of Alta*

California, 1769-1848, in *CONTESTED EDEN*, supra note 3, at 230-34.

60. Sandos, supra note 52. In his report as president of the missions, Father Lasuen asserted that "[the girls and the unmarried women (wrongly called nuns) are gathered together and locked up at night in their quarters." *Architectural Features*, supra note 7, at 179-81.

61. See, e.g., Monroy, supra note 46, at 435. The room at Santa Barbara housing the women is described as encompassing:

1 varas [a vara equals roughly a yard long by 7 wide, is of brick and has a high, wide window for light and ventilation. It has its sewer for corporeal necessities during the night. Along the walls is a platform, 20 varas long by 2 1/4 wide, with two stairways of brick and mortar at the ends for those who ant to ascend and sleep upstairs. In the evening they have a fire for heat and every night they are given a tallow candle to illuminate the room.

The Indian Versus the Spanish Mission, in *NATIVE AMERICAN PERSPECTIVES*, supra note 9, at 127.

62. Hackel, supra note 3, at 123.

63. After some point in time the missions became overly populated, causing the friars to permit the neophytes to visit their communities and in some instances reside near the missions. The fact that some converts were not mistreated physically, and that in some instances the friars protected some native women from Spanish soldiers (although at some point soldiers were encouraged to marry native women) presents contradictory evidence in need of further unpacking. It nonetheless obscures the basic point that former Native societies became fractionalized and restructured according to Hispanic interpretations of property ownership and gender relations.

64. Castillo, supra note 10, at xvii (commenting that "traditional Indians did not share linear time concepts with the Euro-Americans they confronted in 1769" but rather their "world view was organized around a yearly cycle of renewal ceremonies and acts."); see also Caballeria, supra, note 10, at 33 ("Mission life was one of industry. At day-break the whole place was awake and preparing for labor.").

65. *NATIVE AMERICAN PERSPECTIVES*, supra note 9, at 27.

66. [Froliger v. Richardson, 63 Cal. App. 209, 218 P. 497 \(1923\).](#)

67. Monroy, supra note 46, at 435.

68. It is well established that early settlers to the Los Angeles region were also of Indian and African descent. See, e.g., J. Gregg Layne, *The First Census of the Los Angeles District, Padron de la Ciudad de Los Angeles y Su Jurisdiccion*, 19 Q. HIST. SOC'Y S. CAL. 81 (1937); Mason, supra note 54, at 135. For a review of mestizaje and class definitions of Mexican society, see Dennis Nodin Valdes, *The Decline of the Sociedad de Castas in Mexico City* (1978) (unpublished Ph.D. dissertation, University of Michigan) (on file with author) (examining people of mixed descent including but not limited to mestizos and mulattos).

69. For a present example of the influences of Spanish characterizations with linkages into the present see **Kevin R. Johnson**, "[Melting Pot](#)" or "[Ring of Fire?](#)": [Assimilation and the Mexican-American Experience](#), 85 CAL. L. REV. 1259 (1997), 10 LA RAZA L.J. 173 (1998).

70. See WILFRID HARDY CALLCOT, *CHURCH AND STATE IN MEXICO, 1822-1857*, at 20 (1965).

71. Casteneda, *supra* note 59, at 230-32.

72. Sandos, *supra* note 52, at 206; see also Castillo, *supra* note 10, at xxiv.

73. During the Mexican period *alcaldes* functioned as mayors of a given area. Ultimately American males became *alcaldes* following the United States conquest of the region.

74. Castillo, *supra* note 10; see also RICHARD GRISWOLD DEL CASTILLO & ARNOLDO DE LEON, *NORTH TO AZTLAN, A HISTORY OF MEXICAN AMERICANS IN THE UNITED STATES* (1996).

75. Castillo, *supra* note 10, at xvi; see also Robert H. Jackson, *Gentile Recruitment and Population Movements in the San Francisco Bay Area Missions*, in *NATIVE AMERICAN PERSPECTIVES*, *supra* note 9, at 199, 201 (discussing failure of royal officials to apply Spanish laws that were contrary to their interests, and how missionization, contrary to established historical accounts, "involved a degree of force").

76. See Castillo, *supra* note 10, at xxi (explaining that Spanish policy forbade teaching Christian doctrine in native languages).

77. *NATIVE AMERICAN PERSPECTIVES*, *supra* note 9, at 423.

78. See, e.g., BECK & HAASE, *supra* note 7, at 9-10 ("[The fauna of California is as diverse as its climate and topography.]; Anderson, *supra* note 15, at 12 ("California has environmental diversity and richness unparalleled anywhere in the world.)).

79. The struggle to control Native labor also surfaced during the Mexican governance of the province after 1821. Throughout this period, Native Californians argued for independence from mission governance. See generally Gonzalez, *supra* note 22, at 147-49.

80. See Farnsworth, *supra* note 12, at 73 ("Economically the California Missions were a complete success."); see also NORTON, *supra* note 12, at 59.

81. See Farnsworth, *supra* note 12, at 108.

82. But then in some instances thereafter, these Native Californians were confronted with charges that they lacked ownership status of that interest. See generally [Serrano v. United States](#), 72 U.S. (5 Wall.) 451 (1866).

83. See *NATIVE AMERICAN PERSPECTIVES*, *supra* note 9, at 423.

84. See generally [United States v. Wilson](#), 66 U.S. (1 Black) 267 (1861) (providing background on plots of land regarding Huerta de Ramualdo adjoining Mission San Luis Obispo).

85. See BRIGADIER GENERAL JOSE FIGUEROA, *A MANIFESTO TO THE MEXICAN REPUBLIC* (C. Alan Hutchinson ed., 1978) (discussing his

interpretation of events leading to secularization of missions).

86. See Hackel, *supra* note 3, at 136 (summarizing opening of California to international trade, Colonization Act of 1824, Supplemental Regulations of 1828, and Secularization Act of 1833 all manifested unforeseen political transformations).

87. See, e.g., [Luco v. United States, 64 U.S. \(23 How.\) 515, 521-22 \(1859\)](#) (commenting on importance of protecting settlers from "barbarous tribes"); [United States v. Ritchie, 58 U.S. \(17 How.\) 525, 540 \(1854\)](#) (describing Indians and their "degraded condition ... and ignorance generally"). Ejectment actions also confronted the population. See generally [Byrne v. Alas, 68 Cal. 479, 9 P. 850 \(1886\)](#). In some instances recognizing the inequities nonetheless required facing legal struggles over their property. In Byrne, the court allowed reopening affidavits because as the court wrote they were "ignorant and unacquainted with modes of judicial proceedings may be reopened on affidavits of merits made by counsel." *Id.*

88. See generally George Harwood Phillips, *Indians in Los Angeles, 1781-1875: Economic Integration, Social Disintegration*, in *NATIVE AMERICAN PERSPECTIVES*, *supra* note 9, at 395 (recognizing historians disregard of economic relationship between settlers and Indians).

89. Some mission holdings were sold to aid the Mexican government's efforts to "keep California out of the hands of the United States." Helen S. Giffen, *Some Two-Story Adobe Houses of Old California*, 22 Q. HIST. SOC'Y S. CAL. 1, 9 (1938) (noting sale of 121,542 acres of former mission land sold to raise funds in war effort for \$14,000 to Eulogio de Celis). The writings of mission visitors report on the decaying of mission buildings. "In October 1836, the United States ship 'Peacock' stopped at Monterey on its way from the Orient where Mr. Edmund Roberts as special agent of the United States government had been engaged in a diplomatic mission." *Architectural Features*, *supra* note 7, at 32-34. During his stop he visited Mission San Carlos mission. "At this time there are twenty-one missions in Upper California, all of which are in a state of decay. I visited that at Carmelo which I found in ruins, and almost abandoned." *Id.*; see also [Den v. Den, 6 Cal. 81 \(1856\)](#) (involving lease of Mission Santa Barbara for nine-year term).

90. 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., 9 Stat. 922,930 [hereinafter Treaty of Guadalupe Hidalgo]. There is ample case law on land formerly belonging to California missions and/or affecting Native Americans. See, e.g., [Barker v. Harvey, 181 U.S. 481, 482 \(1901\)](#); [United States v. Workman et al., 68 U.S. \(1 Wall.\) 745 \(1863\)](#) (involving ex-mission San Gabriel and purported conveyance of mission from Father Jose Prudencia Santillan for two hundred thousand dollars); [White v. United States, 68 U.S. \(1 Wall.\) 660 \(1863\)](#); [United States v. Bolton, 64 U.S. \(23 How.\) 341 \(1859\)](#) (involving purported grant to secular priest, subsequent conveyance, and determination as to validity of successor in interest); [United](#)

[States v. Ritchie](#), 58 U.S. (17 How.) 525 (1854); (involving Mission Indian's claim of right to permanent occupancy); [Chunie v. Ringrose](#), 788 F.2d 638, 644 (9th Cir. 1986) (holding Chumash Indians had lost their right to California islands for failure to assert claims in California land confirmation proceedings); [Mora v. Foster](#), 17 F. Cas. 720 (C.C.D. Cal. 1875); [Harvey v. Barker](#), 126 Cal. 262, 58 P. 692 (1899) (regarding claims of successors of mission Indians); [Byrne v. Alas](#), 68 Cal. 479, 9 P. 850 (1886); see also ALBERT L. HURTADO, INDIAN SURVIVAL ON THE CALIFORNIA FRONTIER (1988).

91. For an interpretation of U.S. impact on the region, see MENCHACA, *supra* note 29. For a review of the annexation of the former Mexican province see NEAL HARLOW, CALIFORNIA CONQUERED, THE ANNEXATION OF A MEXICAN PROVINCE, 1846-1850 (1982).

92. See [Los Angeles Farming Milling Co. v. City of Los Angeles](#), 217 U.S. 217, 218 (1910) (regarding litigation over riparian rights).

93. See *id.*

94. George Harwood Phillips, wrote that in 1851 for example, an "Anglo-American visitor to California claimed that the extreme indolence of their nature, the squalid condition in which they live, the pusillanimity of their sports, and the general imbecility of their intellects, render them rather objects of contempt than admiration." Phillips, *supra* note 88, at 383.

95. Native Californians outside of the mission complex supplied labor around Los Angeles for civilians and in the presidios. See generally Mason, *supra* note 54, at 124-25. Mason wrote:

The Indian's economic and social role in Los Angeles was important. Rancheros around Los Angeles were using Indian labor at least by the 1790s. Vinyardists considered them indispensable. Most agricultural tasks were done on a contract basis by Indians. Both military authorities and missionaries felt that the Indians were major factors in Los Angeles agricultural production. *Id.* at 124.

96. MACLEOD, *supra* note 5, at 161.

97. See GEORGE E. TINKER, MISSIONARY CONQUEST: THE GOSPEL AND NATIVE AMERICAN GENOCIDE 7 (1993).

98. [United States v. Clapox](#), 35 F. 575, 576 (D. Or. 1888) (involving arrest of Minnie, Umatilla tribal member, for "offense of living and cohabiting" with "an Indian other than her husband"). This also exemplifies the dominant culture imposing its own values on a culture that in many instances regarded spousal relations as the domain of the male.

99. Mexican law, in contrast to the new American regime, recognized the Indigenous population as possessors, and not merely occupants, of their property interests. See, e.g., [Arenas v. United States](#), 322 U.S. 419, 427 (1944).

100. As an example, in violation of the Treaty of Guadalupe Hidalgo, Congress promulgated yet further legislation obligating all holders in interest to defend their property holdings. See An Act to Ascertain and Settle the Private Land Claims in the State of California, Ch. 41, 9 Stat. 631 (1851) (obligating

"[each and every person claiming lands in California to present documentary evidence and testimony to support claim of ownership"). Attempt to reconcile Article IX of the Treaty of Guadalupe Hidalgo with the results of land dispossession, providing:

[The sacredness of this obligation shall never be lost sight of by the said Government, when providing for the removal of the Indians from any portion of the said territories, or for its' [sic being settled by citizens of the United States; but on the contrary special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain. Treaty of Guadalupe Hidalgo, *supra* note 90, at 932; see also [United States v. Candelaria](#), 271 U.S. 432, 442 (1926).

101. See [Arenas](#), 322 U.S. at 427. The Arenas Court commented:

Long ago the Franciscans converted them to Christianity, taught them to subsist by good husbandry and handicrafts. Under the Treaty of Guadalupe Hidalgo ... their ancestral lands and their governance passed from Mexico to the United States. During the gold discovery days they were too gentle to combat the ruthless pressures of the whites and came to lead a precarious and pitiable, but peaceful, existence. *Id.*

102. See e.g., [United States v. Klamath](#), 304 U.S. 119 (1938); [Cramer v. United States](#), 261 U.S. 219 (1923); [Thompson v. United States and Klamath Indians](#), 44 Ct. Cl. 359 (1909); Jo Carrillo, [Identity as Idiom: Mashpee Reconsidered](#), 28 IND. L. REV. 511 (1995).

103. See generally JAMES E. FALKOWSKI, INDIAN LAW/RACE LAW, A FIVE-HUNDRED- YEAR HISTORY 2 (1992); see also NANCY M. FARRISS, CROWN AND CLERGY IN COLONIAL MEXICO 1759-1821, THE CRISIS OF ECCLESIASTICAL PRIVILEGE (1968); D.A. Brading, Government and Elite in Late Colonial Mexico, 53 HAHR 389 (1973).

104. Donald Juneau, The Light of Dead Stars, 11 AM. INDIAN L. REV. 1, 2 (1983). Juneau argues that: "Not only does the Recopilacion afford a basis for establishing ownership in property derived from immemorial aboriginal possession, it can be used to reclaim property wrongfully dispossessed of an Indian tribe that has used and occupied the lands for a long period of time." *Id.*

105. See, e.g., CHARLES R. CUTTER, THE LEGAL CULTURE OF NORTHERN NEW SPAIN, 1700-1810 (1995); Charles Sumner Lobingier, Siete Partidas (Las) in full English Dress, 9 HISPANIC AM. HIST. REV. 529 (1930). For precedent referencing cédulas and the siete partidas exists in law, see [Late Corp. of the Church of Jesus Christ of Latter-Day Saints, v. United States](#), 136 U.S. 1 (1890), and [United States v. Cervantes](#), 59 U.S. (18 How.) 553 (1855).

106. GALARZA, *supra* note 1, at 45-6.

107. See generally Chester King, Chumash Inter-Village Economic Exchange, in NATIVE CALIFORNIANS, *supra* note 38, at 289.

108. See, e.g., GALARZA, *supra* note 1; LAWRENCE J. MOSQUEDA,

CHICANOS, CATHOLICISM AND POLITICAL IDEOLOGY 33 (1986). For an analysis of Spain's political jurisdictions and governing bodies in New Spain, see PETER GERHARD, COLONIAL NEW SPAIN, 1519-1786: HISTORICAL NOTES ON THE EVOLUTION OF MINOR POLITICAL JURISDICTIONS, in HANDBOOK OF MIDDLE AMERICAN INDIANS, 63, 66 (1967) (commenting that "the church in America was part of the Spanish state, and control of it through the papal concession known as patronato real was a privilege jealously guarded by the Spanish kings").

109. Farnsworth, *supra* note 12, at 21.

110. See, e.g., [Gonzales v. Roman Catholic Archbishop of Manila](#), 280 U.S. 1, 16 (1929) (stating that it "is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them"); Theresa J. Fuentes, [Title VII, Religious Freedom and the Case of the Nontenured Nun](#), 65 GEO. WASH. L. REV. 743 (1997).

111. See, e.g., Guillermo X. Garcia, Catholics Are Split on Bishop's Letter to Sanchez, ORANGE COUNTY REG., July 10, 1998, at A17 (discussing Bishop's criticism of Rep. Loretta Sanchez's position on abortion rights and whether she should be "banned from visiting churches during her re-election campaign"); Vincent J. Schodolski, Catholic Policies Inconsistent on Rape Victim Care, CHI. TRIB., Aug. 29, 1999, at A1.

112. Magnate Plans Catholic-view Law School, CHI. TRIB., Apr. 9, 1999, at A18 (noting creation of new law school to produce lawyers who "will consider the moral consequences of the law from a Roman Catholic point of view").

113. See generally Marianne Perciaccante, The [Courts and Canon Law](#), 6 CORNELL J. L. & PUB. POL'Y 171, 208 (1996) (arguing for "consistent deference to religious law in the courts" aside from legal constraints imposed by Free Exercise and Establishment Clauses).

114. See e.g., Helen Lara-Cea, Notes on the Use of Parish Registers in the Reconstruction of Chicana History in California Prior to 1850, in BETWEEN BORDERS, *supra* note 46, at 131; Carmen, Ramos Escandon, Alternative Sources to Women's History, in BETWEEN BORDERS, *supra* note 46, at 200.

115. See Brenda Norrell, Examine Ugly History, We Can All Heal from It, INDIAN COUNTRY TODAY, Nov. 2, 1998, at A1; see also Buckner F. Melton, Jr., CLI O at the [Bar: A Guide to Historical Method For Legalists and Jurists](#), 83 MINN. L. REV. 377 (1998).

116. See generally MENCHACA, *supra* note 29, at xiv.

117. See Harold J. Berman, [Toward an Integrative Jurisprudence: Politics, Morality, History](#), 76 CAL. L. REV. 779 (1988).

118. See, e.g., RIOS-BUSTAMANTE & CASTILLO, *supra* note 40, at 22; Mason, *supra* note 54, at 135 ("After about 40 years of missionization, when a few neophytes were selected to leave the missions and seek homes among the Mexican settlements, some of the women in Los Angeles and nearby ranchos married men who had recently been released from the missions."). Mason also

asserts that contrary to some accounts this branch of Native Californians did not completely disappear: "Evidence of a few descendants of Gabrielinos, heavily mixed with the Mexican descendants of gente de razon, are frequently found." *Id.* at 141.

119. CALLCOT, *supra* note 70, at 10-11 (asserting that priests were "the real friends of the natives and did all in their power to assist them and to protect them from oppression"). There is some merit to her argument as represented by Las Casas, the "Apostle of the Indies" designed to "protect the Indians from the evils of what, in practice, was a species of slavery." *Id.* Additionally, Mexico won its independence from Spain in large measure from the actions of Father Miguel Hidalgo y Costilla. See generally MOSQUEDA, *supra* note 108, at 38. The role of priests working with the Mayan and Zapatista liberation movements also involved the work of religious actors throughout Indigenous America.

120. See THE MEXICO PROJECT, HARASSMENT OF HUMAN RIGHTS DEFENDERS IN MEXICO, THE MEXICO PROJECT, MINNESOTA ADVOCATES FOR HUMAN RIGHTS 7 (1994) (citing media criticism against Bishop Ruiz, Dominican priest Pablo Romo Cedano and human rights advocates for supporting Zapatistas in Chiapas in their struggle for land and human rights).

121. VINE DELORIA, JR., GOD IS RED, A NATIVE VIEW OF RELIGION (1994). Closely related to this issue is the threat to native land by way of environmental degradation and or removal from their land base. See, e.g., THE STATE OF NATIVE AMERICA, GENOCIDE, COLONIZATION, AND RESISTANCE (M. Annette Jaimes ed., 1992); Todd Howland, [United States Law As A Tool of Forced Social Change: A Contextual Examination of the Human Rights Violations by the United States Government Against Native Americans at Big Mountain](#), 7 B.C. THIRD WORLD L.J. 61 (1987) (discussing "removal of Hopi and the Navajo from a portion of their homeland").

122. The Church's stance on homosexuality, women's rights, and absence of diversity in the operations of church structures provide a few examples of its limitations. See JOSE E. LIMON, DANCING WITH THE DEVIL, SOCIETY AND CULTURAL POETICS IN MEXICAN-AMERICAN SOUTH TEXAS (1994) (comparing Catholic Church's emphasis on existence of evil but noting that it says "nothing about the evident evil expressed in the social treatment of the barrios it ostensibly served" yet also recognizing positive features of Catholicism).

123. MOSQUEDA, *supra* note 108, at 33.

124. See generally Allison M. Dussias, [Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases](#), 49 STAN. L. REV. 773 (1997); see also Jorge A. Vargas, [Freedom of Religion and Public Worship in Mexico: A Legal Commentary on the 1992 Federal Act on Religious Matters](#), 1998 BYU L. REV. 421 (noting "history of distrust between Catholic Church and government" in Mexico). Closely connected is the issue of prisoners disallowed from practicing

their native ceremonies. See, e.g., Karen L. Testerman, Former Inmate Asked to Return to State Prison, *INDIAN COUNTRY TODAY*, Dec. 21, 1998, at B2.

125. See, e.g., FARRISS, *supra* note 103, at 6; GALARZA, *supra* note 1, at 52; Perciaccante, *supra* note 113.

126. This is a well-documented issue. See, e.g., Antonia Casteneda, [Language and Other Lethal Weapons: Cultural Politics and the Rites of Children As Translators of Culture](#), 19 *CHICANO-LATINO L. REV.* 229, 238-39 (1998) (commenting on assimilationist strategy of targeting children). Catholic missionaries and the Euro-American educational system went to great lengths to "denaturalize or deculturalize" native peoples through their children. See Lorne M. Grahams, "The [Past Never Vanishes](#)," A Contextual Critique of the Existing [Indian Family Doctrine](#), 23 *AM. INDIAN L. REV.* 1, 10 (1998) ("[E]ducation became one of the most pernicious methods used to separate American Indian children from the influences of family and community and assimilate them into mainstream society.").

127. GALARZA, *supra* note 1, at 57.

128. See CAPRON, *supra* note 6, at 3; FARRISS, *supra* note 103, at 6.

129. GALARZA, *supra* note 1, at 57.

130. The records kept by mission priests also provide information on the role of women in some church ceremonies. See Lara-Cea, *supra* note 114, at 131, 139 (explaining that women performed baptisms and served as lay ministers); see also Margarita Gonzalez De Pazos, [Mexico Since The Maya Uprising](#), 10 *ST. THOMAS L. REV.* 159, 171 (1997) ("The Catholic Church continues promoting peace in Chiapas and denouncing the situation of the Indians."). Some Catholic priests, whose links are with Indians in the area controlled by the Zapatistas, continue to pay a high price for helping the Mayans. See Matt Kantz, Mexican Archdiocese Withdraws Theology Document, 35 *NAT'L CATH. REP.* 9 (Feb. 19, 1999) (criticizing Indigenous theology employed at San Cristobal de las Casas, Mexico).

131. Perciaccante, *supra* note 113; see also [City of Boerne v. Flores](#), 521 U.S. 507 (1997); Joanne C. Brant, [Our Shield Belongs to the Lord: Religious Employers and a Constitutional Right to Discriminate](#), 21 *HASTINGS CONST. L.Q.* 275 (1994); Rev. Edward L. Buelt & Charles Goldberg, [Canon Law & Civil Law Interface: Diocesan Corporations](#), 36 *CATH. LAW.* 69 (1995); Nicholas P. Cafardi, [Discovering the Secret Archives: Evidentiary Privileges for Church Records](#), 10 *J.L. & RELIGION* 95 (1993-1994).

132. William S. Simmons, Indian Peoples of California, in *CONTESTED EDEN*, *supra* note 3, at 48, 63.

133. Sandos, *supra* note 52, at 210.

134. See generally Thomas Workman Temple, II, Toypurina the Witch and the Indian Uprising at San Gabriel, in *NATIVE AMERICAN PERSPECTIVES*, *supra* note 9, at 326. Temple wrote:

As a sorceress, medicine woman, witch; or whatever we call her as she first

appears, full-blown and in all the wild majesty she possessed and exerted over her Gabrielino tribesmen, she deserves to be remembered. She is the only Indian woman in the colonial records of Alta California, known to have led a revolt against the padres and soldados of a mission. *Id.*

135. Other women also called for revitalization movements. "In their preoccupation with Indian sin, priests blinded themselves to something more fundamental and important: Indian resistance and the continuance of native culture within the mission compound." Sandos, *supra* note 52.

136. See Dean B. Suagee, [Human Rights of Indigenous People: Will the United States Rise to the Occasion?](#), 21 *AM. INDIAN L. REV.* 365 (1997); Karyn I. Wendelowski, [A Matter of Trust, Federal Environmental Responsibilities to Native Americans Under Customary International Law](#), 20 *AM. INDIAN L. REV.* 423 (1996); Robert A. Williams, Jr., [Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World](#), 1990 *DUKE L.J.* 660, 673-74.

137. See generally John A. Onorato, [Saving Grace or Saving Face: The Roman Catholic Church and Human Rights](#), 8 *DICK. J. INT'L L.* 81 (1989).

138. See, e.g., Carl H. Johnson, [Balancing Species Protection with Tribal Sovereignty: What Does the Tribal Rights-Endangered Species Order Accomplish?](#), 83 *MINN. L. REV.* 523 (1998).

139. This applies with equal force to the issue of environmental racism in native and Latina/o communities. See, e.g., Nancy B. Collins & Andrea Hall, [Nuclear Waste in Indian Country, A Paradoxical Trade](#), 12 *LAW & INEQUALITY* 267 (1998); Kaylee Ann Newell, Federal Water Projects, Native Americans and Environmental Justice, The Bureau of Reclamation History of Discrimination, 20 *ENVIRONS ENV'T. L. & POL'Y J.* 40 (1997).

140. See generally DAVID R. MACIEL & ISIDRO D. ORTIZ, *CHICANAS/CHICANOS AT THE CROSSROADS* (1996); John A. Garcia, The Chicano Movement: Its Legacy for Politics and Policy, in MACIEL & ISIDERO, *supra*, at 83.

141. Layne, *supra* note 68, at 81.

142. Racial classifications continue to raise significant criticism and debate. See Angel Oquendo, [Re-Imagining the Latino/a Race](#), 12 *HARV. BLACKLETTER L.J.* 93 (1995). For case law examples, see [de Baca v. United States](#), 36 Ct. Cl. 407 (1901), and [In re Rodriguez](#), 81 F. 337 (W.D. Tex. 1897), and [Otero v. State](#), 17 S.W. 1081 (Tex. Ct. App. 1891), involving case of "Mexican Pete."

143. The Nahautl and the Spanish translates into La Virgen/Tonantzin Keep Me Safe. It is used in this context to emphasize the nature of syncretism in the Latina/o culture.

144. Before Christianity forced him to change his name, his Indian name was Cuauhtlatoatzin ("one who talks like an eagle"). See THE STORY OF GUADALUPE, T. LUIS LASO DE LA VEGA'S HUEL TLAMAHUIXOLTICA

OF 1649 (Lisa Sousa & James Lockhart eds., 1998). For a translation of the Nahuatl rendition of the Virgin de Guadalupe into English, see JEANETTE RODRIGUEZ, *OUR LADY OF GUADALUPE, FAITH AND EMPOWERMENT AMONG MEXICAN-AMERICAN WOMEN* (1994). The author emphasizes the Virgin's impact on the Indigenous population: first, "it was the foundation of Mexican Christianity and second, it provided a connection between the indigenous and Spanish culture." *Id.* at 45. She asserts that the "Aztecs adapted Catholicism to their own religious concepts by a process of fusional syncretism." *Id.*; see also *GODDESS OF THE AMERICAS/LA DIOSA DE LAS AMERICAS: WRITINGS ON THE VIRGIN OF GUADALUPE* (Ana Castillo ed., 1996).

145. RODOLFO ACUNA, *OCCUPIED AMERICA, A HISTORY OF CHICANOS* (3d ed. 1988); MAURICE HAMINGTON, *HAIL MARY? THE STRUGGLE FOR WOMANHOOD CATHOLICISM* (1995); MOSQUEDA, *CHICANOS*, *supra* note 108, at 35.

146. JAY P. DOLAN & GILBERTO M. HINOJOSA, *MEXICAN AMERICANS AND THE CATHOLIC CHURCH, 1900-1969* (1994); ADA MARLA ISASI-DLAZ & FERNANDO F. SEGOVLA, *HISPANIC/LATINO THEOLOGY CHALLENGE AND PROMISE* (1996); MOSQUEDA, *supra* note 108, at 35; William Madsen, *Religious Syncretism*, in 6 *Handbook of Middle American Indians*, at 369 (Robert Wauchope ed., 1964-1976).

147. [217 N.Y. 382 \(1916\)](#).

148. For other intersectionalities see generally Iglesias & Valdes, *supra* note 4.

149. Otto Maduro, *Notes Toward a Sociology of Latina/o Religious Empowerment*, in *HISPANIC/LATINO THEOLOGY, CHALLENGE AND PROMISE* 164 (Ada Maria Isasi-Diaz & Fernando F. Segovia eds., 1996).

150. In this context I am speaking specifically about the relationship between Native Californians and Chicanas/os along with other Latinas/os throughout the Americas.

151. For an analysis of [MacPherson, 217 N.Y. 382, 111 N.E. 1050 \(1916\)](#), see Berman, *supra* note 117.

152. Yolanda Leyva, *A People Who Honor Our Dead*, 11 *LA VOZ DE ESPERANZA* 3 (1998).

153. Leyva elaborated: "I come from a people who honor our dead by remembering. We are the keepers of memories that link us to the ones who came before. In our world are places that are sacred and powerful, places that allow us to remember; they call us to remember." *Id.*; see also Brenda Norrell, *Examine Ugly History, We Can All Heal from It*, *INDIAN COUNTRY TODAY*, Nov. 2, 1998, at A1.

5. Tanya K. Hernández,* *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 33 U.C. DAVIS L. REV. 1135 (2000)

What guarantee do Negroes have that socialism means racial equality any more than does capitalist democracy? Would socialism mean the assimilation of the Negro into the dominant racial group In other words, the failure of American capitalist abundance to help solve the crying problems of the Negro's existence cannot be fobbed off on some future socialist heaven. n. 1

INTRODUCTION

The growing discord over the continuing use of race-conscious social justice programs in the United States has given rise to the consideration of replacing them with color-blind class-based affirmative action programs. n. 2 Although there are a number of theoretical investigations into the proposal for class-based affirmative action, n. 3 the discourse is short on practical assessments. n. 4 This Article *1136 amplifies the class-based affirmative action debate by drawing lessons from Socialist Cuba's socioeconomic redistribution measures. Inasmuch as Socialist Cuba attempts to diminish racial disparities with the use of colorblind socioeconomic redistribution programs one can classify their strategy as a class-focused rather than a race-focused attack on racism. I use the term "class-based approaches" to racial justice broadly to encompass all color-blind social reforms that are designed in part to ameliorate the economic aspects of racial inequality. The existence of the Cuban redistribution programs has allowed me to explore the general question of whether racial justice is effectively addressed when the strategy for overcoming race problems discourages a focus on race as divisive.

Although facially distinct in their contexts, comparing the Cuban and U.S. programs is particularly useful for several reasons. Like the United States, Cuba has a long history of racial subordination that continues to exercise its influence today. n. 5 The present-day United States also shares Cuba's disdain for race-conscious measures because they are similarly interpreted as promoting racial divisions. Furthermore, there is a growing recognition in the United States that has long existed in Socialist Cuba, that equal opportunity platforms alone do not operationalize a mechanism for impoverished Blacks to improve their life circumstances. n. 6 To the extent that the Cuban socioeconomic redistribution

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programs are more extensive than any class-based affirmative action plan proposed *1137 in the United States, that substantive difference enriches the comparative analysis. For instance, if the comparison illustrates that the Cuban class-based approach has not successfully eradicated all vestiges of racial inequality, it is reasonable to cast doubt upon the efficacy of the U.S.'s much more modest proposal of class-based affirmative action. In the alternative, if the comparison illustrates that the Cuban class-based approach has been successful in diminishing racial disparities, then it can serve as an example of the kind of commitment of resources it takes to overcome racism. This Article's examination of the continuing racial disparities in Cuba demonstrates that race-blind class-based approaches to racial justice are not the complete answer to the seduction of racial hierarchy.

I begin in Part I by setting forth the details of the Cuban class-based approach to racial inequality. I examine the ways in which Afro-Cubans n. 7 have benefited from the socioeconomic redistribution programs but conclude that racial disparities continue to exist because of the attraction individuals have to maintaining group status. Part II then delineates a brief account of the Cuban history of racial subordination that continues to influence Cuba's political economy. Part III analyzes the interconnections between race and class that cannot be appreciated by a race-blind class-based approach to racial inequality like class-based affirmative action. In Part IV, I draw upon the Cuban context to conclude that the Cuban and Latin American propensity for suppressing Afro-Latino/a *1138 identity may impede LatCrit theory's n. 8 antisubordination goal for Latinos/as and other communities of color in the United States.

I. THE CONTEMPORARY CUBAN CONTEXT

Soon after Fidel Castro came to power he publicly denounced racial discrimination in the most direct and sweeping terms ever heard from a Cuban political leader in office. n. 9

[People's mentality is not yet revolutionary enough. People's mentality is still conditioned by many prejudices and beliefs from the past One of the battles which we must prioritize more and more everyday ... is the battle to end racial discrimination at the work place ... There are two types of racial discrimination: One is the discrimination in recreation centres or cultural centres; the other, which is the worst and the first one which we must fight, is racial discrimination in jobs n. 10

Castro declared that racial discrimination would disappear when class privilege was eradicated. n. 11 With this speech just three months after he came to power, Fidel Castro abolished by edict whites-only beaches and clubs. n. 12 He also purported to terminate racism by abolishing the official use of racial classifications or any reference to race because "[a Cuban is simply someone who belongs to no race in particular!" n. 13 In other words, "[there are no white

Cubans or black Cubans, just Cubans." n. 14

***1139** This was followed with legal reforms which:

I. eliminated private schools in order to expand and improve the educational system for all residents regardless of status, n. 15 II. converted private rental housing into a public service to fulfill the goal of shelter for all, n. 16 III codified a legal right to be employed without regard to race, n. 17 and IV developed a massive public health system and universal health care coverage. n. 18

These legal reforms were translated into the following substantive equality measures. Basic foodstuffs and other necessities were evenly distributed to all citizens pursuant to a government rationing system allocating to every person booklets for food and clothing. Rationing was introduced in March 1962, as an attempt to provide equal distribution of scarce goods. n. 19 The rationing system that exists today offers a limited number of foods and goods at greatly discounted costs. n. 20 The prices of basic goods are determined by the salaries of the lowest-paid workers and housing prices are set at a maximum of twenty percent of one's income. n. 21 The commitment to providing a guarantee to employment was fulfilled with the expansion of public works, the nationalization of industries, and agrarian reform that created many government positions. n. 22 In addition, the government funded child care centers in ***1140** order to facilitate the employment opportunities of women. n. 23 Prior to the decline of the Soviet economy in 1985 and its cessation of subsidies to Cuba, lunches and nutritious snacks were provided free or at a very low cost at all work sites and schools. n. 24 In the 1959-1990 period the rate of malnutrition among children declined to 0.1 percent as compared to the U.S. rate of five percent. n. 25

Before the onset of the economic austerity programs of the 1990s ("the special period") the overall Cuban population was well-nourished and had a life expectancy at birth of seventy-six years. Furthermore, the infant mortality rate was reduced from the 1958 rate of 33.4 deaths per 1000 live births n. 26 to 10.4 per 1000 live births by 1992 -- one of the lowest infant mortality rates in the world n. 27 which compares positively with the overall U.S. rate for the same period of ten deaths per 1000 live births (while the U.S. African American infant mortality rate was 108.14% of the white infant mortality). n. 28 These early redistributive measures improved the status of Afro-Cubans in particular because they were over-represented in the lowest sectors of the population. n. 29 In fact, the universal health care system's eradication of many lethal Third World diseases such as malaria was a significant boost to the health status of Afro-Cubans, who historically had been disproportionately affected. n. 30

The education data is also impressive. Just prior to the revolution, only about one half of primary-school age children were enrolled in school. n. 31 In poor and rural communities where the majority of the Afro-Cuban population was then located, the enrollment was even lower because of the paucity of school buildings and teachers. n. 32 The Revolution's abolition of private schools was

accompanied by the expansion of a free public educational system *1141 whereby more schools were constructed and more people were trained as teachers, n. 33 and books were loaned at no cost to students at every educational level. n. 34 In addition, a massive literacy campaign raised the national educational level of the country. n. 35 Education through junior high school (or age sixteen) was made mandatory and many more post-junior high school educational options including vocational schools, specialized art or sports schools, and pre-university high schools were created. n. 36 From 1959 to 1990, the number of high school graduates increased threefold. n. 37

The desire to provide shelter to all citizens informed Socialist Cuba's reform of the housing laws. Within the first month of the revolution, the government prohibited evictions and ordered the reduction of rents by thirty to fifty percent, depending on the tenant's income level. n. 38 Presently, citizens may own a primary residence and a vacation home but may not seek to profit personally from renting out other residential properties because it can lead to homelessness for those persons unable to pay the requested rental sums. n. 39 The housing law reforms have transformed the majority of Cubans into "homeowners." n. 40 Initially housing was a public service where the state was the primary landlord and after a period of paying a reduced rent the tenant would be converted into an owner of the property. n. 41 As of 1984, the remaining public service tenants *1142 stopped paying rent and instead were extended government mortgages priced at twenty percent of the family income. n. 42 All of these housing reforms ameliorated the condition of Afro-Cubans, who prior to 1959 primarily resided in uninhabitable structures. n. 43 In fact, because of the Urban Reform Law changes in tenancy, by 1979 more Blacks owned their homes in Cuba than in any other country in the world, albeit with a socialist form of ownership. n. 44 Furthermore, housing construction was directed to easing the housing shortage in rural areas where many Afro-Cubans lived in poorly constructed thatched roof shelters.

Notwithstanding the benefits that redounded to Afro-Cubans from the socialist reforms, racial disparities persist today. For instance, despite universal health care coverage, health and medical gaps continue to exist between white Cubans and Afro-Cubans in Cuba, as indicated by the higher vulnerability of Afro-Cubans to the parasitic diseases of the poor. n. 45 Even though much of the housing stock was desegregated when private rental housing was abolished and the state became the primary landlord, n. 46 "barrios marginales" (marginal communities) of poor Afro-Cuban residents still exist and are stigmatized for the residents' inability to improve their standard of living. n. 47 Despite the fact that educational opportunities have been available on an equal basis since the closing of private schools in 1961 and the significant investment in public education, Afro-Cubans are not proportionately represented in university programs. n. 48 A color hierarchy in education is apparent in the greater representation of whites in the better schools of higher education, while mixed-race Mulattos/Mestizos

predominate in technical vocational schools, and Black Cubans dominate *1143 in the junior high schools. n. 49 Education experts note that the quality of teaching and equipment are superior in the elite high schools where white Cubans predominate. n. 50

More telling, perhaps, is that despite the large demographic proportion of Blacks in Cuba, they are not represented in the ranks of government leadership. n. 51 In fact, the proportion of Afro-Cubans in high positions has diminished from the already-low levels of the 1960s and 1970s. n. 52 The decrease in Afro-Cuban leaders is particularly noteworthy given the growth of the Afro-Cuban population since the universal health care coverage decline in Black infant mortality rates, and the mass exodus of tens of thousands of white Cubans immediately after the Revolution. n. 53 After the 1991 Meeting of the Fourth Congress of the Cuban Communist Party, Afro-Cubans continued to make up less than fifteen percent of the party members elevated to the Political Bureau. n. 54 The underrepresentation of Afro-Cubans in leadership roles similarly extends to the military, the Ministry of the Interior, and university appointments. n. 55

The underrepresentation of Afro-Cubans in positions of authority may at first appear puzzling when one considers that the Cuban Constitution explicitly outlaws racial discrimination and specifies the right to ascend in the hierarchy of the armed forces and other public employment sectors without regard to race. n. 56 But an examination of the mechanisms for selecting leaders reveals opportunities for the exercise of conscious and unconscious racial bias. For example, in the government context the highest leadership roles are filled by a selective appointment process internally within the Communist Party of Cuba ("PCC" -- Partido Comunista de Cuba). n. 57 It is only in the lowest ranking governing entity of the Poder Popular (People's Power mass organizations) for each municipality [*1144 N.58 that delegates are popularly elected and thus provide access for Afro-Cubans' participation. But the Poder Popular's elected leadership is constrained in its role to merely execute the orders and policies of the select membership of the PCC. n. 59 Furthermore it was not until 1992 that the electoral law was reformed to permit direct elections for National Assembly representatives. n. 60

The longstanding pattern of racially biased exclusion from the ranks of socialist government leadership positions carries far-reaching implications, given the connection between the distribution of economic privileges and services and one's status in the government. Soon after the installation of the socialist government, high-ranking government officials were allocated residences in the abandoned homes of wealthy Cuban emigres. n. 61 Today, government leaders have their requests for larger housing units and housing relocation more quickly granted than other members of the society. n. 62 Mona Rosendahl, a Swedish Social Anthropologist who recently conducted field work in Cuba, has noted that "[whereas political leaders at the municipal level [who are popularly elected have few privileges, those at the national level [who are specially appointed live rather

privileged and secluded lives." n. 63

Racial bias can also be easily exercised in the controlled system for the distribution of consumer goods entitled Los Estimulos de La Emulacion Socialista (economic incentive award program), whereby government supervisors award consumer goods at much reduced costs to "model" workers. Conflicts often arise over who is a model worker in the disbursement of merit points. Although the model worker is presumably selected based on workplace performance, commentators equate the selection process with a political favoritism, which is itself imbued with racial bias. n. 64 Items that are distributed under the economic incentives program include goods *1145 like electric fans, refrigerators, television sets, and privileges like housing relocation permits and foreign travel permits. n. 65

The current economic crisis has only exacerbated the prevalence of racial disparities. n. 66 The most dynamic sector of the economy is the tourist industry, in which well-paying jobs with access to valued foreign currency, are reserved for persons "de buena apariencia" (good looking but commonly understood as white Cubans). n. 67 The impact of being employed within the tourist industry is profound because it also provides access to scarce foods and consumer goods (like soap) that are extremely difficult to locate within the strained government rationing system. n. 68 The ability to earn extra income with foreign currency tips from tourists enables these lucky Cubans to shop for scarce foods and consumer goods within the U.S. dollar-only shops and restaurants. Therefore, being excluded from employment in the tourist sector restricts Afro-Cubans to job positions in which they are paid in the undervalued domestic currency of the peso. n. 69

Furthermore, it is white Cubans that overwhelmingly benefit from the ability to receive monthly foreign currency remittances from relatives outside of Cuba, because it was white Cubans that primarily fled Socialist Cuba in the 1960s and were economically positioned to succeed in the United States. n. 70 In contrast, the relatives of Afro-Cubans who primarily left with the Mariel boatlift in the 1980s or on handmade rafts in the 1990s did not enter the *1146 United States with the same economic ability to accumulate enough wealth to send significant sums of cash back to their Cuban relatives. n. 71 In fact, the 1993 depenalization of hard currency which enabled Cuban exiles abroad to send U.S. dollars to their relatives in Cuba generated considerable racial hostility. n. 72 Today, approximately 500 million U.S. dollars worth of familial remittances are sent to Cuban nationals each year, and as such have become an important part of the Cuban economy. n. 73

Clearly, the economic austerity of 1990s Cuba has worsened the position of Afro-Cubans, who can no longer rely upon the government guarantee of employment, shelter, or food to subsist from day to day. As in the context of African Americans "[history not only teaches, but warns that in periods of severe economic distress, the rights of Black people are eroded and their lives

endangered." n. 74 But it is important to remember that although the current economic crisis has worsened the condition of Afro-Cubans, they were already disproportionately situated to experience the worse effects of the crisis. In other words, the low status of Afro-Cubans preceded the economic crisis and should be assessed in its own right. Despite the redistribution programs' progress before the economic crisis, Socialist Cuba maintained a racial hierarchy that harmed Afro-Cubans.

There are two principal reasons why the opportunities to assert racial bias are consistently exercised in a nation like Cuba that is committed to a racial equality agenda: the attraction individuals have to maintaining group status, and the legacy of a long history of white supremacy. The attraction to maintaining racial hierarchy was well explained by Law and Economics scholar Richard McAdams, who theorized that "race discrimination best reveals the degree to which group status production is a powerful and pervasive***1147** fact of social life." n. 75 McAdams's status-production theory of race discrimination asserts that individuals are driven in part by their competition for esteem and that racist behavior is a process by which one racial group seeks to produce esteem for itself by lowering the status of another group. n. 76 "Through allocation of intra-group status, whites induce other whites to produce inter-group status through acts of subordination." n. 77 The acts of subordination can turn particularly violent when individuals want to recapture a sense of social position in the midst of social instability. n. 78 The status-production of race discrimination creates prestige solely because one is white. This is akin to W.E.B. Du Bois's early articulation of a "psychological wage" that supplements the wages of low-income white workers in the United States, who receive public deference because they are white. n. 79

The psychological wage is such a powerful inducement that it often overrides some of the economic disadvantages of racism. For example, it has been repeatedly observed that low-income white workers frequently fail to cooperate in labor movements with other low-income workers that are nonwhite because they prefer to maintain the intangible status of whiteness even though it disserves their economic interests. n. 80 Cheryl Harris terms this a property interest in whiteness. n. 81 Thus, even though racism accords tangible benefits to whites it is not purely an economic enterprise. n. 82 Accordingly, ***1148** McAdams's explanation of the status-production theory notes that "[p]eople have a loyalty to groups that goes beyond what serves their narrow pecuniary self-interest." n. 83

An application of the status-production theory to the Cuban context elucidates part of the power of racial privilege in a society that has seemingly abolished class-based hierarchy. n. 84 With Socialist Cuba's official eradication of the ability to garner esteem through the group-based status of socioeconomic class, racial privilege is one of the most accessible mechanisms for garnering esteem. Racial privilege is accessible because no talent or merit is needed before becoming a member of the favored group. It is as Sartre said of anti-Semitism, "a poor man's snobbery." n. 85

Race-based status production also perfectly suits the longstanding Cuban and Latin American ideology of "adelantando la raza atraves de blanqueamiento" (improving the race through whitening). In this ideology nonwhites can aspire to racial privilege by seeking partners that are lighter than they are and producing children that might also be light enough to move up the race and color hierarchy from Black to Mulatto, and then to white. n. 86 Whereas the Horatio Alger ideology informs Blacks in the U.S. that they can achieve economic and social parity with whites by working hard and being thrifty, Cuban racial ideology informs Afro-Cubans *1149 to patiently await the moment that they can be "blanco o casi blanco" (white or almost white) themselves. n. 87 Thus, despite the fact that many are purposely excluded by a system of racial privilege the possibility of ascending the color hierarchy ensnares Afro-Cubans to endorse white privilege. n. 88

Exacerbating the appeal of using a race-based method of status-production is the Cuban legacy of racial bias which is a dynamic part of contemporary Cuban socialization. For example, in a 1994 ethnographic study, seventy-five percent of white Cubans and seventy-five percent of Mulattos surveyed embraced the importance of status enhancement through ascendancy in a color hierarchy. n. 89 As a result, these same persons surveyed indicated that they would disapprove of their children participating in intimate relationships with persons that were darker than themselves. n. 90 The study also revealed that seventy percent of whites and Mulattos interviewed felt that Black Cubans engaged in delinquent behavior and rarely worked. n. 91 A cultural anthropologist conducting research in Cuba in the early 1980s also noted that whites view "Black culture" as the causation of Black Cuban poverty. n. 92 The white Cubans questioned described the problematic aspects of Black culture as lack of importance placed on education, propensity for violence and crime, and lack of discipline. n. 93 Of course such dispersions of Black culture are belied by the extraordinary numbers of Afro-Cubans that pursued higher education when the socialist government abolished private schooling and committed its resources to expanding access to quality public education. n. 94 Furthermore, those that seek to rely upon Black culture as an explanation of Afro-Cuban social status, *1150 often fail to consider the documented relevance of racially selective criminal prosecution and enforcement. n. 95 Yet Cubans persist in relying upon racially biased explanations of poverty to such a large extent, that even after Afro-Cuban slum dwellers are relocated to markedly improved low-cost housing, they continue to be stigmatized as slum dwellers. n. 96

It should be noted, though, that the ideology of "blanqueamiento" which denigrates connections to African ancestry is not a philosophy that the socialist government in Cuba constructed, but has been a part of much of Latin America's historical approach to race relations. n. 97 In fact, a brief review of Cuba's historical construction of racial ideology is also useful in demonstrating how racial disparities continue to exist in a nation that has actively pursued

substantive economic equality. History shows that the Cuban nation-state like many Latin American countries pursuing a nation-building project, has consistently framed considerations of race to be socially divisive, while simultaneously subordinating persons of African ancestry through the use of the "blanqueamiento" ideology and otherwise. n. 98 Indeed, the "blanqueamiento" -- whitening ideology has been an implicit and sometimes explicit part of Latin American nationalism that has perceived race-consciousness as a threat to nationalist sovereignty. n. 99 Examining Cuba's historical context dispels the notion that the socialist government chose a class-based approach to remedy existing *1151 racial disparities solely because of its socialist ideology. n. 100 In actuality the de-emphasis of race has long been a part of Cuba's national ideology. n. 101

II. CUBA'S HISTORY OF RACE SUBORDINATION AND COLORBLIND NATIONALISM

Cuban legal scholar Alejandro de la Fuente has observed that the view of race-based analysis as inherently divisive dates at least as far back to nineteenth century Cuba's struggle for independence from Spain, and continued into the Republican government initiated after Cuba obtained its independence from Spain in 1898. n. 102 For instance, in the nineteenth century Cuban campaign for independence from Spain, race was viewed as a divisive issue that had to be discouraged at all costs. n. 103 None other than Independence hero Jose Marti wrote in 1893:

To insist on the divisions into race, on the difference of race ... is to make difficult both public and individual enterprises [The Negro who proclaims his racial character ... authorizes and brings forth the white racist ... Two racists would be equally guilty, the white racist and the Negro n. 104

In other words, the independence movement viewed national unity as incompatible with racial identity. In fact, any desire for Afro-Cubans to voice race-based grievances was rejected outright as unCuban and thus unpatriotic. n. 105 Yet, white Cubans were overtly racially prejudiced against Afro-Cuban troops, n. 106 who made up almost half of the enlisted ranks of the Liberation Army and an estimated forty percent of the senior commissioned ranks. n. 107 Furthermore, a *1152 number of separatist leaders planned to maintain a white hierarchy of privilege after independence was achieved because their interest was to end Spanish rule, not to destroy the colonial order. n. 108 For instance, after war hero Jose Maceo rose to the rank of brigadier general, he seriously considered retiring because of his white sub-ordinates' negative focus upon his African ancestry. In a letter to the provisional president, Maceo stated that he understood "that a small circle exists who ... did not wish to serve under the orders of the speaker [Maceo ... because they are opposed to, and have their sights on men of color above white men. " n. 109 Even though Afro-Cubans were instrumental in

the Cuban independence movement against Spain, the Cuban elite continued to view them as inferior and subordinate to whites. One Cuban scholar notes that the "main reason for the political immobility of a class that shouldered years of accumulated grievances against colonial rule was its fear of blacks." n. 110

Once Cuba formally achieved independence in 1898, not only did race continue to be silenced to construct a national unity, but whiteness was explicitly promoted as a method for advancing the country and sabotaging the economic mobility of Afro-Cubans. n. 111 Influential intellectuals advocated for the physical elimination of the Black population as a mechanism for advancing the status of the new republic. n. 112 Census figures were distorted to report a decreasing population of Afro-Cubans, n. 113 and new legislation appropriated one million dollars for the sole purpose of promoting European immigration. n. 114 The Republican government facilitated the massive immigration of white workers and their families as another ***1153** facet of the blanqueamiento ideology. n. 115 Land and resources were specifically offered to white immigrants to encourage their permanence. n. 116 Indeed, between 1902 and 1931, forty percent of all immigrants were white Spaniards, n. 117 and between 1902 and 1912 an estimated 250,000 Spaniards emigrated to Cuba despite Spain's former position as colonial oppressor. n. 118 Immigrants from Haiti and Jamaica, in contrast, were viewed as guest workers, who should return to their countries of origin after each sugar harvest, n. 119 and accordingly many of the Black contract workers that remained in the country were forcibly expelled during the Great Depression in the 1930s. n. 120

Census data from the periods 1899-1943 reflects the overrepresentation of Blacks in the lowest and worst paid sectors of the economy, such as agriculture and personal services. n. 121 During this time, Afro-Cubans were also systematically excluded from the academic and electoral processes. n. 122 When disaffected Afro-Cubans attempted to form their own political party, entitled "el Partido Independiente de Color," its leaders were arrested and prosecuted for allegedly conspiring to impose a "Black dictatorship." n. 123 The Cuban senate then passed legislation known as the Morua law, prohibiting the formation of political parties along racial lines. n. 124 When the Black party organized a political parties to repeal the Morua law, the government suppression, in what came to be called the "Race War of 1912," was violent and massive. n. 125 Afro-Cuban protesters demonstrated their frustration with their poor economic status by damaging property, including sugar mills and company stores. Although the protest focused on damaging property and not harming individuals, the Cuban armed forces retaliated by killing ***1154** Afro-Cubans and Haitian contract workers indiscriminately. n. 126 One Afro- Cuban scholar recalled:

I still remember how I listened, wide-eyed and nauseated, to the stories -- always whispered, always told as when one is revealing unspeakable secrets -- about the horrors committed against my family and other blacks during the racial war of 1912 Chills went down my spine when I heard stories about blacks

being hunted day and night; and black men being hung by their genitals from the lamp posts in the central plazas of small Cuban towns. n. 127

A direct observer has also noted that the army "was cutting off heads, pretty much without discrimination, of all Negroes found outside the town limits." n. 128 The government repression was violent and extensive because the creation of an all-Black political party threatened the race-less paradigm on which Cuban nationalism was constructed. n. 129 This may also account for the onslaught of white civilian volunteers, who formed militias and offered their services "to defend the government" against Afro-Cuban political protesters. n. 130 Thus, a decade after independence found Afro-Cubans in worsened economic conditions and with no improvements in political participation for which they had fought the Spaniards.

The remainder of this century has witnessed a further entrenchment of white supremacy within Cuban society along with the continued promotion of a race- less nationalism. By the 1930s Afro-Cubans were prevented from joining the navy or air force officer corps, and were formally excluded from such trades as baking and pastry making. n. 131 Public beaches, parks, restaurants, cabarets and yacht clubs remained racially segregated by custom. n. 132 The Cuban media praised lynchings of Afro-Cubans as "progressive manifestation of Cubans' North Americanization," in what was interpreted as an imitative tribute to United States Jim Crow tactics designed to garner favor with the United States, rather than being *1155 an example of Cuba's native white supremacy. n. 133 Meanwhile, Cuban leaders began to characterize the country as a mulatto and mestizo nation in order to provide an explanation abroad for the presence of Cuba's many dark-skinned residents and obviate the classification of a "Black nation. " The mulatto nation characterization necessitated the continued rejection of Afro-Cuban identity movements because the construction of the mulatto-culture characterization of Cuba makes Afro-Cubanness a socially contested site of identification. A self-proclaimed Afro-Cuban is a menace to the national paradigm of all Cubans being the same because they all share the same mixed-race cultural heritage. So while simultaneously taking public pride in the mixed-race cultural heritage of the country, Cuba discouraged Black identity in order to promote one homogeneous national identity. But the nationalism movement left unaddressed the existing racially determined social, economic and political hierarchies. n. 134 The race-deflection dynamic continued through Batista's rule of Cuba in the 1950s. Afro-Cuban scholar Lourdes Casal noted:

One of the most pervasive features which I found in the dominant pre-revolutionary racial ideology was the unwillingness to discuss racial issues. This taboo was linked to a tendency -- among whites -- to minimize Cuban racism and among blacks to accept racism as a fact of life which you simply tried to circumvent *1156 or avoid [by marrying the right/white person pursuant to the ideology of blanqueamiento. n. 135

The race discourse taboo which persisted through Batista's rule coexisted

with extreme racial stratification and de facto racial segregation. n. 136 In short, a Black racial identity has been historically subverted in Cuba to promote a uniform national identity that has masked racial privilege while simultaneously thwarting the mobilization of racial justice movements that could improve the status of Afro-Cubans. When the Cuban Revolutionary Party ascended to government in 1959, it inherited the race-deflection ideology along with the legacy of racial prejudice.

Even though Fidel Castro often stated that racial discrimination would disappear with egalitarian class reforms because racial inequality was merely a byproduct of class divisions, he has begun to slowly move away from that position. In the 1997 Meeting of the Fifth Congress of the Cuban Communist Party, Castro acknowledged that Blacks and women (of all races one presumes) were underrepresented in the leadership of the government and the state. n. 137 Similarly, Afro-Cubans believe that employment discrimination is pervasive and that they are not welcome in all social spaces. n. 138

There is increasing recognition that historic economic factors have left black Cubans among the poorest sectors, even today when opportunities are opened to all regardless of race. Because of these factors, blacks have had less chance of gaining the privileges *1157 of the professional class or of the higher-level bureaucrats (who have access to travel and other perks, even if minimal by U.S. standards). n. 139

The growing recognition of the continued existence of racial disparity prompted government discussion during the 1997 Meeting of the Fifth Congress of the Cuban Communist Party of an affirmative action program in which Blacks and women across race could be more directly involved in leadership positions. n. 140 The proposal for a method of numerical participation for Blacks and women dates back to the 1986 Meeting of the Third Congress of the Cuban Communist Party. n. 141

But these discussions have not resulted in any direct action. The resistance to a proposal for numerical participation can be explained in part by the wariness with which some Cubans approach policies created in the United States n. 142 given the U.S.'s longstanding antagonism to the socialist government and its economy as commenced with the embargo under the Foreign Assistance Act of 1961. n. 143 But more importantly, there is a concern that such measures are contrary to the egalitarian goals of the Revolution insofar as they make race an issue. n. 144 In fact, one commentator has noted that Fidel Castro may be the lone voice promoting racial advancement amidst a more conservative party leadership n. 145 and that Castro's concern with a possible backlash and exodus by disgruntled white Cuban residents has slowed down his implementation of a more forceful racial justice program. n. 146 The public denials of racism in Cuba by government officials certainly indicate that there is *1158 no official consensus regarding Cuban race issues. n. 147 Rather, there continues to be a reluctance to address the racial disparities as a racial bias problem because of the perception

that the discussion of race is divisive and destructive to the Cuban national identity. In other words, overt considerations of race are still viewed as divisive, and thus taboo. Gisela Arandia Covarrubia, a highly regarded Afro-Cuban scholar, promoted the strengthening of "nationality" as a solution to the continuing racial disparities because a method of numerical participation could produce adverse reactions in the population. n. 148 No adverse reactions, however, have been evident in the Cuban use of affirmative action for women in employment. n. 149 Cuban legal specialist Debra Evenson noted that despite the existence of parallel systems for redressing complaints of discrimination of gender and race, it is only gender bias claims which are publicly brought. n. 150 The contrast between the existence of gender bias claims and the absence of race-bias claims is especially stark when one considers that the socialist government's abolition of the private practice of law for the creation of a system of law collectives for lawyers has made public access to legal counsel relatively easy and inexpensive. n. 151 Furthermore, a large number of the law collective attorneys are white women and a large percentage of law students are white women. n. 152 Thus, despite the hardships that white women have encountered in making the socialist revolution responsive to gender issues, as a group they have fared better than Afro-Cuban women and men alike. n. 153 In short, despite the pervasive use of redistribution programs designed to ameliorate the poor socioeconomic status of Afro-Cubans in particular, racial disparities *1159 continue to exist in part because the class-based approach chosen continues the colorblind historical subordination and makes Afro-Cuban identity and identity movements socially contested.

III. THE INTERCONNECTIONS BETWEEN RACE AND CLASS

This Article's exploration of the Cuban context demonstrates that addressing race problems solely as class problems does not entirely confront the complexities of racial subordination. n. 154 This is because a class-based approach to racial disparities cannot appreciate the investment that favored individuals have in the norm of race-based privilege. If racial disparities continue to exist in a nation like Cuba that has committed extensive resources to ensuring substantive economic equality for its residents, it is unlikely that a more modest program of class-based affirmative action could alleviate racial disparity in the United States. Like Cuba, the United States has a long legacy of racial bias and discrimination, and is no less subject to the lure of race-based esteem acquisition. In both contexts, race and class are linked, and one aspect cannot be addressed without acknowledging the other.

Indeed, some scholars assert that the public discourse which pits race against class as a mode of analysis presents a false debate. n. 155 For instance, those that do focus on class as the culprit of racial disparity often refer to the existence of a U.S. Black middle class as a justification for their colorblind

perspective. n. 156 The analysis connects the ability of a Black middle class to exist with the power of :class *1160 status to be more determinative of one's life chances than is race. But the very growth of a Black middle class is due in no small part to the race-conscious affirmative action programs institutionalized in the 1970s.

Furthermore, the Black middle class's continued exposure to racial discrimination despite their economic success illustrates the way in which economic status alone does not transcend the problems of race. For example, racially comparative studies of the middle class demonstrate that the Black middle class is less financially secure than the white middle class. n. 157 At the same time it is accurate to state that the Black middle class is better off than low-income Blacks just as the white middle class is better off than low-income whites. n. 158 More pertinent, though, is the fact that the race-conscious social programs that facilitated the expansion of a Black middle class from its historically small proportions, n. 159 also improved the status of low-income Blacks. Many blue-collar industries were not racially integrated until race-based affirmative action programs were implemented. n. 160 For example, the representation of Blacks more than doubled from 1960 through 1990 in the blue-collar occupations of telephone operators, aircraft mechanics, firefighters, and electricians. n. 161 It is a misapprehension to view race-conscious affirmative action programs as misplaced because they only benefit middle class Blacks when in point of fact they also have benefited low-income Blacks. Furthermore, it is inappropriate to fault race-based affirmative action programs for not achieving what they were *1161 never designed to do -- in effect, obliterate socioeconomic distinctions. n. 162 Rather, race-based affirmative action programs have only sought to diminish the racial disparity within each socioeconomic class.

Some scholars have critiqued the existing race-based affirmative action programs for being too narrowly drawn to actually change the unequal class and power dynamics that exist across race. n. 163 But the inquiry I have pursued in my examination of the Cuban context is more modest, although no less complex -- that is, what are the race and class connections that disproportionately place Blacks in poverty, and secondarily what accounts for the perpetual subordination of Blacks within each economic class. n. 164 Socialist Cuba sought to obviate the need for such questions by obliterating all economic class differentials and still racial disparity persists. Indeed, Marxist theory has been criticized for discounting the significance of race as a factor in subordination and for alternatively viewing racial oppressors as a classless monolith of whites. n. 165

Derrick Bell offers a more racially centered explanation of capitalist economic exploitation. He posits that the capitalistic class structure has maintained itself by placating low-wage whites with the subordination of Blacks. n. 166 Similarly, Herbert Hill notes that "through the rationalization of labor costs, the greater rate of exploitation of the black worker subsidizes the higher

wages of the *1162 white worker. Employers also gain from such practices through the benefits of a labor policy that results in lower average costs." n. 167

But these are descriptions of how racism intersects with a capitalistic structure; they are not explanations of the cause of racism. Racism predates capitalism, n. 168 and as stated earlier is not always economically motivated. n. 169 Accordingly, economic reductionist explanations of racial subordination that posit a resolution to racism with the implementation of class-based reform are overly simplistic. In other words, any concerted effort to address racial subordination should examine racism's connection to class but simultaneously appreciate the way in which racial ideology adapts itself to changing economic contexts. n. 170 The Cuba-U.S. comparison illustrates this premise.

U.S. class-based reforms of the past have also demonstrated the fallacy of presuming that colorblind economic reforms overwhelmingly assist impoverished people of color. For instance, Roosevelt's New Deal legislation, which sought to stabilize the U.S. economy after the Great Depression, did succeed in reducing unemployment from 13 million to 9 million. n. 171 Most Blacks, however, were purposefully ignored by New Deal programs in that they predominated in work sectors that were omitted from the government mandates for unemployment insurance, the minimum wage, social security and farm subsidies. n. 172 In contrast, Black inclusion in Lyndon B. Johnson's war on poverty and New Society programs was used to racialize the concept of poverty. n. 173 Sociologist Jill Quadagno traces the demise of the War on Poverty to its links to *1163 Black civil rights with programs that used federal funds to: empower community action groups run by local Black activists; provide affirmative action and job-training programs to break long-standing racial barriers to union jobs; and to provide housing subsidies to those otherwise locked into substandard housing. n. 174 The connection to Black civil rights rebounded with a backlash against the poverty programs because "[whites opposed them as an infringement of their economic right to discriminate against Blacks and a threat to white political power." n. 175 In short, the War on Poverty sought to remedy the complexities of poverty with colorblind social welfare programs that included Blacks but failed to consider the racially stratified operation and justification of poverty. n. 176

One of the primary difficulties with relying upon universal race-neutral economic strategies for achieving racial justice is that such strategies fail to appreciate the way in which the very inclusion of Blacks marginalizes Blacks as "the poor" and thereby estranges whites from prioritizing the elimination of poverty. In turn, the identification of poverty with Blacks undermines public concern with poverty because Black "culture" is deemed the cause of their low economic status. n. 177 Indeed, today's circumscribed assessments of poverty relief efforts in the U.S. have encoded Blackness as synonymous with undeserving welfare recipients. n. 178 Similarly, AfroCuban "*1164 low-culture"

is blamed for Afro-Cubans disproportionate experience of poverty. n. 179 The increasing stratification between rich and poor in both the United States and Cuba will only further isolate Blacks as both the image and reality of poverty. n. 180 Simply put, the racialization of poverty justifies the demonization of poverty. n. 181 The ideological power in racializing poverty in order to deflect attention from its systemic causes is demonstrated by the wide-spread usage of the tactic. n. 182

The concept of a pathological under-class has become the rationale for continued racism and economic injustice; in attempting to separate racial from economic inequality and in blaming family pathology for black people's condition, current ideology obscures the system's inability to provide jobs, decent wages, and adequate public services for the black poor. n. 183

The racialization of poverty also breeds complacency about its existence because poor whites are encouraged to view their poverty as a temporary setback compared to what is constructed as the permanent underclass of poor Blacks. n. 184 In addition, Blacks themselves can internalize the vision of Blackness as a culture of poverty so that they dissociate from mobilizing around the concerns of the poor.

Like the Latin American racial ideology of blanqueamiento, the racialization of poverty can become so ingrained that it just seems ***1165** like common sense to blame Blacks as a group for their economically subordinated status and to esteem whites as individuals for their "ability" to be successful. n. 185 The theories are also similar in their hegemonic power to value whiteness while veiling the privilege that is accorded to whiteness. That is the failing of class-based approaches to racial justice. Class-based approaches to racial justice are misplaced because they do not pierce the veil of white invisibility that shields whites from appreciating their institutionalized skin-privilege. n. 186 Hiding from whites the way in which they are complicit in the operation of racial hierarchy disinclines them from becoming agents of change.

The lack of engagement with white privilege is a fatal omission because it permits racial stratification to continue unabated, and worse still obscures white privilege in such a way that it could very well sabotage the ability to eradicate racial discrimination. n. 187 When class-based remedies are not complete correctives of racial problems, their cloak over racial hierarchy relegates Blacks to explaining their continued subjugation as a consequence of their "culture of poverty," and thereby interferes with the ability to mobilize protest against continuing racial hierarchy. n. 188 A race-blind class-based approach to racial inequality is unable to effectively address racial bias or economic stratification because it is ill equipped to unpack the interconnection between race and class that rhetorically defines poverty as Black.

***1166** My exploration of the socialist Cuban context leads me to conclude that even though race-conscious affirmative action has not eradicated racism in the United States, class-based affirmative action would be a poor replacement. Racial justice reformers should instead confront racism directly as

race-based while addressing its interconnections with class. n. 189 Using a race lens in conjunction with a class lens could be more fruitful in devising solutions to racism. n. 190 For instance, maintaining a race-conscious approach to racial equality in the U.S. while simultaneously adopting a version of the Cuban redistribution initiative could provide a broad-based mechanism for communities of color to realize substantive equality rather than mere formal equality. n. 191 The Cuban reduction in Black illiteracy, infant and maternal mortality, and the increase in Black educational attainment and average life span are all indicators which suggest that actual redistribution of wealth is material in ensuring the substantive equality of people of color. In contrast, the U.S. formal equality focus has maintained racial disparities in mortality rates and in educational attainment. Furthermore, current debates in the United States regarding under-funded public schools and the need for health care reform would be well served by considerations of the Cuban successes after abolishing private schools and instituting a system of universal health care. LatCrit theory, a jurisprudence dedicated to highlighting Latino/a concerns and voices in legal discourse and social policy for the attainment *1167 of social justice, supports such multilayered intersectional approaches to subordination. n. 192

IV. CONCLUSION: LESSONS FOR LATCRIT THEORY

In addition to serving as an assessment of class-based approaches to racial justice, this cross-cultural analysis of the interconnections implicates the continued development of LatCrit theory. Specifically, this Article implicitly questions whether its antistatist goal can be achieved if its scholars inadvertently neglect to challenge the Latin American model of discounting racial diversity in assessments of Latin American identity and group needs in the United States. For inasmuch as LatCrit jurisprudence has focused upon critiquing what it terms the Black-white binary of civil rights discourse, n. 193 it has done so while, for the most part, sidestepping the particularities of Afro-Latinos. n. 194 LatCrit inclusion of the Afro-Latino/a perspective would reveal the Black-white binary aspects of the Latin American racial constructs that can manifest themselves in Latino/a identities in the United States. n. 195 To the extent that many Latin American countries have promoted themselves as "mestizo" nations for the very purpose of downplaying their connections to Blackness, the presumed absence of a Black-white binary within the Latin American racial construct is often false, and indeed more indicative of Latin American binary preoccupation *1168 with fleeing Blackness and valuing whiteness. n. 196 The Latin American concern with whiteness is only exacerbated when transplanted in the United States by Latino/a immigrants and migrants, who struggle against being racialized themselves and lumped together with poorly treated African Americans. Many Latinos/as quickly learn that part of the price of the promise of assimilation is denigration of Blacks. n. 197 Indeed, the poverty rates of those Latinos/as

identified as Black are worse than of other Latinos/as. n. 198 The Cuban dissociation from Blackness resonates with the frustrations of Afro-Latinos/as in the United States that feel pressure to disclaim a Black identity. For instance, in a recent issue of Hispanic magazine a reader wrote in to say:

My Latino friends see my race as a liability. "You're not black, like the African Americans in the US" one told me recently. It bothers me that to accept me, they want to distance me from being black, which carries negative connotations in the Americas. n. 199

In addition to problematizing the LatCrit critique of the Black-white binary, an acknowledgement of Afro-Latinas/os would also bring added complexity to the LatCrit assessment of whether Latinas/os are best understood as a race or as an ethnicity. n. 200 Ian Haney Lopez astutely addresses the way in which Latinas/os as a group are often racialized in the United States in ways that do not comport with national understandings of ethnicity. n. 201 But if Latinas/os are a race, what are Afro-Latinas/os? This is not a question of mere semantics within the confines of theoretical analysis. The disposition that Latina/o communities choose to take with respect to the race/ethnicity divide will be indicative of their stance towards coalition building. Eric Yamamoto appropriately cautioned race-crits to be attuned to the ways in which communities of color ***1169** can deploy hierarchies of oppression in their efforts to survive the challenges of racism. n. 202

An Afro-Latina/o attention to praxis is especially sensitive to how the group label of race or ethnicity can be used to further subordinate communities of color. n. 203 For instance, if the ethnicity label is chosen to distance Latinos/as from the dispersions of being a race, then the ethnicity choice undermines the potential for solidarity with African-Americans, who are always viewed as a race. In contrast, choosing the race label in order to negate Latina/o connections to African ancestry derails the potential for coalition building with African-Americans. In order for the LatCrit antisubordination agenda to be effective we must remain alert to how individual expressions of Latina/o identity practically situate Latinas/os's communications with other communities of color. n. 204 An unquestioning reliance upon Latin American racial ideology that suppresses racial difference within Latina/o communities while simultaneously esteeming connections to whiteness through marriage and racial miscegenation will thwart long-term antisubordination coalition building. The white supremacy embedded in the Latin American promotion of racial harmony by encouraging persons of African descent to "marry up" to whiteness, is not conducive to working with other racial and ethnic minorities to dismantle racial hierarchy.

The growing numbers of Latinas/os in the U.S. population will make the race politics of Latinas/os central to the viability for any ***1170** future efforts to develop effective coalitions across communities of color. The popular press has repeatedly alerted the public to the changing racial demographics of the United States, including predictions that Anglo-whites will be a numerical

minority, just as it has expounded upon the consequent importance of the Latina/o population for purposes of election campaigns and economic development. n. 205 The extraordinary public focus upon the growth of the Latina/o community and its influence in the United States is equivalent to the flattering attention of an obsessed suitor. But Latinas/os should stop to consider what the courtship is leading up to. There are numerous historical examples of demographic changes motivating elite whites to allocate middle-tier privileges for certain groups that have elevated the status of those group members, but maintained a hierarchy that privileges whiteness all the same. n. 206

The public focus upon Latinas/os as a "hot new minority that will outnumber African Americans" implicitly encourages Latinas/os to dissociate themselves from the plight of other oppressed people of color. n. 207 Accordingly, Latinas/os will be ideally positioned to either be complicit in the maintenance of a race-based hierarchy, or empowered to challenge the status quo together with other subordinated communities. n. 208 Given the growing demographic importance of Latinas/os, the path they take may be central to the development of opportunities for permanently eradicating racism.

***1171** The Cuban example of the Latin American "blanqueamiento" approach to race relations has demonstrated the harm of denying that race and racism exist while simultaneously maintaining a racially-stratified society that esteems whiteness. Just as Cuba's nationalism project subverts recognition of race to unite all Cubans in a common struggle for economic survival, Latinas/os in the U.S. may succumb to the temptation to discount racial difference in the effort to unify Latinas/os across class as Latinas/os only, distinct from other members of the African Diaspora.

In order for LatCrit to be true to its antisubordination goal it will need to engage the particularities of all Latinas/os rather than viewing those with intersectional identities as a distraction from some essentialized view of how Latinas/os are subordinated. This is a struggle that any group-focused movement will confront as its members assert perspectives that do not conform with a predefined notion of the group's identity or mission. n. 209 The Cuban context indicates that such a dynamic would be an ineffectual response to ameliorating economic and social subjugation of Latinas/os and other communities of color. In conclusion, glossing over the racial particularities of Latinas/os would undermine the antisubordination goal of LatCrit theory, and thus should be resisted at all costs. Similarly, class-based affirmative action should be rejected because of its inability to appreciate and address the personal investment whites have in race-based privilege or the way poverty is racialized.

NOTES:

1. HAROLD CRUSE, *REBELLION OR REVOLUTION?* 93 (1968).
2. See DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF*

RACE AND SEX ON CAMPUS 251 (1991); RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996); Michael Kinsley, *Class, Not Race*, *NEW REPUBLIC*, Aug. 19, 1991, at 4; Regents in Florida Bar: Race and Sex as Admission Factors, *N.Y. TIMES*, Feb. 18, 2000, at A18 (reporting Florida's approval of class-based approach to affirmative action for state college admissions with consideration of socioeconomic status in substitution for consideration of race).

3. See generally Frances Lee Ansley, [Classifying Race, Racializing Class](#), 68 *U. COLO. L. REV.* 1001 (1997); Deborah C. Malamud, [Class-Based Affirmative Action: Lessons and Caveats](#), 74 *TEX. L. REV.* 1847 (1996); Frederick A. Morton, Jr., [Class-based Affirmative Action: Another Illustration of America Denying the Impact of Race](#), 45 *RUTGERS L. REV.* 1089 (1993).

4. The UCLA School of Law's published account of their use of class-based admissions preferences is one of the few empirical studies which exists and is justifiably limited in its scope given its recent implementation and focus on law school admissions. See Richard H. Sander, [Experimenting with Class-Based Affirmative Action](#), 47 *J. LEGAL EDUC.* 472 (1997); see also Deborah C. Malamud, [A Response to Professor Sander](#), 47 *J. LEGAL EDUC.* 504 (1997); Linda F. Wightman, [The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions](#), 72 *N.Y.U. L. REV.* 1 (1997) (examining theoretical implications of using socioeconomic status as proxy for race based on data from students that applied to law schools in 1990-1991, and concluding that it would not achieve diverse student body); Tung Yin, [A Carbolic Smoke Ball for the Nineties: Class-Based Affirmative Action](#), 31 *LOY. L.A. L. REV.* 213, 234 (1997) (reviewing RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996)) (examining income distributions and test scores by race indicating that primary beneficiaries of race-blind, class-based affirmative action program are likely to be overwhelmingly white).

5. See *infra* Part II.

6. See H. EDWARD RANSFORD, *RACE AND CLASS IN AMERICAN SOCIETY: BLACK, LATINO, ANGLO* (2d rev. ed. 1994).

7. The term "Afro-Cubans" is used here to collectively describe all persons of African descent whether labeled Mulatto or Black to focus upon the centrality of bias against African ancestry and phenotype in Cuba. See Nadine Therese Fernandez, *Race, Romance, and Revolution: The Cultural Politics of Interracial Encounters in Cuba* 27 (1996) (unpublished Ph.D. dissertation, University of California (Berkeley)) (on file with author) (describing academic's use of term Afro-Cuban to refer to Blacks and Mulattos together when discussing race issues). The Cuban discussion on racism focuses upon Blacks and whites because the demographic numbers of other racial and ethnic groups is relatively small. For instance, Chinese Cubans who are descended from Chinese brought to Cuba in the 1800s as contract labor, now number fewer than 500 in a total population of

approximately ten million. See Evelyn Hu Dehart, Chinese Coolie Labour in Cuba in the Nineteenth Century: Free Labour or Neo-Slavery?, in *THE WAGES OF SLAVERY* 67, 68-70 (Michael Twaddle ed., 1993). In addition, the religious diversity of the country was diminished when the vast majority of the Jewish population left after the Revolution. See Robert Levine, Jews Under the Cuban Revolution: 1959-1995, in *THE JEWISH DIASPORA IN LATIN AMERICA*, 265, 269, 278 (David Sheinin & Lois Baier Barr eds., 1996) ("In 1990, the number [of Jews in Cuba] had dwindled to roughly 305 families, most with non-Jewish spouses, in a total population of about ten million. ").

8. LatCrit theory is a jurisprudence dedicated to highlighting Latina/o concerns and voices in legal discourse and social policy for the attainment of social justice. See Francisco Valdes, Foreword: [Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities](#), 9 *LA RAZA L.J.* 1, 12 (1996).

9. See Lourdes Casal, Race Relations in Contemporary Cuba, in *MINORITY RIGHTS GROUP, THE POSITION OF BLACKS IN BRAZILIAN AND CUBAN SOCIETY* 11, 19 (Anani Dzidzienyo & Lourdes Casal eds., 1979).

10. See *id.*

11. See PEDRO PEREZ SARDUY, *AFRO-CUBAN VOICES: ON RACE, REPRESENTATION, AND IDENTITY IN 1990'S CUBA* (1995).

12. See Casal, *supra* note 9, at 19.

13. CARLOS MOORE, *CASTRO, THE BLACKS, AND AFRICA* 27 (1988).

14. JOHN CLYTUS, *BLACK MAN IN RED CUBA* 76 (1970). Castro's articulation of a color blind platform is very reminiscent of Justice Scalia's denunciation of race-conscious remedies in *Adarand Constructors v. Peña*, wherein he states "In the eyes of government, we are just one race here. It is American. " [515 U.S. 200, 239 \(1995\)](#) (Scalia, J., concurring in part and concurring in judgment). Yet there is a meaningful difference in their purpose. Justice Scalia supports a purely mechanical approach to racial equality that would merely prohibit formal barriers to civil rights. In contrast, Castro has instituted a substantive commitment to racial equality by coupling his call for color-blindness with law reforms that have sought to go to the heart of race-based socio-economic disparities.

15. See MARJORIE S. ZATZ, *PRODUCING LEGALITY: LAW AND SOCIALISM IN CUBA* 24- 25 (1994).

16. See Ley de Reforma Urbana [Urban Reform Law, *Gaceta Oficial*, Oct. 14, 1960; Ley No. 48, Ley General de la Vivienda [General Housing Law, *Gaceta Oficial*, Dec. 31, 1984; Ley No. 65, Ley General de la Vivienda [General Housing Law, *Gaceta Oficial*, Dec. 23, 1988.

17. See Cuban Const. art. 43 (amended 1992) (providing right to be employed by government without regard to race); *id.* art. 45 (amended 1992) (providing employment as right of citizenship).

18. See Sarah M. Santana, *The Cuban Health Care System: Responsiveness to*

Changing Needs and Demands, in CUBA'S SOCIALIST ECONOMY TOWARD THE 1990'S 115, 115-18 (Andrew Zimbalist ed., 1987).

19. See DOUGLAS BUTTERWORTH, THE PEOPLE OF BUENA VENTURA: RELOCATION OF SLUM DWELLERS IN POSTREVOLUTIONARY CUBA 36 (1980).

20. See MONA ROSENDAHL, INSIDE THE REVOLUTION 28-32 (1997).

21. See ZATZ, *supra* note 15, at 10.

22. See *id.* at 9.

23. See Marvin Leiner, Cuba's Schools: 25 Years Later, in THE CUBA READER: THE MAKING OF A REVOLUTIONARY SOCIETY 445, 448 (Phillip Brenner et al. eds., 1989).

24. See ZATZ, *supra* note 15, at 9.

25. See John A. Kovach, Reinventing Socialism in Cuba: The Relevance of Trotskyist Revolutionary Theory, 42 CARIBBEAN Q., Mar. 1996, at 30, 35.

26. See SUSAN SCHROEDER, CUBA: A HANDBOOK OF HISTORICAL STATISTICS 86 (1982).

27. See *id.* at 7.

28. Compare *id.*, with U.S. DEPT OF HEALTH & HUMAN SERVICES, HEALTH STATUS OF MINORITIES AND LOW INCOME GROUPS 108 tbl.10 (3d ed. 1991).

29. See Casal, *supra* note 9, at 21.

30. See Carlos Moore, Cuban Communism, Ethnicity and Perestroika: The Unmaking of the Castro Regime, 42 CARIBBEAN Q., Mar. 1996, at 14, 16.

31. See Leiner, *supra* note 23, at 446.

32. See *id.*

33. See *id.* at 450.

34. See ZATZ, *supra* note 15, at 24.

35. See DEBRA EVENSON, REVOLUTION IN THE BALANCE: LAW AND SOCIETY IN CONTEMPORARY CUBA 25 (1994).

36. See Fernandez, *supra* note 7, at 184.

37. See Kovach, *supra* note 25, at 35.

38. See EVENSON, *supra* note 35, at 179; see also Jill Hamberg, Cuban Housing Policy, in TRANSFORMATION AND STRUGGLE: CUBA FACES THE 1990S, at 235 (Sandor Halebsky & John M. Kirk eds., 1990).

39. See EVENSON, *supra* note 35, at 178-79.

40. See *id.* at 184. The legal meaning of Cuban homeownership must be understood within the socialist context that only permits personal property over "items intended for consumption to satisfy an individual's basic needs, which includes a household's dwelling unit." Stuart Grider, [A Proposal for the Marketization of Housing in Cuba: The Limited Equity Housing Corporation -- A New Form of Property](#), 27 U. MIAMI INTER-AM. L. REV. 453, 470 (1996). In contrast, the land under a dwelling unit is considered state property because it is a natural resource and the sale of a home is subject to state restrictions, which give

the government the option to repurchase any property at a price previously established by the government's Urban Reform Committee. See [id. at 470, 472](#). Initially, testamentary disposition rights over homes was limited to persons living with the deceased for at least a full year before death, but has since been extended to allow non-cohabiting heirs to inherit dwelling units. See [id. at 475](#).

41. See EVENSON, *supra* note 35, at 179.

42. See ZATZ, *supra* note 15, at 21.

43. See Lourdes Casal, Race Relations in Contemporary Cuba, in *THE CUBA READER: THE MAKING OF A REVOLUTIONARY SOCIETY*, *supra* note 23, at 471.

44. See EVENSON, *supra* note 35, at 179-80; *supra* note 40.

45. See Jorge Dominguez, Cuba Since 1959, in *CUBA: A SHORT HISTORY* 119 (Leslie Bethell ed., 1993).

46. See EVENSON, *supra* note 35, at 179 (Urban Reform Law of October 14, 1960, converted private rental housing into a public service). In 1984, the property laws were reformed to transform occupants of public housing into the owners of the units in which they resided. See ZATZ, *supra* note 15, at 21 (explaining that the 1984 Ley de Viviendas and its 1988 modification made Cubans the owners of their homes).

47. See Gayle McGarrity, Cubans in Jamaica: A Previously Neglected Segment of the Cuban Diaspora, 42 *CARIBBEAN Q.*, Mar. 1996, at 55, 67.

48. See EVENSON, *supra* note 35, at 110.

49. See Fernandez, *supra* note 7, at 176.

50. See Leiner, *supra* note 23, at 453.

51. See Gayle McGarrity & Osvaldo Cardenas, Cuba, in *NO LONGER INVISIBLE: AFRO-LATIN AMERICANS TODAY* 97 (Minority Rights ed., 1995).

52. See *id.*

53. See ROBIN MOORE, *NATIONALIZING BLACKNESS* 224 (1997).

54. See EVENSON, *supra* note 35, at 112-13.

55. See MOORE, *supra* note 13, at 225; Jorge I. Dominguez, Racial and Ethnic Relations in the Cuban Armed Forces: A Non-Topic, 2 *ARMED FORCES & SOC'Y* 273, 284-85 (1976) (noting that blacks are underrepresented in top military elite and officer ranks and over-represented in lowest ranking troop level).

56. See Cuban Const. arts. 42-43.

57. See Rosendahl, *supra* note 20, at 165.

58. *Id.* at 15 n. 5 ("There are 15 provinces in Cuba and between eight and twenty municipalities in each province.").

59. See *id.* at 6-7, 82-83, 91.

60. See ANTONI KAPCIA, *CUBA AFTER THE CRISIS: REVOLUTIONISING THE REVOLUTION* 16 (1996).

61. See Fernandez, *supra* note 7, at 80.

62. See ROSENDAHL, *supra* note 20, at 165.

63. *Id.*

64. See Grider, *supra* note 40, at 474; Enid Lynette Logan, *El Apostol y el Comandante en Jefe: Dialectics of Racial Discourse and Racial Practice in Cuba, 1890-1999*, in *THE GLOBAL COLOR LINE: RACIAL AND ETHNIC INEQUALITY AND STRUGGLE FROM A GLOBAL PERSPECTIVE* 195 (Pinar Batur-VanderLippe & Joe Feagin eds., 1999).

65. See ROSENDAHL, *supra* note 20, at 37-38.

66. The recent scarcity of resources has seriously hampered the ability of the Cuban government to consistently maintain the redistribution programs. For instance: 1) medical institutions often run out of medicine; 2) the ration system does not have enough food to supply a healthy diet; 3) the state guarantee of employment is provided with salaries paid in the undervalued national currency which cannot compete with the prices of non-rationed foods and consumer goods; and 4) the state guarantee to shelter is hindered by the cost of scarce housing construction materials. Despite the universality of the hardships, Afro-Cubans are not as structurally well-positioned as white Cubans to survive the economic crisis. See Fernandez, *supra* note 7, at 78.

67. See McGarrity & Cardenas, *supra* note 51, at 77, 98, 100.

68. See John J. Putman, *Cuba*, *NAT'L GEOGRAPHIC*, June 1999, at 20.

69. The contemporary dynamic of a racially restrictive dual currency economy replicates the multiple currency economy of nineteenth-century Cuba that harmed Afro-Cubans after the War of Independence in 1898. See ALINE HELG, *OUR RIGHTFUL SHARE: THE AFRO-CUBAN STRUGGLE FOR EQUALITY, 1886-1912*, at 101 (1995) (noting that Afro-Cuban laborers were paid prewar wages in depreciated Spanish silver that could not match cost of goods gradated to value of U.S. dollar in postwar Cuba).

70. See Pedro Perez Sarduy, *What Do Blacks Have in Cuba?* (last modified Mar. 9, 1999) <<http://www.afrocubaweb.com/WhatDoBlacks.htm>> (on file with author) (originally published in Spanish in 11 *ENCUENTRO DE LA CULTURA CUBANA* (1996)).

71. See Silvia Pedraza, *Cuba's Refugees: Manifold Migrations*, in *ORIGINS AND DESTINIES: IMMIGRATION, RACE, AND ETHNICITY IN AMERICA* 263, 273-75 (Silvia Pedraza & Ruben G. Rumbaut eds., 1996).

72. See GILLIAN GUNN, *CUBA IN TRANSITION: OPTIONS FOR U.S. POLICY* 36-37 (1993).

73. See Pedro Monreal, *Las Remesas Familiares en la Economia Cubana* [Familal Remittances in the Cuban Economy, 14 *ENCUENTRO DE LA CULTURA CUBANA* 49, 50 (1999).

74. Derrick Bell, *Revocable Rights and a Peoples' Faith: Plessy's Past in Our Future*, 1 *RUTGERS RACE L. REV.* 347, 348 (1999) (observing that during times of economic crisis Black needs become vulnerable to compromise and sacrifice).

75. Richard H. McAdams, [Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination](#), 108 HARV. L. REV. 1003, 1033 (1995). See generally GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954).

76. See McAdams, *supra* note 75, at 1044.

77. *Id.* at 1050.

78. See *id.* at 1052.

79. See W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 700 (1935).

80. See DAVID R. ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY 29, 63, 191-92 (1994); DAVID R. ROEDIGER, THE WAGES OF WHITENESS 13 (1991) (discussing how racial privileges conferred by whiteness can motivate subordinated and exploited whites to overlook their exploitation by other whites).

81. See Cheryl I. Harris, [Whiteness as Property](#), 106 HARV. L. REV. 1709, 1760 (1993); see also Derrick Bell, Property Rights in Whiteness: Their Legacy, Their Economic Costs, in CRITICAL RACE THEORY: THE CUTTING EDGE 75, 81 (Richard Delgado ed., 1995) (discussing historical argument for property right in whiteness).

82. See MANNING MARABLE, BEYOND BLACK AND WHITE: TRANSFORMING AFRICAN- AMERICAN POLITICS 89 (1995) ("The impetus for racism is not narrowly 'economic' in origin. "); see also GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS VII (1998). Lipsitz noted that:

Whiteness has a cash value: it accounts for advantages that come to individuals through profits made from housing secured in discriminatory markets, through the unequal educations allocated to children of different races, through insider networks that channel employment opportunities to the relatives and friends of those who have profited most from present and past discrimination, and especially through intergenerational transfers of inherited wealth that pass on the spoils of discrimination to succeeding generations.

Id.

83. See McAdams, *supra* note 75, at 1084.

84. The Cuban context also undermines Richard Epstein's critique of the status-production of race theory for under-appreciating the ability of a free market to overcome racial bias. See generally Richard A. Epstein, The [Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake](#), 108 HARV. L. REV. 1085 (1995). After Cuba's totalitarian control of the economy relaxed to permit foreign investment, privately owned restaurants, and the promotion of the tourism industry, the introduction of these free- market reforms were accompanied by "white-only" hiring preferences that were not imposed by the government. See KAPCIA, *supra* note 60, at 6-8 (describing Cuba's recent

economic reforms). In short, racism has a force of its own that asserts itself in both controlled markets and free markets.

85. JEAN-PAUL SARTRE, *ANTI-SEMITES AND JEWS* 26 (1960).

86. See Sabrina Gledhill, *The Latin Model of Race Relations*, in MOORE, *supra* note 13, at 355. Skin color-based hierarchies have also existed in regions besides Latin America such as British, French, and Dutch Guyana, Curacao, Guadeloupe, Haiti, Jamaica, Martinique, and Trinidad among others. See HARMANNUS HOETINK, *SLAVERY AND RACE RELATIONS IN THE AMERICAS* 41-47 (1973).

87. See Gledhill, *supra* note 86, at 355.

88. See McGarrity, *supra* note 47, at 75 (providing anecdotal evidence of racist attitude of light-skinned mulatto Cubans); see also ABBY L. FERBER, *WHITE MAN FALLING: RACE, GENDER, AND WHITE SUPREMACY* 7 (1998) ("The power of ideology comes from its power to define what it does and does not make sense to say, the power to define knowledge and reality.").

89. See McGarrity, *supra* note 47, at 64-65.

90. See *id.*; see also Fernandez, *supra* note 7, at 190-227 (detailing parental and peer pressure targeted against interracial couples in Cuba); **Kevin R. Johnson**, *Racial Mixture, Identity Choice, and Civil Rights*, *CIVIL RIGHTS J.* 44, 45 (1998) (observing sociopolitical aspects of choosing intimate partner).

91. See McGarrity, *supra* note 47, at 64-65.

92. See *id.* at 67.

93. See *id.*

94. See EVENSON, *supra* note 35, at 110 ("The closing of private schools in 1961 and the public investment in public education were extremely important to the process of rectifying racial inequality.").

95. See McGarrity & Cardenas, *supra* note 51, at 101 (concluding that greater level of police repression targeted against Afro-Cubans accounts for estimated 70% of Cuban prison population that is Black); Jody Benjamin, *Police Racism Flourishes in Castro's 'Workers Paradise'*, *L.A. DAILY J.*, May 21, 1992, at 6 (describing consistent harassment by Cuban police experienced by African American journalist and other Afro-Cuban residents he interviewed).

96. See BUTTERWORTH, *supra* note 19, at 29, 67.

97. See VERENA MARTINEZ ALIER, *MARRIAGE, CLASS AND COLOR IN NINETEENTH- CENTURY CUBA: A STUDY OF RACIAL ATTITUDES AND SEXUAL VALUES IN A SLAVE SOCIETY* 91-99 (1974); Blackness in Latin America and the Caribbean: Social Dynamics and Cultural Transformations, in 2 *EASTERN SOUTH AMERICA AND THE CARIBBEAN* 7-9 (Arlene Torres & Norman E. Whitten, Jr., eds., 1998). During Spanish colonial rule of Cuba the "blanqueamiento" ideology was institutionalized into Spanish law, permitting upper-class Mulattos to purchase the rights of whiteness. See James F. King, *The Case of Jose Ponciano de Ayarza: A Document on Gracias al Sacar*, 32 *HISPANIC AM. HIST. REV.* 640, 643 (1951).

98. See ARTHUR P. WHITAKER & DAVID C. JORDAN, *NATIONALISM IN CONTEMPORARY LATIN AMERICA* 166 (1966).

99. See *Blackness in Latin America and the Caribbean: Social Dynamics and Cultural Transformations*, *supra* note 97, at 7-8.

100. At the same time it is important to note that Marxist theory has long been criticized for its de-emphasis of race in its analysis of class oppression. See CRUSE, *supra* note 1, at 151.

101. See Richard R. Fagen, *Continuities in Cuban Revolutionary Politics*, in *THE CUBA READER: THE MAKING OF A REVOLUTIONARY SOCIETY*, *supra* note 23, at 51, 56-57.

102. See Alejandro de la Fuente, *Race, National Discourse, and Politics in Cuba: An Overview*, *LAT. AM. PERSP.*, May 1998, at 43, 44.

103. See *id.* at 44-45.

104. *Id.* at 44 (quoting Marti). Marti thought that Afro-Cubans would "rise" to the level of whites through intermarriage with whites and by rejecting their African heritage in favor of Western culture. See HELG, *supra* note 69, at 45.

105. See de la Fuente, *supra* note 102, at 45.

106. See generally LESLIE B. ROUT, JR., *THE AFRICAN EXPERIENCE IN SPANISH AMERICA* (1976).

107. See Louis A. Perez, Jr., *Politics, Peasants, and People of Color: The 1912 "Race War" in Cuba Reconsidered*, 66 *HISPANIC AM. HIST. REV.* 509, 511 (1986).

108. See HELG, *supra* note 69, at 71-72.

109. Rafael Duarte Jimenez, *The 19th Century Black Fear*, in *AFROCUBA: AN ANTHOLOGY OF CUBAN WRITING ON RACE, POLITICS AND CULTURE* 37, 43 (Pedro Perez Sarduy & Jean Stubbs eds., 1993).

110. *Id.* at 39.

111. See Alejandro de la Fuente, "With All and for All," *Race, Inequality and Politics in Cuba: 1900-1930*, at 44-112 (1996) (unpublished Ph.D. dissertation, University of Pittsburgh) (on file with author).

112. See Aline Helg, *Race in Argentina and Cuba, 1880-1930: Theory, Policies, and Popular Reaction*, in *THE IDEA OF RACE IN LATIN AMERICA, 1870-1940*, at 37, 47 (1990).

113. See ROUT, *supra* note 106, at 306. It is interesting to note that Cuba employed an overt white immigrant preference in its immigration system long before the United States did the same with the National Origins Quota Act of 1924. See *Immigration Act of 1924*, ch. 190, 43 Stat. 153 (1924) (restricting immigration based on national origin and quotas to favor white European immigrants).

114. See ROUT, *supra* note 106, at 303.

115. See de la Fuente, *supra* note 111, at 44-112.

116. See MOORE, *supra* note 13, at 30.

117. See Alejandro de la Fuente, *Race and Inequality in Cuba, 1899-1981*, 30

J. Contempt. Hist. 131, 144 (1995).

118. See Perez, *supra* note 107, at 527.

119. See *id.* at 524.

120. See de la Fuente, *supra* note 117, at 144.

121. See *id.* at 155.

122. See Helg, *supra* note 112, at 53.

123. Aline Helg, Race and Black Mobilization in Colonial and Early Independent Cuba: A Comparative Perspective, 44 *ETHNOGRAPHY* 53, 63 (1997).

124. See Luis E. Aguilar, Cuba, c. 1860 - c. 1930, in *CUBA: A SHORT HISTORY*, *supra* note 45, at 21, 44.

125. See HELG, *supra* note 69, at 193.

126. See Perez, *supra* note 107, at 537.

127. Casal, *supra* note 9, at 12.

128. Perez, *supra* note 107, at 537.

129. See de la Fuente, *supra* note 102, at 55.

130. See HELG, *supra* note 69, at 203.

131. See ROUT, *supra* note 106, at 305.

132. See *id.* at 305.

133. Helg, *supra* note 112, at 56. Although some commentators attribute Cuban segregation policies to the work of the United States occupation forces and the continuing influence of the United States, Cuba had a long history of racism that complemented the race-based intervention of the United States. See NANCY LEYS STEPAN, "THE HOUR OF EUGENICS:" RACE, GENDER, AND NATION IN LATIN AMERICA 174 (1991). Post-slavery 19th-century Spanish-ruled Cuba had an entrenched *de facto* system of segregation that did not require legal enforcement. See HELG, *supra* note 69, at 25. Prisons and hospitals, for example, had one section for whites that included Chinese and another for Blacks and Mulattos, and all theater seats except for that of the gallery were whites-only. See *id.* Further, exclusive hotels were whites-only, and many other places of public accommodation often refused to serve Blacks and Mulattos. See *id.* In fact, when U.S. planters and the U.S. Chamber of Commerce in Havana wanted to increase the numbers of immigrants from Haiti, Jamaica, Barbados, and other Caribbean islands to work the sugar plantations of Cuba in the 1910s, the native Cuban government was in opposition and accused the United States of being more concerned with the cost of sugar than with the racial and cultural future of Cuba. See de la Fuente, *supra* note 102, at 51-52.

134. The failings of Cuba's nationalism project to overcome the problem of racism contravenes U.S. proposals to solve racism by submerging racial identities to a more forceful "American" vision. See generally JIM SLEEPER, *LIBERAL RACISM* (1997) (discussing inclusion of Blacks by imploding notions of "Blackness" and of "whiteness").

135. See Casal, *supra* note 9, at 13.

136. See LOUIS A. PEREZ, JR., *CUBA BETWEEN REFORM AND REVOLUTION* 307 (2d ed. 1995). Perez noted that: In the main Afro-Cubans occupied the lower end of the socio-economic order. Almost 30 percent of the population of color over twenty years of age was illiterate. Blacks tended to constitute a majority in the crowded tenement dwellings of Havana. They suffered greater job insecurity, more unemployment/under-employment, poorer health care, and constituted a proportionally larger part of the prison population. They generally earned lower wages than whites, even in the same industries. Afro-Cubans were subjected to systematic discrimination, barred from hotels, resorts, clubs, and restaurants.

Id.

137. See de la Fuente, *supra* note 102, at 63.

138. See McGarrity, *supra* note 47, at 64-65 (noting that 84% of Black Cubans surveyed in 1994 ethnographic study indicated that discrimination in employment was endemic and increasing).

139. EVENSON, *supra* note 35, at 113.

140. See de la Fuente, *supra* note 102, at 63.

141. See *id.* at 62.

142. See Gisela Arandia Covarrubias, *Strengthening Nationality: Blacks in Cuba*, 12 *CONTRIBUTIONS IN BLACK STUD.* 62, 68 (1994) ("I believe that the problems of the Blacks in Cuba can be resolved only within the space of their own nation, and not outside.").

143. See [22 U.S.C. § 2370\(a\)\(1\) \(1994\)](#); see also Cuban Democracy Act of 1992, [22 U.S.C. §§ 6001-10 \(1994\)](#) (prohibiting foreign subsidiaries of U.S. companies from trading with Cuba and empowering President to sanction nations granting aid to Cuba); Cuban Liberty and Democratic Solidarity Act of 1996, [22 U.S.C. §§ 6021-24 \(Supp. II 1996\)](#) (permitting U.S. nationals to file claims in U.S. federal court against persons "trafficking" in Cuban socialist government seized property); Cuban Assets Control Regulations of 1962, 31 C.F.R. § § 515.10-515.901 (1994).

144. See Casal, *supra* note 9, at 21; de la Fuente, *supra* note 102, at 62-63.

145. See James Early, *Talking Race in the Revolution* (last modified Mar. 4, 1999) <http://www.afrocubaweb.com/JamesEarly.htm> (on file with author).

146. See Moore, *supra* note 30, at 19.

147. See Radio Havana Cuba, *Carlos Lage Delivers Speech at the Geneva-Based United Nations Human Rights Commission* (visited Mar. 13, 2000) <<http://www.radiohc.org>> (on file with author) (speaking before 55th session of United Nations Human Rights Commission in Geneva, Cuban ambassador Carlos Lage asserted that, in contrast to United States, racial discrimination does not exist in Cuba).

148. See Gisela Arandia Covarrubia, *One Way to Strengthen Nationality -- A Panorama of Afrocuban Culture and History* (last modified Jan. 31, 1999) <<http://www.afrocubaweb.com/Arandia-art.htm>> (on file with author).

149. See EVENSON, *supra* note 35, at 99.

150. See *id.* at 98, 112.

151. See Raymond J. Michalowski, *Between Citizens and the Socialist State: The Negotiation of Legal Practice in Socialist Cuba*, 29 L. & SOC'Y REV. 65, 74- 75 (1995) (describing 1973 abolition of private practice of law and its replacement with "bufetes colectivos" system of self-financed law collectives for purpose of ensuring universal public access to legal services).

152. See *id.* at 81.

153. See Debra Evenson, *Women's Equality in Cuba: What Difference Does a Revolution Make?*, 4 L. & INEQ. J. 295 (1986).

154. See Frances Lee Ansley, [Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship](#), 74 CORNELL L. REV. 993, 1073 (1989) (urging civil rights scholars to commit themselves to dealing interrelatedly with race and class in order to fully understand white supremacy); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 320 (1987) ("It is not enough to subsume racism under some other category, such as class struggle, that fails to understand racism's subtlety and complexity.").

155. See MARABLE, *supra* note 82, at 89.

156. See WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 150 (1978) ("[Class has become more important than race in determining black life chances in the modern industrial period" because middle class Blacks with skills are better able to be successful than low-income non-skilled Black workers). But see STEPHEN STEINBERG, *TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY* 148 (1995) ("Wilson falls into the familiar trap of assuming that the postindustrial economy is based primarily on an educated and skilled work force. While this holds true for some jobs in a few fast-growing areas of technology, most jobs in the service sector are notable for not requiring much education and skills.").

157. See Deborah C. Malamud, [Affirmative Action, Diversity, and the Black Middle Class](#), 68 U. COLO. L. REV. 939, 967-87 (1997) (noting that Black middle class is less secure than white middle class when these social factors are considered: housing segregation, prestige of job classification, income security, educational bias, wealth accumulation, and intergenerational status transmission).

158. See Alex M. Johnson, Jr., [How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods](#), 143 U. PA. L. REV. 1595, 1602 (1995). Johnson further posited that there are circumstances under which an elevated socio-economic class assists Blacks circumvent some of the harsh effects of racism, as when real estate agents distinguish wealthy Blacks from the stereotypes of Blacks when facilitating their ability to integrate a white neighborhood. See *id.* at 1616.

159. See MANNING MARABLE, *HOW CAPITALISM*

UNDERDEVELOPED BLACK AMERICA: PROBLEMS IN RACE, POLITICAL ECONOMY AND SOCIETY 140 (1983) (noting that Black propertied elite emerged before Civil War). Census figures show that the size of the Black middle class more than doubled between 1965 and 1974. See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 902 (3d ed. 1992).

160. See STEINBERG, *supra* note 156, at 147-48.

161. See ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 113 (1992); STEINBERG, *supra* note 156, at 166.

162. See MARABLE, *supra* note 82, at 88 ("Affirmative action has always had a distinct and separate function from antipoverty programs.").

163. See *id.*

164. See BELL, *supra* note 159, at 807 (stating that Blacks in United States are over three times as likely than whites to live in poverty); Thomas F. Pettigrew, *The Changing, but Not Declining, Significance of Race*, 77 MICH. L. REV. 917, 920 (1979) (book review) ("[The black poor are far worse than the white poor, and the black middle class still has a long way to catch up with the white middle class in wealth and economic security.]). But Frances Ansley observes that ultimately a vision of racially equal economic stratification should give way to a more expansive notion of economic justice that seeks to diminish all economic disparities. See Ansley, *supra* note 154, at 1048-50. Unfortunately, the more expansive notion of economic parity that Frances Ansley advocates is particularly utopian given the entrenched nature of capitalism and this nation's historical resistance to radical economic reforms for the poor. See HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT* 383, 433 (rev. ed. 1995).

165. See Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880, 1891-1894 (1981) (book review).

166. See BELL, *supra* note 159, at 895-96, 901-906.

167. Herbert Hill, *Comments on Race and Class*, NATION, Apr. 11, 1981, at 436; see also MARABLE, *supra* note 159, at 2 (elaborating on connection between capitalism and economic exploitation of Blacks).

168. See GEORGE M. FREDRICKSON, *WHITE SUPREMACY* 199 (1981).

169. See *supra* notes 49-57 and accompanying text (discussing underrepresentation of Afro-Cubans in positions of governmental authority); see also FREDRICKSON, *supra* note 168, at 209-212 (discussing consistent U.S. pattern of Black exclusion from industrialized jobs to placate low-wage white workers along with exclusion from unions); MARABLE, *supra* note 159, at 35-39 (documenting virulent racism of United States unions).

170. See Ansley, *supra* note 154, at 1036 ("White supremacist regimes are, in fact, not confined to any particular political economy. They can be shown to exist in non-capitalist economies as well as in socialist ones.").

171. See ZINN, *supra* note 164, at 393.

172. During the New Deal reforms of the 1930s most Blacks worked as farmers, farm laborers, migrants and domestic workers. See *id.* at 394.

173. See JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* 197 (1994) (interpreting war on poverty as effort to eliminate racial barriers of New Deal programs and to integrate Blacks into national political economy).

174. See *id.* at 28-31.

175. Dorothy E. Roberts, [Welfare and the Problem of Black Citizenship, 105 YALE L.J. 1563, 1572-73 \(1996\)](#) (book review) ("Privileged racial identity gives whites a powerful incentive to leave the existing social order intact. White Americans therefore have been unwilling to create social programs that will facilitate Blacks' full citizenship, even when those programs would benefit whites.").

176. Similarly, contemporary color-blind educational programs in Florida and Texas which select the top performers in every high school for enrollment in a state university, are superimposed upon a system of racially segregated high schools that ignores the difference in college preparation resulting from underfunded high schools. See Peter T. Kilborn, *Jeb Bush Roils Florida on Affirmative Action*, N.Y. TIMES, Feb. 4, 2000, at A1. I have N.Y.U. Law Professor Paulette Caldwell to thank for this observation.

177. See STEINBERG, *supra* note 156, at 119-26 (detailing U.S. legacy of 1965 Moynihan Report which associated Blacks and more specifically the Black family with pathological and self-inflicted "culture of poverty"); McGarrity & Cardenas, *supra* note 51, at 66-67 (describing anthropological studies of white Cuban views of "low Black culture").

178. See Roberts, *supra* note 175, at 1563. The public discourse surrounding the enactment of The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 promoted an erroneous stereotype of Blacks as the typical welfare recipients. See April L. Cherry, [Social Contract Theory, Welfare Reform, Race and the Male Sex-Right, 75 OR. L. REV. 1037, 1040 \(1996\)](#) ("Underlying the welfare reform movement generally, and the statute in particular, is the image of the typical welfare recipient as a promiscuous African American teenage girl with little or no self-control or respect for the values of the white middle class."); Kathleen A. Kost & Frank W. Munger, [Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Values, 4 VA. J. SOC. POL'Y & L. 3, 7 \(1996\)](#) ("[Only a tiny fraction of AFDC recipients actually match the reformers' stereotype of an adolescent, unmarried, African-American female.").

179. See de la Fuente, *supra* note 111, at 13-14, 24.

180. See David Gergen, *To Have and Have Less*, U.S. NEWS & WORLD REP., July 26, 1999, at 64 (stating that gap between rich and poor is widening in United States, and poverty rates have dropped very little despite current economic boom).

181. See John A. Powell, Welfare Reform for Real People: Engaging the Moral and Economic Debate, 17 LAW & INEQ. J. 211, 211-12 (1999) ("We have changed the focus on welfare from addressing the needs of the recipient and structural impediments to focusing on the apparent defects of the recipients.").

182. See Larry Cata Backer, [The Many Faces of Hegemony: Patriarchy and Welfare as a Woman's Issue](#), 92 NW. U. L. REV. 327, 352 (1997) (noting that number of Asian countries have racialized concept of poverty).

183. Margaret B. Wilkerson & Jewell Handy Gresham, Sexual Politics of Welfare: The Racialization of Poverty, NATION, July 24, 1989, at 126 (quoting Barbara Ommolade, single-mother college counselor).

184. See PATRICIA J. WILLIAMS, THE ROOSTER'S EGG: ON THE PERSISTENCE OF PREJUDICE 3 (1995) (noting that typical woman on welfare is young white woman with children, who is convinced she is not typical but just temporarily down on her luck).

185. See MICHAEL OMI & HOWARD. WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960'S TO THE 1990'S, at 66-67 (1986) (stating that in order to consolidate hegemony, ruling groups produce ideology to pervade popular thought that comes to be considered common sense).

186. See STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 180 (1996).

187. See Rachel F. Moran, Neither Black nor White, 2 HARV. LATINO L. REV. 61, 89 (1997) ("In substituting class for race, officials could obscure the ongoing significance of race in the everyday lives of Americans and the ways in which it interacts with class to exacerbate the condition of the underclass.").

188. Black comedian Chris Rock unintentionally illustrates the perversity of the "culture of poverty" ideology with his stand-up routine on the subject of "why Black people hate niggers" in which he juxtaposes Black middle class values as being in opposition to low-class "nigger" culture. See CHRIS ROCK, ROCK THIS (1997); see also Leslie Espinoza & Angela P. Harris, [Afterword: Embracing the Tar-Baby - LatCrit Theory and the Sticky Mess of Race](#), 85 CAL. L. REV. 1585, 1603 (1997), 10 LA RAZA L.J. 499, 517 (1998) ("Many of us who grew up in middle class, 'respectable' African-American homes can recall being told by parents or other relatives to stop 'acting colored.' The image we were all fleeing was the image of the nigger, the lower-class black person who talked too loudly in 'Black English,' laughed too heartily, and was vulgar in appearance, word, and deed.").

189. The closest parallel to the race and class perspective favored in this Article is the anticaste principle used in the distinct context of India's reservation program for disadvantaged groups because it connects economic and political disadvantage to social structure. See Clark D. Cunningham & N.R. Madhava Menon, [Race, Class, Caste ...? Rethinking Affirmative Action](#), 97 MICH. L. REV. 1296, 1302 (1999); see also Cass R. Sunstein, [Affirmative Action, Caste, and Cultural Comparisons](#), 97 MICH. L. REV. 1311-12, 1316-18 (1999).

190. For instance a race-class mode of analysis can more completely explain why white women as a group benefit the most from current affirmative action programs rather than the racial minority groups they were originally designed for, and similarly why white Cuban women have fared better than Afro-Cuban women and men under the socialist redistribution programs. See Evelyn Hu-DeHart, [Affirmative Action--Some Concluding Thoughts](#), 68 U. COLO. L. REV. 1209, 1212 (1997) (explaining that white women are best positioned to take advantage of affirmative action programs because their social, economic and educational backgrounds more closely parallel that of white men).

191. See Marian E. Gornick et al., Effects of Race and Income on Mortality and Use of Services Among Medicare Beneficiaries, 335 NEW ENG. J. MED. 791 (1996) (demonstrating that among those covered by Medicare health insurance, Black mortality rates exceed those of whites, after controlling for income).

192. See Valdes, *supra* note 8, at 12.

193. See, e.g., Juan Perea, Latina/o Identity and Pan-Ethnicity: Toward LatCrit Subjectivities: Five Axioms in Search of Equality, 2 HARV. LATINO L. REV. 231, 233-34 (1997).

194. It has been noted that one of the challenges of LatCrit is that the search for a Latino/a perspective on the law can result in essentializing Latino/a identity. See Stephanie M. Wildman, Reflections on Whiteness and Latino/a Critical Theory, in CRITICAL WHITE STUDIES (Richard Delgado & Jean Stefancic eds., 1997) ("I will say first that there is a downside to this lens, to naming Latinas/os as a group, because this act of naming essentializes a very diverse group, making it appear to be a homogeneous whole."). But see Elizabeth M. Iglesias & Francisco Valdes, Afterword: [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, 583 (1998) ("To rise above crude or self-defeating identity politics, the LatCrit community, like many others, therefore must recognize and come to terms with the complex effects that multilayered identity issues visit on the production, as well as the contents, of our work.").

195. See Raquel Z. Rivera, Boriucas From the Hip Hop Zone: Notes on Race and Ethnic Relations in New York City, 8 CENTRO J. OF CENTER FOR PUERTO RICAN STUD. 202, 209 (1996) (concluding that reason many Puerto Ricans in United States refuse to identify as Black is because of anti-Black sentiment "brought on the trip from Puerto Rico").

196. The Latin American preoccupation with whiteness and denigration of Blackness is also prevalent in Latin American countries with small numbers of self-identified Afro-Latinos like Mexico, Argentina, and Peru just to name a few. See ROUT, *supra* note 106, at 185-312.

197. See generally NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995).

198. See Marta Tienda & Ding-Tzann Lii, Minority Concentration and Earnings Inequality: Blacks, Hispanics and Asians Compared, 93 AM. J. SOC. 141, 163- 64 (1987); see also Moran, *supra* note 187, at 175 ("Indeed, Latinos who disproportionately self-identify as Black bear this racial tax as well.").

199. Delina D. Pryce, Black Latina, HISPANIC, Mar. 1999, at 56.

200. See, e.g., Ian F. Haney Lopez, Retaining Race: LatCrit Theory and Mexican American Identity in Hernandez v. Texas, 2 HARV. LATINO L. REV. 279, 282 (1997).

201. See *id.* at 282-83.

202. See Eric K. Yamamoto, Conflict and Complicity: Justice Among Communities of Color, 2 HARV. LATINO L. REV. 495, 495 (1997) ("[A racial group can be simultaneously oppressed in one relationship and complicitous in oppression in another.").

203. Eric K. Yamamoto, [Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America](#), 95 MICH. L. REV. 821, 840-44 (1997)..

204. One powerful example of the political significance of individual expressions of Latino/a identity is illustrated by the interaction that a Latina acquaintance of mine had with her white male partner. After dating one another in college for approximately two years, the young woman asked her partner when he meant to introduce her to his parents. The time for their college graduation had arrived and she wished to coordinate a convenient time to meet them. He responded that he could not possibly introduce her to his parents. When she inquired why that was the case he replied, "Because you have Black blood." Her outcry was immediate: "I don't have Black blood! My dark skin comes from my Puerto Rican Taino indian ancestry." Despite the fact that the Spaniards decimated the Taino indian population of Puerto Rico in the 1500s, this Latina deployed a common Latino/a defense to U.S. racism -- she condoned bias against Blacks by asserting a Mestizo ethnic identity. See TAINO REVIVAL: CRITICAL PERSPECTIVES ON PUERTO RICAN IDENTITY AND CULTURAL POLITICS 49 (Gabriel Haslip-Viera ed., 1999) (explicating Puerto Rican phenomenon of asserting false Taino identity to deny African ancestry).

205. See Dick Kirschten, Hispanics: Beyond the Myths, 31 NAT'L J. 2350, 2351-52 (1999) (describing Hispanics as America's hottest minority and crucial to America's future); Brook Larmer, Latin U.S.A.: How Young Hispanics Are Changing America, NEWSWEEK, July 12, 1999, at 48; Katharine Q. Seelye, Embracing Clinton at Arm's Length, Gore Formally Begins Run For President, N.Y. TIMES, June 17, 1999, at A26 (noting that Gore, like George W. Bush, speaks to Latina/o voters in Spanish because they make up important swing constituency).

206. See **Tanya Kateri Hernandez**, The [Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws](#), 76 OR. L. REV. 731, 738-39 (1997).

207. See Espinoza & Harris, *supra* note 188, 85 CAL. L. REV. at 1624, 10 LA RAZA L. J. at 538 ("Latinos/as are offered a lure by mainstream society: the choice of not identifying with African Americans and not identifying as racial minorities.").

208. See Moran, *supra* note 187, at 169-170. Moran wrote:

As the Latino population continues to grow, officials are likely to pay increased attention to its unique needs and characteristics. With its heightened visibility will come weighty responsibilities Latinos must be sensitive to the ways in which their reform agenda will affect those Americans least able to escape the strictures of race labels.

Id.

209. See, e.g., Kimberle Williams Crenshaw, [Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color](#), 43 STAN. L. REV. 1241, 1241-43, 1272-73 (1991) (describing doctrinal problems Black women confront in civil rights movement based on experiences of Black men and with feminist movement based on experiences of white women); Harlon L. Dalton, *Minority Critique of the Critical Legal Studies Movement: The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 436 (1987) (expressing some difficulties that minority scholars encountered in working within Critical Legal Studies movement rubric).

**6. 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. 1227 (2000)**

In 1998, the California voters, by a sixty-one to thirty-nine percent margin, passed Proposition 227, n. 2 a ballot initiative innocuously known as "English for the Children. " n. 3 This measure in effect prohibits bilingual education programs for non-English speakers in the state's public school system. This Article contends that this pernicious initiative violates the Equal Protection Clause of the *1228 Fourteenth Amendment n. 4 because, by employing language as a proxy for national origin, it discriminates against certain persons of Mexican and Latin American, as well as Asian, ancestry. n. 5 By attacking non-English speakers, Proposition 227, in light of the historical context and modern circumstances, discriminates on the basis of race n. 6 by focusing on an element central to the identity of many Latinas/os. n. 7

*1229 In the face of constitutional and other challenges, the courts upheld the initiative but failed to sufficiently engage the core Equal Protection issue that the case raised. n. 8 In [Washington v. Davis](#), n. 9 the Supreme Court held that, in order to establish an Equal Protection violation, the plaintiff must prove that the challenged state action was taken with a "discriminatory intent." The conventional wisdom considers this requirement to be unduly stringent because it fails to fully appreciate the nature of modern racial discrimination in the United States. n. 10 Much can be said for this argument. However, in this instance, there is sufficient evidence to establish that Californians passed Proposition 227 with a discriminatory intent and that it therefore runs afoul of the Equal Protection Clause. n. 11 This intent flies in the face of the debatable claim of *1230 some supporters that the law would improve educational opportunities for non-English speaking students, a contention that obscures the core racial motivation behind the law's enactment. n. 12

This Article outlines the arguments supporting the Equal Protection challenge to Proposition 227. It is now an especially appropriate time to analyze the circumstances surrounding the initiative's passage because, as time passes, it becomes more difficult to marshal the evidence necessary to prove discriminatory intent. n. 13 To place Proposition 227 into its larger historical context, Part I sketches the history of discrimination in education against persons

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of Mexican ancestry, citizens as well as immigrants, in California and the Southwest. Part II analyzes the racial edge to the initiative campaign, its provisions, and the disparate impact that the law will have on non-English speakers and, under current conditions in California, on racial minorities. It contends that Proposition 227 amounts to unlawful racial discrimination by proxy. n. 14 Part III analyzes *1231 the discrimination by proxy concept's relevance to the understanding of discrimination against Mexican Americans and other minority groups in the United States and contends that the Supreme Court should incorporate the concept more fully into its Equal Protection jurisprudence.

Ultimately, Proposition 227 can be seen as part of a general attack on Latinas/os. Unlike the days of old, the antidiscrimination principle that evolved from the Civil Rights movement of the 1960s has tended to drive blatant anti-Mexican animus underground, making it more difficult to identify, isolate, and eliminate. This disturbing trend raises serious legal questions concerning the scope of the Equal Protection Clause of the Fourteenth Amendment. This Article considers how Latinas/os may employ this constitutional provision to protect their civil rights and draws conclusions relevant to minorities generally. In so doing, we take up the challenge of addressing practical problems in a constructive way with the hope of "providing intellectual leadership in a time of serious retrenchment." n. 15

I. THE HISTORY OF DISCRIMINATION AGAINST PERSONS OF MEXICAN ANCESTRY IN CALIFORNIA EDUCATION

A full understanding of Proposition 227 requires consideration of the long history of discrimination against persons of Mexican ancestry in California. Although most of the state was once part of Mexico, California has seen more than its share of racism directed at Mexican Americans and Mexican immigrants. n. 16 Anti-Mexican sentiment also has pervaded other states in the Southwest, particularly *1232 Texas n. 17 and Arizona. n. 18 This Section sketches the impact of anti-Mexican animus on educational opportunity in the twentieth century and the changes in the California educational system brought about because of the growing Latina/o population in the state.

A. The Struggle for Equal Educational Opportunity in the Public Schools

Mexican Americans have long struggled to ensure equal access to education. School desegregation and finance litigation, along with a political battle for bilingual education, have been central to the struggle.

1. School Desegregation Litigation

One of the most damaging manifestations of racial discrimination has been the segregation of minorities in the public schools. n. 19 Mexican Americans in California have faced this obstacle in their effort to become educated citizens. They have been litigating against school segregation at least as far back as the Great Depression.

In 1931 in the town of Lemon Grove, California, the school board decided to construct a separate school for Mexican Americans and begin school segregation. n. 20 Mexican Americans and Mexican citizens formed the *Comite de Vecinos de Lemon Grove* (the Lemon Grove Neighborhood Committee) and organized a boycott of the school. The committee made public appeals for support in statewide Spanish and English newspapers. With the aid of lawyers provided by the Mexican consul in San Diego, the committee successfully challenged the school segregation in a lawsuit.

***1233** Despite the victory in Lemon Grove, by the 1940s the segregation of Mexican Americans was widespread throughout the West and Southwest. n. 21 In [Westminster School District v. Mendez](#), n. 22 Mexican Americans in Orange County, California, filed an action against school district officials responsible for placing Mexican American children into segregated schools. The trial court found that the segregation violated plaintiffs' Fourteenth Amendment rights. n. 23 The court of appeals affirmed, distinguishing cases, including [Plessy v. Ferguson](#), n. 24 that had upheld segregation. n. 25 The court of appeals distinguished those cases because the California legislature in this instance had not authorized segregation. n. 26

In so doing, the court in *Mendez* left open the possibility that the legislature might enact legislation that lawfully could segregate Mexican Americans. n. 27 Moreover, the court made it clear that, even absent statutory authorization, English language difficulties might justify segregating Mexican American children. n. 28

Interestingly, the plaintiffs had urged the court to "strike out independently on the whole question of segregation" in light of the fact that the country had just fought and won World War II, n. 29 in which many Mexican Americans had distinguished themselves on the battle field. n. 30 Although acknowledging that judges "must keep ***1234** abreast of the times," the court declined to take an independent course, stating that "judges must ever be on their guard lest they rationalize outright legislation under the too free use of the power to interpret." n. 31 The court instead chose to simply distinguish the earlier segregation cases.

Seven years after *Mendez*, the Supreme Court decided the watershed case of [Brown v. Board of Education](#). n. 32 In *Brown*, the Court held that the segregation of African American children in the public schools violated the Equal Protection Clause of the Fourteenth Amendment. n. 33 In the years following *Brown*, the lower courts struggled to apply that decision. In particular, they faced the question whether *Brown* prohibited only de jure (intentional) segregation or

whether it also outlawed de facto (in fact) segregation.

For example, in [Soria v. Oxnard School District](#), n. 34 Mexican Americans brought a desegregation suit against a school district. District Court Judge Harry Pregerson found an illegal racial imbalance within the district resulting from the board's neighborhood school policy. n. 35 In reaching this conclusion, Judge Pregerson ruled that de facto segregation violated the law regardless of whether there was an intent to segregate. n. 36 The court of appeals reversed. The court relied on the recently decided Supreme Court case, [Keyes v. School District No. 1](#), n. 37 and held that plaintiffs must establish de jure segregation in order to establish a constitutional violation. n. 38 Keyes, however, never directly addressed the question whether to distinguish between de jure and de facto segregation and never specifically *1235 decided whether de facto segregation violated the Constitution. n. 39

The Soria case suggests that the ability to achieve social change through litigation may be limited. n. 40 As Soria indicates, litigation led to judicial holdings that de jure segregation was unconstitutional. That litigation effort, however, found it difficult to remedy the de facto segregation that continued to exist in the California schools.

2. School Finance Litigation

In addition to segregation in the public schools, Mexican Americans have also suffered from relatively low funding for schools in predominantly Mexican American neighborhoods. Failures in school desegregation litigation led the civil rights community to attack school financing schemes. n. 41 Mexican Americans challenged school financing in two precedent-setting cases, [Serrano v. Priest](#), n. 42 and [San Antonio School District v. Rodriguez](#). n. 43

In Serrano, Mexican Americans brought a class action alleging that the California public school financing scheme violated the Equal Protection Clause of the United States Constitution and the *1236 California Constitution. In particular, they alleged that, because the financing plan was based on local property taxes, it created deep inequalities among the various school districts in the money available per student. n. 44 The California Supreme Court held that California's school financing scheme discriminated on the "basis of the wealth of a district." n. 45 In addition, the court held that the "priceless function of education in our society" required that it be classified as a "fundamental interest." n. 46 Given the wealth-based discrimination and the fundamental interest at stake, the court applied the rigorous "strict scrutiny" Equal Protection standard to the school financing plan. n. 47 Because the plan did not further a compelling state interest, the plan failed the strict scrutiny test and violated the Equal Protection Clause. n. 48

Two years later, the United States Supreme Court took a contrary position

in [Rodriguez](#). n. 49 In Rodriguez, Mexican Americans brought a class action alleging that the Texas property tax scheme for public school financing violated the Equal Protection Clause. The Court found that the strict scrutiny standard was not appropriate because education is not a fundamental right under the United States Constitution and distinctions based on wealth do not implicate a suspect class. n. 50 Applying the lenient "rational basis" Equal Protection test, the Court held that there was no constitutional violation because the financing scheme rationally furthered a legitimate state purpose. n. 51

Subsequently, the California Supreme Court reaffirmed the validity of Serrano under the California Constitution. n. 52 Thus, Serrano survives Rodriguez to the extent that it was based on California law. In an effort to satisfy the requirements of Serrano, the California legislature in 1977 enacted a new method of school financing. n. 53 *1237 The new law sought to reduce inequalities among school districts by transferring property taxes raised in affluent districts to poorer districts. n. 54

However, in 1978, California voters approved Proposition 13, n. 55 which drastically reduced property taxes in California by more than fifty percent. n. 56 The impact on public education was devastating. "Most observers agree that Proposition 13 left California school finance in shambles." n. 57 By dramatically cutting local property taxes, the initiative instantly cut school budgets, with particularly onerous consequences for Latinas/os. n. 58 California's scheme for financing public schools continues to permit serious funding inequalities between predominantly white schools and those attended by Mexican Americans and other minorities. n. 59 Ultimately, Serrano created a right without a remedy. n. 60

Since Serrano, California state financing for education has dropped compared to the spending of most other states. n. 61 In 1994-95, California ranked forty-first of the fifty states in expenditures on education. n. 62 Financing takes on greater significance given the perceived need for bilingual education programs.

*1238 3. Bilingual Education

Limited English proficiency has proven to be an educational obstacle to many Mexican Americans and Mexican immigrants. In addition, they historically have been deprived by the lack of instruction in Latina/o culture and history. In response, Mexican Americans and other minorities have advocated that the public schools provide bilingual and bicultural education.

Over twenty-five years ago, the Supreme Court decided *Lau v. Nichols*. n. 63 In *Lau*, Chinese students unable to speak English brought an action against the San Francisco School District, alleging that the lack of instruction in their native language violated Title VI of the 1964 Civil Rights Act. The Court held that the school district had violated the law prohibiting race discrimination by failing to provide an appropriate curriculum to resolve the English language difficulties. n.

64

Following Lau, in 1976, the California legislature enacted the Chacon-Moscone-Bilingual-Bicultural Education Act. n. 65 This Act required that, among other things, California public schools must teach students in kindergarten through high school in a language they could understand. n. 66 In 1987, however, Governor George Deukmejian ended mandatory bilingual education in California by vetoing a bill that would have continued the Chacon-Moscone Act. n. 67 Although bilingual-bicultural education no longer is mandatory, districts could continue to receive funding for bilingual education if they provided instruction in accordance with the Chacon-Moscone Act. n. 68

***1239 B.** The Latina/o Population Explosion and the Impact on California's Public School Enrollment

The legal developments in public education in California can only be fully understood by considering the changing demographics of the state. California's population is the country's most diverse and will continue to become more so for the foreseeable future. Although people of every race and national origin are contributing to this demographic shift, the growth of the Latina/o population has been nothing less than explosive. Alarming many Anglo Californians, it contributed to their unwillingness to support the state's public schools and to their embrace of Proposition 227. n. 69

"If 'demography is destiny,' then California's destiny is becoming decidedly more Latino." n. 70 Over seven million, or one-third, of the twenty- one million Latinas/os living in the United States reside in the Golden State. n. 71 Latinas/os jumped from 18% of the state's population in 1980 to 26% in 1990. n. 72 Current projections have them comprising 25.8% of the state's population in 2000, 31.6% in 2010, and 36.3% in 2020, n. 73 when they will be poised to become California's "majority minority." n. 74 Most California Latinas/os are of Mexican origin. In 1990, 80% traced their roots to Mexico, followed by 11% from Central and South America. n. 75

Nowhere has Latina/o population growth been more apparent than in Southern California. In Los Angeles County, Latinas/os already make up the majority of all residents, which represents a dramatic increase from 1990, when Latinas/os constituted about ***1240** 38% of the county's population, and 1980, when they amounted to over 27%. n. 76 Indeed, "Los Angeles County alone contains 44% of California's Latinos." n. 77 By 2010, Anglo majorities will have disappeared in at least sixteen local jurisdictions, including the high-growth counties of Fresno, Riverside, and San Bernardino. n. 78

A comparison of the surnames of new home buyers confirms the shift. Nationally, the top four buyers are named Smith, Johnson, Brown, and Jones. Garcia shows up at number seven. But in Los Angeles, the top four buyers are named Garcia, Hernandez, Martinez, and Gonzalez, all Spanish surnames. The grand "American" name Johnson drops to number seven. n. 79

Although high birth rates have contributed to Latina/o population growth,

the most significant factor continues to be high levels of immigration from Latin America. From 1951 to 1960, a majority of immigrants came from Europe. n. 80 But from 1992 to 1995, 39% of all immigrants came from Latin America, followed by Asia at 36.2%. Mexico is the leading country of birth for legal immigrants to California. In fiscal year 1995, the state opened its doors to over 33,000 Mexicans, 20% of all documented immigrants. n. 81

Increased immigration, high birth rates, and "white flight" from urban areas and public schools to suburban areas and private schools, have resulted in Latina/o domination of California's public schools. In 1997-98, of the state's 5.7 million public school students, 2.3 million (40.5%) were Latina/o compared to 2.2 million white (38.8%). African Americans (8.8%) and Asians (8.1%) constituted another million students. n. 82

***1241 SELECTED ENROLLMENT IN CALIFORNIA PUBLIC
SCHOOL BY ETHNIC GROUP, 1981-
82 THROUGH 1997-98 n. 83**

Year	Hispanic	White	Black	Asian
1981-82	25.8%	56.4%	9.9%	5.5%
1987-88	30.1%	50.1%	9.1%	7.3%
1991-92	35.3%	44.5%	8.6%	8.0%
1997-98	40.5%	38.8%	8.8%	8.1%

Similar changes have occurred in the enrollment of limited English proficient ("LEP") students, the vast majority of whom are recent immigrants. From 1982 to 1990, there was an increase of over 430,000 LEP students statewide to 1.4 million -- an increase of 226%. n. 84 LEP students accounted for nearly a quarter of all students enrolled in California public schools. n. 85 For years, the lion's share of LEP enrollment has been Spanish-speaking students of Latina/o origin. In 1993, 47.3% of Latina/o students were LEP; by 1998, this figure had risen to 49.2%. By contrast, in 1993, 44.1% of Asian students were LEP; by 1998,

this figure had dropped to 40.1%. n. 86

As Latina/o numbers in the schools are increasing, they "are rapidly becoming our largest minority group and have been more segregated than African Americans for several years." n. 87 Perhaps the best example of this segregation is in Los Angeles, where public school enrollments have long been majority-Latina/o. The Los Angeles Unified School District was sixty-eight percent Latino in 1996- 97. n. 88

Simultaneous with the Latinas/os increase as a percentage of California public school enrollment, California's spending per pupil *1242 fell precipitously as a percentage of the national average. The trends are reflected graphically in Figures 1 and 2.

Figure 1

Percentage Hispanic Enrollment in California Schools

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IS NOT DISPLAYABLE

Source: See supra note 84.

Figure 2

California Compared to National Average Expenditure Per Pupil

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT
IS NOT DISPLAYABLE

Source: See supra note 84.

*1243 C. Responses to the Demographic Changes: Disadvantaging Latinas/os and

Other Minorities Through Race Neutral Proxies

Many legal and political responses, in addition to decreased funding to the public schools, can be linked to the changing racial *1244 demographics of the State of California. n. 89 As the minority population increased as a proportion of the state's population in the post-World War II period, a variety of laws were passed in response. Consider the last decade.

Passed in 1994, Proposition 187, which if implemented would have barred undocumented immigrant children from the public schools and excluded undocumented immigrants from a variety of public benefits, would have disparately impacted the community of persons of Mexican ancestry in California. n. 90 The initiative galvanized Latina/o voters in the state; they voted

overwhelmingly against a law that Anglo voters decisively supported. n. 91 Proposition 187 drew the attention of Congress, which in 1996, enacted welfare "reform" that eliminated eligibility of many legal, as well as undocumented, immigrants from various public benefits. n. 92 Latina/o immigrants subsequently flocked to naturalize and become citizens in order to avoid the potential impacts of the new laws, as well as other onerous laws punishing noncitizens, and to participate in the political process to avoid such attacks in the future. n. 93

More generally, anti-immigrant sentiment contained a distinctly anti-Mexican tilt as the century came to a close. n. 94 Drastic immigration reforms in 1996 eliminated judicial review of many immigration decisions of the immigration bureaucracy with devastating *1245 consequences for minority communities. n. 95 Deportations of aliens, especially "criminal aliens," meant the removal of many Mexican and Central American immigrants. n. 96 In fiscal year 1998, almost ninety percent of those removed from the United States were from Mexico and Central America. n. 97 At the same historical moment, hate crimes, police harassment, and violence against Latina/o immigrants and citizens increased. n. 98

Other laws with similar racial bents often speak in facially neutral terms. The ever-popular "tough on crime" laws, such as the "three strikes" law, target minority criminals, as does the claim that certain politicians are "soft" on crime, as driven home by the famous Willie Horton advertisements in the 1988 Presidential election. n. 99 Welfare "reform," often directed at women of color, long has been an issue polarizing minorities and whites, thereby forming a wedge between racial groups. n. 100

*1246 Moreover, the political retrenchment with respect to affirmative action directly challenged the status of racial minorities. Proposition 209, dubbed the "California Civil Rights Initiative," in fact dismantled affirmative action programs designed to remedy discrimination against the state's minority population n. 101 and ensure diversity in employment and education. n. 102 The electorate passed this law in the face of strong opposition from Latinas/os and African Americans. n. 103 Coming on the heels of some high profile judicial decisions rolling back affirmative action, n. 104 underrepresented minorities found it difficult to understand Proposition 209 as anything other than an attack directed at them. n. 105

***1247 D. Summary**

In sum, there has been a history of discrimination against Mexican Americans in the California public schools that has evolved with the times. In the later part of the twentieth century, demographic changes in the racial composition of the state, and its schools, have provoked legal and political responses negatively impacting Mexican Americans.

II. PROPOSITION 227: DISCRIMINATION BY PROXY

The Supreme Court has acknowledged that a court deciding whether an initiative violates the Equal Protection Clause may consider "the knowledge of the facts and circumstances concerning [its passage and potential impact]" and "the milieu in which that provision would operate." n. 106 In the final analysis, it becomes clear after consideration of these factors that Proposition 227 at its core concerns issues of race and racial discrimination.

A. Language as an Anglo/Latina/o Racial Wedge Issue

The ability to speak Spanish has long been an issue in California. For much of the state's history, the public schools adhered to an English-only policy, with punishment meted out to children who braved speaking Spanish in the public schools. n. 107 Sensibilities changed, however, and some school districts eventually began to offer bilingual education. n. 108 Nonetheless, "[the debate over bilingual education has raged since the 1960s." n. 109

***1248** In [Lau v. Nichols](#), n. 110 the Supreme Court held that a school district violated provisions of the Civil Rights Act of 1964 that barred discrimination on the basis of race, color, or national origin. The school district violated this act because it failed to establish a program for non- English speaking students. Critical to our analysis, the Court treated non- English speaking ability as a substitute for race, color, or national origin. n. 111 Other cases also have treated language as a proxy for race in certain circumstances. n. 112 This reasoning makes perfect sense. Consider the impact that English-only rules have on Spanish, Chinese, and other non-English speakers. It is clear at the outset that, under current conditions, such regulations will have racial impacts readily understood by proponents. n. 113 "Given the huge numbers of immigrants who enter this country from Asian and Latin American countries whose citizens are not White and who in most cases do not speak English, criticism of the inability to speak English coincides neatly with race." n. 114

***1249** The sociological concept of status conflict also helps explain the intensity of the racial divisiveness generated by laws regulating language usage. n. 115 Anglos and Latinas/os see language as a fight for status in U.S. society. Courts n. 116 and commentators n. 117 have analyzed extensively the Latina/o fight against English only laws and regulations. n. 118 Some vocal critics claim that the alleged demise of the English language in the United States has "splintered" U.S. society. n. 119 "Unfortunately, the English-only movement ... hosts an undeniable component of nativism and anti-Latino feeling." n. 120 Not coincidentally, English-only initiatives have tended to be in states with significant Latina/o, Asian, Native American, or foreign born populations. n. 121

With race at the core, the modern English-only and bilingual

education controversies are closely related. Latinas/os resist the *1250 language onslaught as an attack on their identity. "[Language minorities understand English-only initiatives as targeted at them Spanish ... is related [to affective attitudes of self-identity and self-worth. Thus, language symbolizes deeply held feelings about identity and is deeply embedded in how individuals place themselves within society." n. 122

The intensity of the language debate at times is difficult to comprehend unless one views the laws as symbolic attacks under color of law against minority groups. n. 123 For example, California voters in 1986 passed an advisory initiative that had no legal impact but to declare English the official language of the state of California. n. 124

[Opponents contended the measure conveyed a symbolic message that culturally and linguistically different groups were unwanted. They alleged that the campaign was a thinly veiled form of racism and derived from anti-immigrant sentiment. ... [Supporters argued that it was a common sense way to ensure that California's population remained politically cohesive. n. 125

Importantly, symbolic action of this nature can have concrete long-term impacts. In 1990, Professor Julian Eule observed that recent efforts in Arizona, California, and Colorado declaring English the official language were largely "symbolic and offer little opportunity *1251 for courts to remedy the gratuitous insult" to non-English speakers. n. 126 However, he predicted that such measures would be "invoked in efforts to terminate states' bilingual programs" and that "[attempts to demonstrate that the initiatives are motivated by racial animus [as required by the Supreme Court's Equal Protection jurisprudence will encounter ... proof difficulties" n. 127

Unfortunately, this is precisely what has happened. State English-only laws were followed by English-only regulations in the workplace and, ultimately, attacks such as Proposition 227, on bilingual education. n. 128 And, as we shall see, it proved difficult to establish that states enacted such laws with a discriminatory intent.

B. The Case of Proposition 227

Following closely upon "the gratuitous insult" to Latinas/os transmitted by voter approval of English-only measures in Arizona, California, and Colorado, proponents unveiled Proposition 227 in July 1997 and it came before the California voters in June 1998. Although not identifying Latinas/os by name, the measure's text and context leave little doubt that a motivating factor behind its passage was to attack educational opportunities for Spanish-speaking Latinas/os, especially Mexican immigrants. n. 129

1. The Language of the Initiative

The people targeted by Proposition 227 are identified in the official title of the measure. This title, English Language Education for Immigrant Children, n. 130 was shortened by advocates during the campaign to English for the Children. n. 131 In the "Findings and Declarations," Proposition 227 refers four times to immigrants or immigrant children. Mention is made of "[immigrant parents," who "are eager to have their children acquire a good knowledge of English"; [***1252** n. 132 the state's public school system, which has done "a poor job of educating immigrant children"; n. 133 the "wast[e of financial resources on costly experimental language programs whose failure ... is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children"; n. 134 and the resiliency of "[young immigrant children," who "can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language." n. 135

In a state where Latinas/os dominate the ranks of immigrants, n. 136 public school children, and non-English speakers, references to immigrants necessarily refer primarily to Latinas/os. From 1992 to 1995, the largest group of legal immigrants to California -- almost forty percent -- came from Latin America, n. 137 with more hailing from Mexico than any other country. n. 138 In 1998, Latinas/os constituted over forty percent of California public school children enrolled in kindergarten through twelfth grade. n. 139 According to the 1990 census, among the state's school age children who lived in households where nobody over age fourteen spoke only English or spoke English well, over seventy percent lived in Spanish-speaking homes. n. 140 In the California schools, students not fluent in English are classified as "limited English proficient" or "LEP." n. 141 In 1996, ***1253** over 1.3 million LEP students attended the state's public schools, n. 142 with more than a million being Spanish- speakers. n. 143

In addition to the disparate impact on Latinas/os, the initiative places special burdens on them. First, Proposition 227 proclaims as public policy what every Latina/o immigrant in this country already knows: that English "is the national public language of the United States of America and the State of California ... and is also the leading world language for science, technology, and international business, thereby being the language of economic opportunity." n. 144 This statement is curious in light of the fact that Latina/o immigrants and citizens strive to -- and in fact do -- acquire English language skills. n. 145

Second, the heart of the measure, section 305, eliminates the right of Latina/o parents to choose how their children will acquire English language skills and imposes a one-size-fits-all approach:

[All children in California public schools shall be taught English by being taught in English [This shall require that all children be placed in English language classrooms. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year. n. 146

This flies in the face of this nation's firm tradition of protecting fundamental family decisions, such as the type of education the children should receive, from governmental interference. n. 147 Section 305 denies Latina/o parents the choice of having their children taught English through gradual exposure rather than through mandatory immersion. It also dismisses the views of bilingual education experts, many of whom believe that non- Englishspeaking *1254 children generally need years of study in a second language to become proficient enough to succeed in it academically. n. 148

Finally, section 310, which permits parents to petition for bilingual instruction, requires that the child's parent or guardian provide "written informed consent." n. 149 Such consent, however, cannot be obtained in the time-tested manner, that is, by having the parent sign a consent form. Section 310 instead requires that a "parent or legal guardian personally visit the school to apply for the waiver." n. 150 Imagine the reaction of Anglo parents if a provision of the California Education Code effectively required them, but not African American, Asian, or Latina/o parents, to personally visit a school before their children could opt out of mandatory education programs.

2. Ballot Arguments

Like the language of the initiative, the Proposition 227 campaign often spoke softly and subtly about race. Most campaign materials did not squarely mention race. Opponents feared raising the claim of racial discrimination because of a possible backlash. n. 151 The ballot arguments in the voters pamphlet, however, make clear that the initiative singles out Latinas/os. Despite paying homage to "the best of intentions" with which the architects of bilingual programs began their efforts, n. 152 the proponents sharply criticize those programs and explicitly refer to persons of Latina/o (and no other) descent.

First, the Proposition 227 advocates proclaimed that "[for most of California's non-English speaking students, bilingual education actually means monolingual, SPANISH-ONLY education for the first 4 to 7 years of school." n. 153 No mention is made of the type of education afforded any other group of students, whether African American, Asian, or white. Second, the argument identifies "Latino *1255 immigrant children" as "the principal victims of bilingual education," because they have the highest dropout rates and lowest test scores of any group. n. 154

Third, the proponents of the measure state that "[most Latino parents [support the initiative, according to public polls. They know that Spanish-only bilingual education is preventing their children from learning English by segregating them into an educational dead-end." n. 155 If Proposition 227 were truly race neutral, it would be unnecessary to invoke the alleged political opinions of Latina/o parents. n. 156 Similarly, the rebuttal to the argument against Proposition 227 criticized the measure's opponents as the leaders of organizations

whose members "receive HUNDREDS OF MILLIONS OF DOLLARS annually from our failed system of SPANISH-ONLY bilingual education. " n. 157

3. Statements by Advocates

At first glance, the overt anti-Latina/o sentiments that surfaced during the racially-charged campaigns for Propositions 187 n. 158 and 209 n. 159 seemed to be missing from the Proposition 227 campaign. California Governor Pete Wilson campaigned vigorously for passage of these racially-divisive immigration and affirmative action initiatives and gained the reputation as "the greatest bogeyman for Latinos." n. 160 Quirky Silicon Valley millionaire Ron Unz, who wrote, financed, and directed the campaign for Proposition 227, and had once challenged Pete Wilson for the Republican gubernatorial *1256 nomination, took a different tack. Having opposed Proposition 187, Unz distanced himself from Wilson and other kindred spirits. n. 161

From the outset, the sponsors of Proposition 227 denied any racial animus. Unz claimed to support Latina/o parents who kept their children out of bilingual classes and insisted that they learn English. n. 162 To unveil Proposition 227, he went to Jean Parker Elementary School in San Francisco, n. 163 where nearly a quarter-century earlier the family of Kinney Lau, an immigrant Chinese student, had successfully sued the city's school district to secure Lau's right to receive a bilingual public education. n. 164 In media appearances, Unz asserted that Proposition 227 was neither anti-immigrant nor anti-Latina/o n. 165 and proclaimed that any victory would be morally hollow without Latina/o support. n. 166 All of which prompted some Latinas/os, such as California Assembly Speaker Antonio Villaraigosa, to regard Unz as "a decent guy, although we have different views of the world." n. 167

Three of the four principal spokespersons who joined Unz in sponsoring Proposition 227 were Latinas/os. n. 168 Nevertheless, many *1257 statements made by supporters demonstrated an intent to single out Spanish-speaking Latinas/os in a way that would not be tolerated if aimed at Anglos. Unz, for example, unfavorably compared today's Latina/o immigrants to the European immigrants of the 1920s and 1930s. n. 169 He acknowledged that the only group of children given large quantities of "so-called bilingual instruction are Latino-Spanish speaking children" n. 170 and emphasized that Proposition 227 was "something that will benefit, most of all, California's immigrant and Latino population. " n. 171 Responding to the argument that bilingual education helps immigrant pupils learn better by teaching them respect for their culture, he sharply responded that "[it isn't the duty of the public schools to help children maintain their native culture." n. 172

Emphasizing that she was a Latina supporter of Proposition 227, cosponsor Gloria Matta Tuchman played a similar role for Unz that Ward Connerly, an African American, did for Governor Wilson in the Proposition 209

campaign. n. 173. She exuded the tough-love assimilationism of her father, who taught her that, "Anglos did us a favor by making us learn English. That's why we are so successful." [*1258 n. 174 Although few would question the importance to immigrants of learning English, n. 175 coerced assimilation, which too often calls upon immigrants to renounce their native language and other ties to their heritage, is another matter. n. 176

Ron Unz's comments demonstrate the pro-Proposition 227 campaign's efforts to attack Latinas/os by using Latina/o figureheads: "Gloria [Matta Tuchman is the best possible spokesperson for something like this," Unz said. "Her ethnicity, her gender ... all those things play an important role." n. 177 "Unz called [Jaime Escalante's support a 'tremendous boost' to his campaign. ... Having the most prominent Latino educator serving as honorary chairman really just allows more of these Latino public figures to voice their true feelings on the issue,' Unz said." n. 178 "Unz says he hopes Escalante's support of the campaign will help shake loose support ... from California's GOP leaders. ..." n. 179 Consequently, Latina/o supporters were used to serve anti-Latina/o ends. n. 180

In the end, it is difficult to state how many Proposition 227 supporters were influenced by race. The web page of One Nation/One California, which helped place Proposition 227 on the ballot, candidly admits that anti-Latina/o sentiment added to support for the measure:

There is a strong public perception that many opponents of "bilingual education" are using the issue as a cover for anti-Latino and anti-immigrant views. Unfortunately, this is often true. [Private *1259 polling indicates that anger at "bilingual education" is a leading cause of anti-immigrant sentiment among California Anglos. n. 181

Similarly, Ron Unz "admit[ted] that some of the initiative's supporters are no doubt anti-immigrant." n. 182

Significant contributors to the pro-Proposition 227 campaign also had racial aims. For example, One Nation/One California, which gave over one million dollars to the campaign, n. 183 expressed concern with "ethnic nationalism." n. 184 The California English Campaign, which contributed almost twenty thousand dollars to the supporters of Proposition 227, n. 185 expressed deep concerns with the emerging racial mix:

We are all American, but in recent years, our country has been losing its sense of cohesiveness, of unity and of an American identity. Among the reasons for these losses are a lack of an official language (which in our country must be English), bilingual education (meaning teaching immigrant children in native languages), foreign language ballots, drivers license tests (in scores of languages), rising ethnic nationalism, multilingualism, multiculturalism. n. 186

Race was near the surface of the campaign. Linda Chavez, the conservative Reagan Administration official turned syndicated columnist, attacked A. Jerrold Perenchio, the non-Latino television executive of Univision Communications, a Spanish language media outlet, who contributed \$1.5 million

to defeat Proposition 227. n. 187 A school activist supporting the initiative accused Oakland school *1260 officials of forcing bilingual education on English-speaking African American students. n. 188

To some extent, the harshest anti-Latina/o sentiments were expressed by Proposition 227's advocates after the election. n. 189 The head of the restrictionist Federation for American Immigration Reform, responded to a pro-immigration speech by President Clinton a few days after the measure passed, by stating that "[rather than revitalize the cities, immigrants have driven Americans out of the cities. Native-born Americans are fleeing cities like Los Angeles because of the impact of excessively high levels of immigration. " n. 190 The president of the restrictionist Voice of Citizens Together, who had campaigned for Proposition 187, in effect predicted a race war and suggested that California's demographic changes themselves were the problem: "[Proposition 227 passed overwhelmingly except for the Mexican and the black vote." n. 191

4. The Latina/o Reaction

Even if what the advocates of Proposition 227 said could be considered race neutral, what many Latinas/os actually heard was yet another direct attack on them. The initiative inevitably attracted support from Californians uncomfortable with the growing Latina/o population and lost support among Latinas/os who saw the measure as an extension of Propositions 187 and 209. n. 192 Among bilingual education teachers who worked directly with immigrant Latina/o children, feelings about Proposition 227 hit especially close to home. One first grade teacher said "It's a painful subject. I can't even begin to explain to somebody the pain and fright that children are going to feel if they are thrown into an all-English classroom." n. 193

Recalling the nasty Propositions 187 and 209 campaigns, one prominent attorney for the Mexican American Legal Defense and Education Fund called Proposition 227 "the third in a chain of *1261 anti-immigrant, anti-Latino proposals." n. 194 The vice president for the National Council of La Raza wondered: "Hasn't the state had enough? Do we need another racially charged, sharp-edged debate about a hot-button, political wedge issue?" n. 195 California Congressman Xavier Becerra characterized Proposition 227 as "immigrant-bashing." n. 196 Speaker of the California Assembly Antonio Villaraigosa called the measure "divisive and polarizing." n. 197 State Democratic Party Chair Art Torres called it "another attack" on the Latina/o community. n. 198

5. The Results

At the June 1998 election, Anglos heavily supported Proposition 227 while Latinas/os strongly opposed it. Specifically, although the measure passed by a 61-39% margin, n. 199 Latinas/os, according to exit polls, opposed

the measure by a 63-37%, n. 200 which was contrary to what the pre-election polls had predicted. n. 201 The election results are generally consistent with survey results showing that over 80% of Latinas/os supported bilingual education. n. 202

***1262** In light of what we have detailed above about the anti-Latina/o animus behind Proposition 227, n. 203 the wide split between Anglo and Latina/o voters should surprise no one. What is surprising is that so many never saw the Latina/o rejection coming. Before the election, nearly every poll reportedly showed strong support for Proposition 227 among Latina/o voters. n. 204 In November 1997, before the initiative had qualified for the ballot, a Los Angeles Times poll claimed that 84% of Latinas/os, as contrasted with 80% of whites, supported it. n. 205 Latina/o opposition, claimed U.S. News & World Report, was confined largely to "bilingual-education teachers and Hispanic activists." n. 206 In March 1998, the Field Poll reported that 61% of Latinas/os and 70% of the general population supported Proposition 227. n. 207 In April 1998, The Economist reported that various polls showed that 55% to 65% of Latinas/os and 63% of all voters still favored the initiative. n. 208 Frequent repetition by noted political commentators gave credence to the polls. n. 209 Indeed, the proponents of Proposition 227 in the voter ballot pamphlet distributed to voters stated unequivocally that "[most Latino parents" favored the initiative. n. 210 Ron Unz went so far as to say that the initiative's broad support might unify Californians with "a vote which cuts across party lines, which crosses ideological lines and which crosses lines of ethnicity." n. 211

It was only Latina/o media outlets that accurately documented the coming tide of resentment among Latina/o voters toward Proposition 227. In early 1998, La Opinion, Southern California's leading Spanish newspaper, and a Spanish television station commissioned ***1263** a poll showing that 43% of Latinas/os favored Proposition 227 but 49% opposed it. n. 212

Despite Latina/o voter rejection of Proposition 227, after the election the media continued to report that Latinas/os supported the measure. For at least two days after the vote, the Associated Press, Washington Post, Chicago Tribune, Christian Science Monitor, and Dallas Morning News, all erroneously reported that Latinas/os voted in favor of the measure by wide margins. n. 213 These errors before and after the vote demonstrate that Proposition 227 was conceived, debated, and enacted in an atmosphere of obsession with Latinas/os and their views about the measure.

As the campaign and racially-polarized results demonstrate, Proposition 227 exacerbated already existing racial tensions. n. 214 A horrible attack on a white principal of a predominantly Latina/o school in the Los Angeles area made this point clear. n. 215. Latina/o students at a number of high schools walked out of class. n. 216 Within weeks of Proposition 227's passage, a group of men attacked, kicked, and assaulted two Latinos at a convenience store in Lancaster, California, while yelling "What are you wetbacks doing in here?" n.

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C. The Discriminatory Intent Necessary for an Equal Protection Violation?

In [Valeria G. v. Wilson](#), n. 218 the district court rejected all challenges to Proposition 227. The court specifically held against the plaintiffs on an Equal Protection claim based on the argument that the initiative created a political barrier that disadvantaged racial minorities. n. 219 In so doing, the court emphasized that, even if the *1264 measure had a disproportionate impact on a minority group, the plaintiffs failed to establish the necessary discriminatory intent for an Equal Protection challenge. n. 220 According to the court, the plaintiffs did not attempt to satisfy this "burden [but claimed that they [were not arguing a 'conventional' equal protection claim." n. 221

An amicus curiae brief submitted in *Valeria G.* contended that Proposition 227 violated international law, including the Convention on the Elimination of All Forms of Racial Discrimination, n. 222 thereby "impl[ying that Proposition 227 was motivated by racial or national origin discrimination. " n. 223 Finding that the issue was not properly before it, the court simplistically asserted that a better education for limited English proficient children, was the purpose behind the measure. n. 224

The district court's cursory analysis of whether the voters passed Proposition 227 with a discriminatory intent deserves careful scrutiny.

1. Factors in Discerning a "Discriminatory Intent"

The Supreme Court in [Washington v. Davis](#) n. 225 held that a discriminatory intent was necessary to establish an Equal Protection violation. Although upholding a test used in hiring police officers that had a disparate impact on African Americans, the Court emphasized that the "intent" requirement was not rigid:

[An invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact ... may for all practical purposes demonstrate unconstitutionality because in *1265 various circumstances the discrimination is very difficult to explain on nonracial grounds. n. 226

However, the Court stated unequivocally that impact alone is insufficient to establish an equal protection violation and speculated that such a rule "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." n. 227

Subsequently, the Supreme Court held that an Equal Protection violation can be established with "proof that a discriminatory purpose has been a motivating factor in the decision." n. 228 To make this determination requires:

[A sensitive inquiry into such circumstantial and direct evidence as may be available The impact of the action ... may provide an important starting point. Sometimes a clear pattern, inexplicable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. n. 229

Among the factors that the Court has found appropriate to consider in evaluating whether state action was motivated by an invidious intent is the "historical background," "[the specific sequence of events leading up to the challenged decision," "[departures from the normal procedural sequence," and the "legislative or administrative history." n. 230 Importantly, "[historical evidence is relevant to a determination of discriminatory purpose." n. 231

***1266** The discriminatory intent standard has proven to be a formidable barrier to an Equal Protection claim, although it is not impossible to satisfy. n. 232 It historically has proven particularly difficult to establish discriminatory motive when an institutional body made the challenged decision. n. 233 Consequently, some critics claim that initiatives, often legally bullet-proof, are especially damaging to minority rights. n. 234 History supports this contention. n. 235 Not only racial minorities, but other minorities may be adversely affected. n. 236 The initiative process effectively encourages voters to take out aggressions against an array of minority groups in a way that has become increasingly difficult to do in American political and community life. Indeed, one political scientist suggests that the increase in initiatives in California in the 1990s reflects the anxieties of middle class whites and is linked to increasing minority representation in government. n. 237 Such fear about these sorts of passions swaying the political process help explain why the framers of the Constitution opted for a representative form of government. n. 238

Because of the rigor of the "discriminatory intent" requirement, some courts and advocates, as suggested by Valeria G., appear to have shied away from Equal Protection challenges to invalidate English-only laws passed by the voters in order to strike them down on less demanding grounds. For example, the Arizona Supreme Court invalidated an initiative that required government employees to speak only English on the job on First Amendment grounds. n. 239 Previously, a federal court of appeals had invalidated the same law for similar reasons, n. 240 only to have the case dismissed by the Supreme Court as moot. n. 241 In so doing, the court of appeals expressly acknowledged the national origin impacts of the English-only law. n. 242

***1268 2. Discriminatory Intent and Proposition 227**

Because the evidence establishes that race was "a motivating

factor" n. 243 behind the passage of Proposition 227, the law violates the Equal Protection Clause of the Fourteenth Amendment. n. 244 Language was employed as a proxy for race. Race, although not explicitly raised, can be seen by the near exclusive focus on the Spanish language, the history of discrimination against Mexican Americans in California, including the increase in anti-Latina/o and anti-immigrant animus in the 1990s, statements by the advocates of the initiative, and the racially-polarized vote. Race obviously was "a motivating factor" behind the passage of Proposition 227.

A judicial finding that Proposition 227 violates the Equal Protection Clause would be consistent with the landmark decision of [Brown v. Board of Education](#). n. 245 In Brown, Chief Justice Warren wrote that segregation "generates a feeling of inferiority as to [the status [of African Americans in the community that may affect their hearts and minds in a way unlikely ever to be undone." n. 246 Proposition 227, by banning teaching in the native language of Spanish speakers, creates a similar stigma for Latinas/os. It suggests that Spanish and other languages are inferior to English and not fit for education. n. 247

***1269 III. MEXICAN AMERICANS AND THE FOURTEENTH AMENDMENT**

Mexican Americans and Latinas/os historically have suffered intentional discrimination in the state of California, as well as other states. n. 248 Over the years, discriminators have used a number of proxies, some more transparent than others, to discriminate against Latinas/os. n. 249

The proxies for different minority groups may vary. n. 250 For example, the "alien land" laws prevalent in many states early in the twentieth century discriminated against persons of Japanese ancestry in a facially neutral way by prohibiting real property ownership by persons "ineligible to citizenship," at a time when Japanese were the largest nonwhite immigrant group ineligible for naturalization. n. 251 Opposition to low income housing in certain circumstances may serve as cover for discrimination against African Americans. n. 252 In both instances, a proxy for race is employed to discriminate on the basis of race. To this point, the Supreme Court has not generally analyzed the issue by utilizing the proxy concept. In applying the antidiscrimination laws, courts have held that an employer cannot be permitted to use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination. An example is using gray hair as a proxy for age: there are young people with gray hair (a few), but the fit between age and gray hair is sufficiently close that they would form the basis for invidious classification. n. 253

***1270** The Supreme Court has emphasized that an "employer cannot rely on age as a proxy for ... characteristics such as productivity" and recognized that "[pension status may be a proxy for age." n. 254 Indeed, in [Hunter v. Underwood](#), n. 255 the Court understood that Alabama's constitutional

provision disenfranchising persons convicted of "any crime of moral turpitude" in effect served as a proxy for race and therefore was invalid under the Equal Protection Clause.

Immigration status is often used in today's public discourse as a proxy for race. n. 256 For example, attacks on "illegal aliens" often may be used as a code, particularly in the Southwest, for Mexican immigrants and Mexican American citizens. n. 257 This is because Mexican immigrants currently constitute about fifty percent of the undocumented population in the United States. n. 258 Attacks on "illegal aliens" therefore tend to be directed at Mexican immigrants. Similarly, efforts to deport "criminal aliens" or others who have violated the criminal laws tend to adversely affect minority communities. This is because, in the post-1965 period, most of the lawful immigrants *1271 have come from Asia and Latin America. n. 259 Thus, an attack on the "criminal alien," and, similarly, the "alien" welfare abuser, may translate into attacks on immigrants of color.

In the case of Proposition 227, voters discriminated against Mexican Americans and Mexican immigrants by proxy. Through targeting language when the largest bilingual education programs in California by far were for Spanish speakers, n. 260 the initiative was able to negatively affect a discrete and insular racial minority. n. 261 A growing Latina/o population in the California public schools results in reduced financial support, a reduced commitment to bilingual education, and, ultimately to the prohibition of such education. n. 262 Latinas/os were the known and actual victims. n. 263 A racially-polarized vote confirmed that the measure used language as a proxy for race. n. 264

Current Equal Protection doctrine and the discriminatory intent requirement, however, make it difficult for Latinas/os to establish constitutional violations. Mexican Americans historically have found it difficult to protect their rights under the Equal Protection Clause of the Fourteenth Amendment. n. 265 For example, in [Hernandez v. State](#), n. 266 a Mexican American defendant challenged a murder conviction on the ground that Mexican Americans had been excluded from serving on the jury. Hernandez relied on case law holding that the government violated the Equal Protection Clause by excluding African Americans from serving on juries. The Texas Supreme Court, however, held that the Fourteenth Amendment exclusively protected African Americans. n. 267 In this regard, the *1272 court held that Mexican Americans are "white." n. 268 Because the juries that indicted and convicted Hernandez were composed of white persons and therefore members of his own race, the court refused to find an Equal Protection violation. n. 269

The Supreme Court reversed and held in [Hernandez v. Texas](#) n. 270 that the Equal Protection Clause covered "persons of Mexican descent." The Court, however, only extended a weak form of protection to Mexican Americans. The Fourteenth Amendment covered Mexican Americans only in areas where

they were the targets of local discrimination. n. 271 Thus, in areas where Mexican Americans could not prove that they suffered from such discrimination, they were not entitled to invoke the Equal Protection Clause. n. 272 Consequently, Mexican Americans found it difficult to assert rights under the Fourteenth Amendment, in part because they lacked funds to satisfy the evidentiary burden of establishing the existence of local prejudice. n. 273

The view that the Fourteenth Amendment only limited discrimination against African Americans may well be consistent with the original understanding of its framers. As the Supreme Court in the Slaughterhouse Cases explained:

[No one can fail to be impressed with the one pervading purpose found in [all the Reconstruction Amendments; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied n. 274

***1273** Indeed, the Court stated that the Fourteenth Amendment dealt exclusively with discrimination against African Americans: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. " n. 275

The idea that the structure of civil rights law historically focused on African Americans and Whites has been termed the "Black-White binary." n. 276 Although some argue that the Constitution must be interpreted in accordance with the intent of the Framers, n. 277 a dualistic approach to antidiscrimination law is clearly outdated. As famous sociologist Nathan Glazer has proclaimed, "[we are all multiculturalists now." n. 278 Justice Oliver Wendell Holmes explained in *Missouri v. Holland* that a constitutional issue "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago We must consider what the country has become" in interpreting the Constitution. n. 279 Thus, the ***1274** courts should interpret the Equal Protection Clause in a way to fully protect Mexican Americans and other minority groups as well as African Americans and whites.

Some contend that efforts to expand beyond the Black-White dichotomy are "reactionary." n. 280 However, a Black-White view of the Fourteenth Amendment seems to have been the position of its framers. Interpreting the Constitution by focusing on the framers' intent is traditionally viewed as a conservative position. n. 281 Moving to a multiracial approach to reflect our changing society represents a proper modern interpretation of the Equal Protection Clause.

The expansion of the law's protection raises a number of difficult

issues. As we progress historically away from the hey-day of Jim Crow, racial discrimination ordinarily is no longer as blatant and obvious as it once was. n. 282 With respect to Latinas/os, discrimination is often conducted by proxy -- targeting characteristics such as the Spanish language, as a surrogate for discriminating against Latinas/os. To provide legal protection to Latinas/os, and in order to keep pace with the changing nature of racial discrimination, the Fourteenth Amendment must be interpreted in a way to cover discrimination by proxy.

Ultimately, interpreting the Constitution in a way that is sensitive to discrimination by proxy would benefit all minority groups. Various subordinated peoples -- African Americans, Asian Americans, Native Americans, Latinas/os, women, lesbians, gay men, and others n. 283 -- are discriminated against through different proxies. As sociologists have recognized, appeals to "law and order" and for a ***1275** return to "traditional" values can "effectively remarginalize minority cultures without ever expressly invoking issues of race." n. 284

Once this is considered, to demand that plaintiffs establish discriminatory intent -- that is, some secret racist mental state -- to establish unlawful race discrimination appears incoherent. Legal theorists who have investigated the "grammar" of the term "intent" have shown that when referring to intent, one does not seek to describe a mental event, n. 285 but is simply asking for a justification for "fishy or untoward actions." n. 286 The Supreme Court was mistaken to require plaintiffs to establish intent as a prerequisite for proving an Equal Protection violation. In so doing, the Court saddled racial minorities with an incoherent, often impossible task.

Moreover, it was unnecessary for the Supreme Court to establish the intent requirement. As the Court itself emphasized in *Brown v. Board of Education*, "[segregation is unconstitutional not because it is intended to hurt blacks but because, whatever its intent, it relegates them as a group to a permanently subservient position." n. 287 As many have argued, this anticaste principle deserves greater valence in constitutional analysis. n. 288

CONCLUSION

This Article contends that Proposition 227, and possibly related measures, discriminates against persons of Mexican ancestry in violation of the Equal Protection Clause of the Fourteenth Amendment. California's history, together with the text of the initiative, the arguments of the proponents, the campaign, and the racially polarized election results, all demonstrate this to be true. n. 289

***1276** If the analysis is less than persuasive, then one must question the "discriminatory intent" requirement itself. Its coherence is far from clear when hundreds of thousands of voters cast ballots and discerning an "intent"

is less real than imaginary. Like other discriminatory measures of the past, n. 290 history books will record Proposition 227's discrimination by proxy as race-based. n. 291 One worries when legal doctrine requires the difficult efforts at historical reconstruction of "intent" as seen in this Article. Legal doctrine that obscures social reality ultimately loses credibility. One almost feels like philosopher Ludwig Wittgenstein upon completion of his monumental tract:

My propositions serve as elucidations in the following way: anyone who understands me eventually recognizes them as non-sensical, when he has used them -- as steps -- to climb up beyond them. (He must, so to speak, throw away the ladder after he has climbed up it) He must transcend these propositions and then he will see the world aright. n. 292

NOTES

1. Don Terry, Bilingual Education Facing Toughest Test, N.Y. TIMES, Mar. 10, 1998, at A1 (quoting Antonia Hernandez, Executive Director and General Counsel for the Mexican American Legal Defense and Educational Fund, commenting on Proposition 227).

2. See CAL. SECRETARY OF STATE, CALIFORNIA VOTER INFORMATION GUIDE PRIMARY ELECTION: JUNE 2, 1998 BALLOT PAMPHLET 75-76 (1998) (reprinting text of initiative) [hereinafter BALLOT PAMPHLET].

3. See [Valeria G. v. Wilson](#), 12 F. Supp.2d 1007, 1012 (N.D. Cal. 1998); see also [Doe v. Los Angeles Unified Sch. Dist.](#), 48 F. Supp.2d 1233 (C.D. Cal. 1999) (certifying class action challenging school district's implementation of Proposition 227 on federal statutory grounds); [McLaughlin v. State Bd. of Educ.](#), 75 Cal. App. 4th 196, 89 Cal. Rptr. 2d 295 (1999) (addressing parental waiver requirement under initiative); Ballot Measures, CALIF. J., July 1, 1998 (summarizing campaigns over various California initiatives on June 1998 ballot, including Proposition 227).

4. In [Hernandez v. Texas](#), 347 U.S. 475 (1954), the Supreme Court first squarely held that the Equal Protection Clause's protections may apply to persons of Mexican ancestry. See Ian F. Haney Lopez, [Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory](#), 85 CAL. L. REV. 1143 (1997) (analyzing significance of Hernandez in showing how persons of Mexican ancestry were treated as separate race); George A. Martinez, The Legal Construction of Race: Mexican-Americans and Whiteness, 2 HARV. LATINO L. REV. 321, 332 (1997) (contending that Hernandez imposes artificially high standards on Mexican Americans seeking protection of Equal Protection Clause); see also *infra* text accompanying notes 265-73 (discussing Hernandez).

5. See Christopher Edley, Jr., [Color at Century's End: Race in Law, Policy, and Politics](#), 67 FORDHAM L. REV. 939, 950, 951 (1998) ("[There is lurking just beneath the surface [of the bilingual education debate] a subtext about culture,

color, and race."); see also *infra* text accompanying notes 129-217, 243-47 (analyzing this issue in context of Proposition 227). This Article focuses on how Proposition 227 discriminates against Latinas/os in California. Needless to say, other groups composed in part of non-English speakers, particularly Asian Americans, may be adversely impacted in ways similar to Latinas/os by the elimination of bilingual education. See Symposium, [Rethinking Racial Divides -- Panel on Affirmative Action](#), 4 MICH. J. RACE & L. 195, 210-11 (1998) (comments of Marina Hsieh) (noting negative impact that Proposition 227 will likely have on Asian Americans); see also Jim Chen, [Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny](#), 59 OHIO ST. L.J. 811, 856-60 (1998) (collecting data showing great language diversity in United States). Indeed, Native Americans in California, often not thought of as linguistic minorities, may be adversely affected. See Scott Ellis Ferrin, [Reasserting Language Rights of Native American Students in the Face of Proposition 227 and Other Language- Based Referenda](#), 28 J.L. & EDUC. 1 (1999). In our analysis, we recognize that the initiative "will not necessarily coincide with color lines" and will affect "white immigrants from Eastern Europe" as well as Latinas/os. Peter J. Spiro, [Questioning Barriers to Naturalization](#), 13 GEO. IMMIGR. L.J. 479, 492 n. 63 (1999) (discussing English language requirement for naturalization). However, language, under particular facts and circumstances, can serve as a proxy for race, which we establish in this Article.

6. We use the term "race" here interchangeably with national origin, based on the view that race, like national origin, is a social construction. See generally MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (2d ed. 1994) (elaborating on theory of social construction of race).

7. See Christopher David Ruiz Cameron, [How the Garcia 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, 1354 (1998) ("Spanish language is central to Latino identity."); Deborah A. Ramirez, [Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service](#), 1993 WIS. L. REV. 761, 763 n. 8 (stating that "being Latino and speaking Spanish are 'intrinsically interwoven' because in the Latino community, language is an affirmative badge of ethnic identity") (citations omitted); see also [Hernandez v. New York](#), 500 U.S. 352, 371-72 (1991) ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."); Berta Esperanza Hernandez-Truyol, *Las Olvidadas -- Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 IOWA J. GENDER, RACE & JUSTICE 353, 379-81 (1998) (analyzing how marginalization of Spanish language in U.S. adversely affects Latinas/os). For this reason, "[language rights have been a central issue in LatCrit theory since its inception. " Elizabeth M.

Iglesias, Foreword: [Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evaluation of LatCrit Theory and Community](#), 53 [U. MIAMI L. REV.](#) 575, 646 (1999) (footnote omitted).

The Article employs the term Latina/o, rather than "Hispanic," because it "conveys an alignment with people of color in [the United States, as well as the embrace of the non-Spanish, or indigenous elements that help to configure our present-day communities." Elizabeth M. Iglesias & Francisco Valdes, Afterword -- [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, 569 (1998).

8. See *infra* text accompanying notes 218-24 (analyzing litigation).

9. [426 U.S. 229 \(1976\)](#).

10. See, e.g., Theodore Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 [N.Y.U. L. REV.](#) 36 (1977); Barbara J. Flagg, "Was [Blind, But Now I See](#)": [White Race Consciousness and the Requirement of Discriminatory Intent](#), 91 [MICH. L. REV.](#) 953 (1993); Alan D. Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 [MINN. L. REV.](#) 1049, 1114-18 (1978); Charles R. Lawrence III, [The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism](#), 39 [STAN. L. REV.](#) 317 (1987); Daniel R. Ortiz, [The Myth of Intent in Equal Protection](#), 41 [STAN. L. REV.](#) 1105 (1989); see also Sheila Foster, [Intent and Incoherence](#), 72 [TUL. L. REV.](#) 1065 (1998) (offering a more flexible "intent" standard to be applied by the Court); Andrew D. Leipold, [Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law](#), 73 [CHI.-KENT L. REV.](#) 559, 551-63 (1998) (summarizing difficulties of proving discriminatory intent in criminal law enforcement). See generally Theodore Eisenberg & Sheri Lynn Johnson, [The Effects of Intent: Do We Know How Legal Standards Work?](#), 76 [CORNELL L. REV.](#) 1151 (1991) (studying negative impacts of intent requirement on plaintiffs trying to prove Equal Protection claims). For analysis of the case law and literature in the area with a particular focus on lawmaking by initiative, see Sylvia R. Lazos Vargas, [Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship](#), 60 [OHIO ST. L.J.](#) 399 (1999) [hereinafter Lazos, *Judicial Review* and Sylvia R. Lazos Vargas, [Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity](#), 58 [MD. L. REV.](#) 150, 161-77 (1999).

11. In a similar vein, Professor Girardeau Spann contends that voters passed California Proposition 209, which bars consideration of race and gender in state programs, with a discriminatory intent. See Girardeau A. Spann, [Proposition 209](#), 47 [DUKE L. J.](#) 187, 300-14 (1997); see also Erwin Chemerinsky, [The Impact of the Proposed California Civil Rights Initiative](#), 23 [HASTINGS CONST. L.Q.](#) 999 (1996) (explaining legal ramifications of initiative); Neil Gotanda et al., [Legal Implications of Proposition 209 -- The California Civil Rights Initiative](#), 24 [W.](#)

ST. L. REV. 1 (1996) (same); Eugene Volokh, The [California Civil Rights Initiative: An Interpretive Guide](#), 44 UCLA L. REV. 1335 (1997) (same). The courts upheld the measure, which was challenged on another sort of Equal Protection theory. See, e.g., [Coalition for Econ. Equity v. Wilson](#), 122 F.3d 692 (9th Cir. 1997), cert. denied, 522 U.S. 963 (1997); see also Vikram D. Amar & Evan H. Caminker, [Equal Protection, Unequal Political Burdens, and the CCRI](#), 23 HASTINGS CONST. L.Q. 1019 (1996) (articulating Equal Protection theory based on [Hunter v. Erickson](#), 393 U.S. 385 (1982), line of cases that initiative created political structure that racial minorities will find difficult to modify). This Article focuses on the discriminatory intent approach rather than the "political structure" Equal Protection challenge. In making this argument, we necessarily disagree with the characterization that proving that Proposition 227 was passed with a discriminatory intent is "futile." See Nirej Sekhon, Note, [A Birthright Rearticulated: The Politics of Bilingual Education](#), 74 N.Y.U. L. REV. 1407, 1442 (1999).

12. See *infra* text accompanying notes 129-217. Proving a discriminatory intent is made all the more difficult by the fact that two Latina/o intellectuals popularized by the media have ardently advocated the elimination of bilingual education. See LINDA CHAVEZ, *OUT OF THE BARRIO: TOWARD A NEW POLITICS OF HISPANIC ASSIMILATION* (1991); RICHARD RODRIGUEZ, *HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ* (1981).

13. See [Smith v. Boyle](#), 144 F.3d 1060, 1064-65 (7th Cir. 1997) (Posner, C. J.). Such historical research, of course, is not impossible. See, e.g., Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace -- and Denial -- of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 704 (1999) (documenting history of discrimination against racial minorities in Colorado to demonstrate the need for remedial affirmative action). Our point is that such research is easier to conduct earlier as opposed to later, after memories have faded and documentary evidence has been lost.

14. Many commentators discuss discrimination by proxy. See, e.g., Larry Alexander, [What Makes Wrongful Discrimination Wrong? Bias, Preferences, Stereotypes, and Proxies](#), 141 U. PA. L. REV. 149 (1992); Larry Alexander & Kevin Cole, [Discrimination by Proxy](#), 14 CONST. COMMENTARY 453 (1997); Deborah Hellman, [Two Types of Discrimination: The Familiar and the Forgotten](#), 86 CAL. L. REV. 315 (1998); see also Alfredo Mirande, ["Now that I Speak English, No Me Dejan Hablar \["I'm Not Allowed to Speak": The Implications of Hernandez v. New York\]](#), 18 CHICANO-LATINO L. REV. 115, 132 (1996) (arguing "that the exclusion of bilingual Latino jurors [at issue in [Hernandez v. New York](#), 500 U.S. 352 (1991)] is racial discrimination not only because language and race are inextricably linked but because bilingualism is itself an immutable characteristic"); Susan Kiyomi Serrano, Comment, *Rethinking Race for Strict Scrutiny Purposes: Yniguez and the Racialization of English Only*, 19

HAW. L. REV. 221 (1997) (contending that, under certain circumstances, concept of "race" may include language and that, in those circumstances, courts should strictly scrutinize language regulation).

15. Richard Delgado & Jean Stefancic, Critical Race Theory: Past, Present, and Future, 51 CURRENT LEG. PROBS. 468, 491 (1998).

16. See generally RODOLFO F. ACUNA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 107-33 (3d ed. 1988); TOMAS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994); LEONARD PITT, THE DECLINE OF THE CALIFORNIOS: A SOCIAL HISTORY OF THE SPANISH SPEAKING CALIFORNIANS, 1846- 1890 (1996).

17. See generally NEIL FOLEY, THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE (1997); DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986 (1987).

18. See ACUNA, *supra* note 16, at 82-103.

19. See [Brown v. Board of Educ., 347 U.S. 483, 494 \(1954\)](#) ("[Separating children from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.").

20. Several sources recount these facts. See, e.g., ROBERT R. ALVAREZ JR., FAMILIA: MIGRATION AND ADAPTATION IN BAJA AND ALTA CALIFORNIA, 1800-1975, at 153-55 (1987); FRANCISCO E. BALDERRAMA, IN DEFENSE OF LA RAZA 58-61 (1982); Robert R. Alvarez, Jr., The Lemon Grove Incident: The Nation's First Successful Desegregation Case, 32 J. San Diego Hist. 116 (1986); The Lemon Grove Incident (The Cinema Guild, 1985).

21. See generally Jorge C. Rangel & Carlos M. Alcala, Project Report, De Jure Segregation of Chicanos in Texas Schools, 7 HARV. C.R.-C.L. L. REV. 307 (1972) (documenting segregation of Mexican Americans in public schools); Guadalupe Salinas, Mexican Americans and the Desegregation of Schools in the Southwest, 8 HOUS. L. REV. 929 (1971) (same).

22. [161 F.2d 774 \(9th Cir. 1947\)](#).

23. [Id. at 776](#).

24. [163 U.S. 537 \(1896\)](#) (upholding segregation on passenger trains); see also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 452 (4th ed. 1991) (discussing cases upholding state laws authorizing segregation).

25. See [Mendez, 161 F.2d at 779-81](#).

26. See [id. at 780-81](#).

27. See [id. at 781](#) (noting that California could legislatively authorize this type of segregation).

28. See [id. at 784](#). The court stated that:

English language deficiencies of some of the children of Mexican ancestry ... may justify differentiation by public school authorities in the exercise of their

reasonable discretion as to the pedagogical methods of instruction to be pursued with different pupils, and foreign language handicaps may be to such a degree in the pupils in elementary schools as to require separate treatment in separate classrooms. *Id.*

29. *Id.* at 780.

30. See JULIE LEININGER PYCIOR, *LBJ & MEXICAN AMERICANS* 53 (1997).

31. [Mendez, 161 F.2d at 780.](#)

32. [347 U.S. 483 \(1954\)](#); see also DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 544 (3d ed. 1992) ("As with other landmark cases, the Supreme Court's 1954 decision in *Brown v. Board of Education* has taken on a life of its own, with meaning and significance beyond its facts and perhaps greater than its rationale"); Constance Baker Mottley, *The Historical Setting of Brown and Its Impact on the Supreme Court's Decision*, 61 *FORDHAM L. REV.* 9, 13 (1992) (stating that *Brown's* "new approach to attacking segregation, per se, in education had been inspired by *Mendez*").

33. See [Brown, 347 U.S. at 495.](#)

34. [488 F.2d 579 \(9th Cir. 1973\)](#), cert. denied, [416 U.S. 951 \(1974\)](#).

35. See [id. at 580, 584.](#)

36. See [id. at 585.](#)

37. [413 U.S. 189 \(1973\)](#).

38. [Soria, 488 F.2d at 585.](#) On remand, Judge Pregerson found sufficient evidence of intentional segregation to justify relief. See [Soria v. Oxnard Sch. Dist., 386 F. Supp. 539 \(C.D. Cal. 1974\)](#).

39. See [Keyes, 413 U.S. at 212](#) ("[We have no occasion to consider in this case whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of finding that school authorities have committed acts constituting de jure segregation. "); [Arthur v. Nyquist, 415 F. Supp. 904, 912 n. 10 \(W.D.N.Y. 1976\)](#) ("Since the plaintiffs in *Keyes* pleaded and proved de jure segregation, the Supreme Court was not forced to decide whether merely proof of de facto segregation constitutes cognizable legal wrong."); The Supreme Court, 1973 *Term*, 88 *HARV. L. REV.* 43, 70 n. 58 (1974) (stating "constitutionality of de facto segregation" was "explicitly left open in *Keyes*"); Comment, *Public School Segregation and the Contours of Unconstitutionality: The Denver School Board Case*, 45 *U. COLO. L. REV.* 457, 475-76 (1974) ("The questions as to the necessity of proving intent [to segregate ... were ... never at issue in the Supreme Court's consideration of *Keyes* [The distinction between de jure and de facto segregatory conditions was never really at issue in the Court's consideration of *Keyes*"); see also Rachel F. Moran, [Milo's Miracle, 29 CONN. L. REV. 1079, 1085-87 \(1997\)](#) (discussing implications of *Keyes*).

40. See generally RICHARD DELGADO & JEAN STEFANCIC, *FAILED REVOLUTIONS: SOCIAL REFORM AND LIMITS OF LEGAL IMAGINATION* (1994); GERALD n. ROSENBERG, *THE HOLLOW HOPE:*

CAN THE COURTS BRING ABOUT SOCIAL CHANGE? (1991); GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1993).

41. See Peter Enrich, [Leaving Equality Behind: New Directions in School Finance Reform](#), 48 VAND. L. REV. 101, 123-24 (1995); see also Martha Minow, [Reforming School Reform](#), 68 FORDHAM L. REV. 257 (1999) (contending that education advocates should rethink various strategies to ensure quality education in public schools). For analysis of the role of race in the success of school finance litigation, see James E. Ryan, The [Influence of Race in School Finance Reform](#), 98 MICH. L. REV. 432 (1999).

42. [5 Cal. 3d 584, 96 Cal. Rptr. 601 \(1971\)](#).

43. [411 U.S. 1 \(1973\)](#).

44. See [Serrano](#), 5 Cal. 3d at 589-90, 96 Cal. Rptr. at 604.

45. [Id.](#) at 604, 96 Cal. Rptr. at 615.

46. [Id.](#) at 608-09, 96 Cal. Rptr. at 618.

47. See [id.](#) at 609-15, 96 Cal. Rptr. at 619-23.

48. See [id.](#) at 614-15, 96 Cal. Rptr. at 623.

49. [411 U.S. 1 \(1973\)](#).

50. See [id.](#) at 28, 37.

51. See [id.](#) at 55. After Rodriguez, efforts shifted to state law to ensure educational opportunity through school finance litigation. See Enrich, *supra* note 41, at 128-93 (analyzing developments in school finance litigation under state law after Rodriguez).

52. [18 Cal. 3d 728, 135 Cal. Rptr. 345, 374 \(1976\)](#), cert. denied sub nom., [Clowes v. Serrano](#), 432 U.S. 907 (1977).

53. See William A. Fischel, [How Serrano Caused Proposition 13](#), 12 J.L. & POL. 607, 611 (1997); see also Martha S. West, Equitable Funding of Public Schools Under State Law, 2 IOWA J. GENDER, RACE & JUST. 279, 299-309 (1999) (discussing how Serrano was seriously undermined by Proposition 13 and analyzing developments in other states to same effect).

54. See Fischel, *supra* note 53, at 611.

55. [Cal. Const. art. XIII A, § § 1-6](#).

56. See Fischel, *supra* note 53, at 612. See generally ROBERT KUTTNER, REVOLT OF THE HAVES (1980) (discussing genesis of Proposition 13).

57. Fischel, *supra* note 53, at 613.

58. See RODOLFO F. ACUNA, ANYTHING BUT MEXICAN: CHICANOS IN CONTEMPORARY LOS ANGELES 91-93 (1996).

59. See generally Hanif S. P. Hirji, Note and Comment, [Inequalities in California's Public School System: The Undermining of Serrano v. Priest and the Need for a Minimum Standards System of Education](#), 32 LOY. L. A. L. REV. 583 (1999) (analyzing how school financing perpetuates educational inequality).

60. See Note, [Unfulfilled Promises: School Finance Remedies and State Courts](#), 104 HARV. L. REV. 1072 (1991). States other than California have

experienced similar difficulties in ensuring equitable public school financing schemes. See, e.g., [Edgewood Ind. Sch. Dist. v. Meno, 893 S.W.2d 450 \(Tex. 1995\)](#) (reviewing efforts of Texas legislature to ensure compliance with finding that school financing system violated various provisions of Texas Constitution).

61. See Fischel, *supra* note 53, at 613 ("Throughout the 1980s, California was last or near last in the country in terms of the percent of personal income spent on public education. What is not often noticed is that the decline began soon after Serrano.") (footnote omitted); see also *infra* notes 82-88 (providing statistics on rapid decline in California's spending per pupil in public schools as Latina/o percentage of student body increased).

62. See Hirji, *supra* note 59, at 596 (citing PAUL M. GOLDFINGER, REVENUES AND LIMITS: A GUIDE TO SCHOOL FINANCE IN CALIFORNIA 8 tbl.11 (1997)).

63. [414 U.S. 563 \(1974\)](#). See generally JAMES CRAWFORD, BILINGUAL EDUCATION: HISTORY, POLITICS, THEORY AND PRACTICE (3d ed. 1995) (outlining history of bilingual education in United States); U.S. Comm'n on Civil Rights, Equal Educational Opportunity and Nondiscrimination for Students with Limited English Proficiency: Federal Enforcement of Title VI and Lau v. Nichols (1997) (summarizing efforts to enforce Lau v. Nichols). It is at best uncertain how effective Lau v. Nichols has been in protecting language minorities in public education. See [Flores v. Arizona, 48 F. Supp.2d 937 \(D. Ariz. 1999\)](#) (addressing in 1999 motion in action filed in 1992 based on Lau).

64. See [Lau, 414 U.S. at 568](#).

65. See [Cal. Educ. Code § § 52160-52178](#) (Deering 1987); see also Rachel F. Moran, Bilingual Education, Immigration, and the Culture of Disinterest, 2 Iowa J. Gender, Race & Just. 163, 169-75 (1999) (tracing recent history of bilingual education in California and other states).

66. See [Cal. Educ. Code § 52165](#) (Deering 1987).

67. See Stuart Biegel, The [Parameters of the Bilingual Education Debate in California Twenty Years After Lau v. Nichols](#), 14 CHICANO-LATINO L. REV. 48, 54 (1994).

68. See [id. at 55](#).

69. See Good Morning America (ABC television broadcast, May 31, 1998) (remarks of Professor Raul Hinojosa-Ojeda) ("Proposition 227 is basically a reaction against the fact that there's a demographic change occurring in the state, and that some people are very anxious about what this demographic change will mean. "); cf. Spann, *supra* note 11, at 312 (arguing that demographic changes -- i.e., that "whites will soon cease to be a majority in the state of California" -- strengthened case for finding of discriminatory intent underlying passage of Proposition 209, outlawing various affirmative action programs under state law).

70. FREDRIC C. GEY ET AL., CALIFORNIA LATINA/LATINO DEMOGRAPHIC DATA BOOK 1 (1993).

71. See *id.*

72. See *id.* at 1, 7, tbl.1-1.

73. See RAND California, Population Projections <<http://www.ca.rand.org/cgi-bin/annual.cgi>> (visited Apr. 24, 2000) (on file with author).

74. See generally DAVID E. HAYES-BAUTISTA, *NO LONGER A MINORITY: LATINOS AND SOCIAL POLICY IN CALIFORNIA* (1992).

75. See GEY ET AL., *supra* note 70, at 9 tbls.1-3 & fig.1-3. Latinas/os, African Americans, and Asians together accounted for 32% of the state's population in 1980 (19% Latina/o, 8% African American, and 5% Asian) and 44% in 1990 (25% Latina/o, 7% African American, and 9% Asian). See *id.* at 8 fig.1- 2.

76. See *id.* at 21 tbl.2-5.

77. JON STILES ET AL., *CALIFORNIA LATINO DEMOGRAPHIC DATABOOK 2-4* (California Policy Seminar publication 1998).

78. See RAND California, *supra* note 73.

79. See *id.* ("New Home Buyers: Most Common Surnames" table).

80. See *id.* at 2 ("Then and Now: Origins of Legal Immigrants" table).

81. See Julie Hoang, California Legal Immigrants -- Federal Fiscal Year 1995, *CAL. DEMOGRAPHICS*, Winter 1997, at 1, 6 (Cal. Dep't of Finance newsletter).

82. See GEY ET AL., *supra* note 70, at 8 fig.1-2.

83. Cal. Dep't of Educ., Enrollment in California Public Schools by Ethnic Group, 1981-82 through 1997-98, at 1, available in <<http://www.cdc.ca.gov/demographics/-reports/statewide/ethstud.htm>> (visited Apr. 10, 1999) (on file with author). In 1996-1997, Latinas/os constituted 39.7% with whites at 39.5% and Asians 11.2%, of public school enrollments on California. See GARY ORFIELD & JOHN T. YUN, *RESEGREGATION IN AMERICAN SCHOOLS* 7 tbl.3 (1999).

84. See Cal. Dep't of Educ., Number of Limited-English-Proficient (LEP) Students and Students Redesignated as Fluent-English-Proficient (LEP) in California Public Schools, 1982 Through 1998, at 1, available in <<http://www.cdc.ca.gov/demographics/reports/-statewide/rees98/htm>> (visited Apr. 10, 1999) (on file with author). Portions of this information are reproduced graphically below, in Figures 1 and 2.

85. See *id.* at 1 (reporting that in 1998 Hispanic LEP students constituted 24.6% of all enrollment).

86. *Id.*

87. ORFIELD & YUN, *supra* note 83, at 2.

88. See *id.* at 8 tbl.4.

89. See *supra* text accompanying notes 69-88.

90. See **Kevin R. Johnson**, [Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class](#), 42 *UCLA L. REV.* 1509 (1995); **Kevin R. Johnson**, An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal

Irrelevance of Race, 70 WASH. L. REV. 629 (1995) [hereinafter Johnson, Immigration Politics. A district court enjoined this measure's implementation. See [League of United Latin American Citizens v. Wilson](#), 908 F. Supp. 755 (C.D. Cal. 1995). While an appeal was pending, the parties settled the action. See Patrick J. McDonnell, Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles, L.A. TIMES, July 29, 1999, at A1.

91. See Johnson, Immigration Politics, *supra* note 90, at 658-59 & n. 143.

92. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § § 400-51, 110 Stat. 2105, 2260-77.

93. See Linda Kelly, [Defying Membership: The Evolving Role of Immigration Jurisprudence](#), 67 U. CIN. L. REV. 185, 197-209 (1998). Not coincidentally, the number of denials of naturalization petitions have risen significantly. See Patrick J. McDonnell, INS Denials of Citizenship Climb Sharply, L.A. TIMES, June 14, 1999, at A1 (reporting that INS denials rose by 25% during first sixth months of 1998-99 fiscal year, including 1624% increase in Los Angeles INS office).

94. See **Kevin R. Johnson**, [Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness](#), 73 IND. L.J. 1111, 1136-40 (1998)..

95. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § § 501-553, 1010 Stat. 3009, 3670-81; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § § 423, 502, 110 Stat. 2105, 2260-77.

96. For analysis of the criminalization of immigration, see Bill Ong Hing, [The Immigrant as Criminal: Punishing Dreamers](#), 9 HASTINGS WOMEN'S L.J. 79 (1998) and Maria Isabel Media, [The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud](#), 5 GEO. MASON L. REV. 669 (1997).

97. See Patrick J. McDonnell, Deportations Increase Almost 50% in U.S., L.A. TIMES, Jan. 9, 1999, at A17 (reporting on release of latest INS statistical data on removals). Most immigration law scholarship ignores the disparate racial impacts of such strategies. See, e.g., Peter H. Schuck & John Williams, Removing Criminal Aliens: The Pitfalls and Promises of Federalism, 22 HARV. J. L. & PUB. POL'Y 368 (1999). See generally Special Issue, Race and Immigration Law? A Paradigm Shift, 2000 U. ILL. L. REV. (forthcoming) (analyzing failure of mainstream immigration law scholarship to consider race).

98. See NATIONAL COUNCIL OF LA RAZA, THE MAINSTREAMING OF HATE: A REPORT ON LATINOS AND HARASSMENT, HATE VIOLENCE, AND LAW ENFORCEMENT ABUSE IN THE '90S (1999).

99. See JODY D. ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA (1997) (analyzing impact of white fears of Black criminality); Paul Butler, [Racially Based Jury Nullification: Black Power in the Criminal Justice System](#), 105 YALE L.J. 677 (1995) (advocating jury nullification by African American juries in cases

involving African American defendants accused of certain non-violent crimes); Angela J. Davis, [Prosecution and Race: The Power and Privilege of Discretion](#), 67 [FORDHAM L. REV.](#) 13 (1998) (analyzing impact of race on exercise of prosecutorial discretion); David A. Sklansky, [Cocaine, Race, and Equal Protection](#), 47 [STAN. L. REV.](#) 1283 (1999) (analyzing significance of racial disparate impact of crack cocaine laws). For an analysis of crime and the African American community, see RANDALL KENNEDY, *RACE, CRIME AND THE LAW* (1997).

100. See Dorothy E. Roberts, [Welfare and the Problem of Black Citizenship](#), 105 [YALE L.J.](#) 1563, 1563 (1996) ("Racial politics has so dominated welfare reform efforts that it is commonplace to observe that 'welfare' has become a code word for race. When Americans discuss welfare, many have in mind the mythical Black 'welfare queen' or profligate teenager who becomes pregnant at taxpayers' expense to fatten her welfare check. Although most welfare recipients are not Black, Black single mothers do rely on a disproportionate share of Aid to Families with Dependent Children. ") (footnote omitted); Sylvia A. Law, [Ending Welfare as We Know It](#), 49 [STAN. L. REV.](#) 471, 493 (1997) ("The popular perception is that welfare mothers are black, and while racism has become socially and legally unacceptable, condemning welfare mothers remains as American as apple pie.") (footnote omitted).

101. Previously, the Board of Regents of the University of California had barred consideration of race in admissions decisions. See Jeffrey B. Wolff, Comment, [Affirmative Action in College and Graduate School Admissions -- The Effects of Hopwood and the Actions of the U.C. Board of Regents](#), 50 [SMU L. REV.](#) 627 (1997). In recent years, the state college and university systems in California began charging undocumented persons resident in the state the higher fees charged to nonresidents, which has had predictably negative impacts on persons of Mexican ancestry. See Michael A. Olivas, [Storytelling out of School: Undocumented College Residency, Race, and Reaction](#), 22 [HASTINGS CONST. L.Q.](#) 1019 (1995).

102. See Spann, *supra* note 11, at 293 ("Proposition 209 is ultimately best understood as an effort to discount the interests of women and racial minorities in order to advance the interests of white males."); see also Deborah Waire Post, [The Salience of Race](#), 15 [TOURO L. REV.](#) 351, 373 (1999) ("[The anti-affirmative action movement is fueled by the assumption that blacks are inferior to whites and that they are being given something they do not deserve."].

103. See Elections '96; State Propositions: A Snapshot of Voters, *L.A. TIMES*, Nov. 7, 1996, at A29 (reporting exit poll results showing that 61% of male voters supported Proposition 209 compared to 48% of female voters and that 63% of white voters supported the measure compared to 26% of Black, 24% of Latina/o, and 39% of Asian American voters).

104. See, e.g., [Adarand Constructors, Inc. v. Peña](#), 515 U.S. 200 (1995) (holding that all racial classifications, including those in federal program designed

to foster minority businesses, are subject to strict scrutiny); [Hopwood v. Texas](#), 78 F.3d 932 (5th Cir. 1996) (finding unconstitutional University of Texas law school affirmative action plan), cert. denied sub nom., 518 U.S. 1033 (1996).

105. See David Montejano, On the Future of Anglo-Mexican Relations in the United States, in CHICANO POLITICS AND SOCIETY IN THE LATE TWENTIETH CENTURY 234, 244 (David Montejano ed., 1999) ("[The English-only movement, the anti-immigration campaign, the anti-civil rights sentiment, the reaction to multiculturalism, and so on, all manifest a conservative 'lifeboat' reflex to the changing demographics of the United States, and of the Southwest in particular."); **Guadalupe T. Luna**, [LatCrit Theory, "Don Pepe" and Senora Peralta](#), 19 CHICANO-LATINO L. REV. 339, 349-50 (1998) (stating that restrictionist immigration laws, affirmative action rollbacks, English-only, and welfare "reform" are propagated by political leaders "who address the public through the use of racial images and stereotypes that are derogatory towards Mexicans and those of Mexican descent") (footnote omitted).

106. [Reitman v. Mulkey](#), 387 U.S. 369, 378 (1967) (invalidating initiative that effectively offered state approval of private discrimination); see also [Crawford v. Board of Educ.](#), 458 U.S. 527, 543 (1982).

107. See JULIAN SAMORA & PATRICIA VANDEL SIMON, A HISTORY OF THE MEXICAN AMERICAN PEOPLE 162 (rev. ed. 1993). As Professor Cruz Reynoso has described:

I grew up before we had bilingual education. We were punished for speaking Spanish in school. It was well intentioned; the teachers wanted us to learn English. Many of us, however, took it as an attack upon our culture, language, upon everything that we stood for. That educational experience turned negative rather than positive. Proposition 227 ... has been viewed by the Latino community as an abrasive anti-Latino step taken by the electorate.

Cruz Reynoso, [The Role of Assets in Assuring Equity](#), 21 U. ARK. LITTLE ROCK L. REV. 743, 754-55 (1999).

108. See *supra* text accompanying notes 63-68.

109. Rachel F. Moran, [Bilingual Education as Status Conflict](#), 75 CAL. L. REV. 321, 326 (1987) (footnote omitted) [hereinafter Moran, Status Conflict; see ACUNA, *supra* note 58, at 293-94 (focusing on bilingual education debate in 1980s and 1990s). For analysis of the legal history surrounding bilingual education, see Moran, Status Conflict, *supra*, at 326-41 and Rachel F. Moran, [The Politics of Discretion: Federal Intervention in Bilingual Education](#), 76 CAL. L. REV. 1249 (1988) (analyzing federal intervention in bilingual education as a fight for control with states for ability to establish educational policy).

110. [414 U.S. 563 \(1974\)](#); see also *supra* text accompanying notes 63-68 (discussing Lau in context of history of bilingual education litigation).

111. See Gloria Sandrino-Glasser, [Los Confundidos: De-Conflating Latinas/os' Race and Ethnicity](#), 19 CHICANO-LATINO L. REV. 69, 147-48 (1998); see also Note, ["Official English": Federal Limits on Efforts to Curtail](#)

[Bilingual Services in the States](#), 100 HARV. L. REV. 1345, 1357-59 (1987) (contending that "a strong case can be made for the proposition that the designs of English-only advocates satisfy the intent requirement" for proving Equal Protection violation).

112. See, e.g., [Yu Cong Eng v. Trinidad](#), 271 U.S. 500, 524-28 (1926) (holding that law prohibiting Chinese merchants from keeping books in Chinese violated their Equal Protection rights); [Sandoval v. Hagan](#), 197 F.3d 484 (11th Cir. 1999) (finding that Alabama policy of offering driver's license examinations only in English discriminates against non-English speakers and national origin minorities); [Olagues v. Russoniello](#), 797 F.2d 1511 (9th Cir. 1986) (finding that investigation of those who requested bilingual ballots, which were printed only in Spanish and Chinese, discriminated on basis of national origin), vacated as moot, 484 U.S. 806 (1987); see also [Garcia v. Spun Steak Co.](#), 13 F.3d 296, 298-99 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc) (emphasizing that language regulation can mask impermissible race discrimination); [Gutierrez v. Municipal Court](#), 838 F.2d 1031, 1038-40 (9th Cir. 1988) (same), vacated as moot, 490 U.S. 1016 (1989).

113. Indeed, evidence suggests that racism is at the core of certain English only organizations. One well-known group, for example, was publicly embarrassed when a racist, anti-Latina/o document came to light that forced a prominent Latina leader to resign. See CHAVEZ, *supra* note 12, at 91-92 (describing incident).

114. Bill Ong Hing, [Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society](#), 81 CAL. L. REV. 863, 874 (1993); see e. christi cunningham, *The "Racing" Cause of Action and the Identity Formerly Known as Race: The Road to Tamazunchale*, 30 RUTGERS L.J. 707, 709-10 (1999) (discussing connection between culture and race).

115. See Moran, Status Conflict, *supra* note 109, at 341-45.

116. See, e.g., [Garcia v. Spun Steak Co.](#), 998 F.2d 1480 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994) (holding that employer's English only rule did not violate Title VII); [Gutierrez](#), 838 F.2d at 1031 (enjoining enforcement of English-only rule); [Long v. Baeza](#), 894 F. Supp. 933 (E.D. Va. 1995) (finding that similar policy did not violate Title VII); [Garcia v. Gloor](#), 618 F.2d 264 (5th Cir. 1980) (upholding employers English-only rule); [EEOC v. Synchro-Start Prods., Inc.](#), 29 F. Supp. 2d 911 (N.D. Ill. 1999) (holding that EEOC had stated valid claim based on employer's English-only rule).

117. See, e.g., BILL PIATT, *ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES* (1990); Mark L. Adams, [Fear of Foreigners: Nativism and Workplace Language Restrictions](#), 74 OR. L. REV. 849 (1995); Stephen W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145 (1997); Antonio J. Califa, [Declaring English the Official](#)

[Language: Prejudice Spoken Here](#), 24 HARV. C.R.-C.L. L. REV. 293 (1989); Cameron, *supra* note 7; Drucilla Cornell & William W. Bratton, Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish, 84 CORNELL L. REV. 585 (1999); see also Lazos, Judicial Review, *supra* note 10, at 399, 433-47, 551-52 (listing English-only and bilingual education initiatives passed by states in recent years).

118. See Michael W. Valente, Comment, [One Nation Divisible by Language: An Analysis of Official English Laws in the Wake of *Yniguez v. Arizonans for Official English*](#), 8 SETON HALL CONST. L.J. 205, 209-10 (1997) (compiling various English only laws proposed in Congress and those enacted by states). Discrimination on the basis of accent is a related concern. See Mari J. Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 YALE L.J. 1325 (1991); see also [Fragante v. City of Honolulu](#), 888 F.2d 591 (9th Cir. 1989) (addressing Title VII claim alleging accent discrimination); [Carino v. University of Oklahoma](#), 750 F.2d 815, 819 (10th Cir. 1984) ("A foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions."); [Forsythe v. Board of Education](#), 956 F. Supp. 927 (D. Kan. 1997) (quoting Carino).

119. See, e.g., ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA (1992).

120. Lazos, Judicial Review, *supra* note 10, at 442.

121. See *id.* at 435-40.

122. *Id.* at 445. As Professor Rachel Moran has observed:

Participants in the debate over bilingual education have often responded in deeply emotional ways that seem to transcend immediate concerns with the allocation of scarce resources. Some have openly acknowledged that more than pedagogy is at stake because government support of bilingual education signals acceptance of and respect for the Hispanic community.

Moran, Status Conflict, *supra* note 109, at 341 (emphasis added) (footnote omitted).

123. See T. Alexander Aleinikoff & Ruben G. Rumbaut, [Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?](#), 13 GEO. IMMIGR. L.J. 1, 14 (1998) (stating that, in light of strong empirical evidence that immigrants learn English, initiatives like Proposition 227 "seem aimed less at pursuing the intended goal (teaching English) than at tightening the circle of membership"); Terry, *supra* note 1 ("Proposition 227 is about much more than what is printed in the initiative. It is about race, class, culture, shifting demographics, politics, fear and sometimes even education. ").

124. See [Cal Const. art. III, § 6](#); see also Moran, Status Conflict, *supra* note 109, at 332 n. 63 (reporting survey results reflecting racially- polarized vote).

125. Moran, Status Conflict, *supra* note 109, at 332 (footnote omitted). One complicating factor was that the measure was supported by a Japanese

American, U.S. Senator S. I. Hayakawa. See *id.* at 331-32. Oddly enough, Hayakawa wrote that, although he supported the proposition, he was "a firm believer in effective bilingual education." See S. I. Hayakawa, *A Common Language, So All Can Pursue Common Goals*, L.A. TIMES, Oct. 29, 1986, at B5.

126. Julian n. Eule, [Judicial Review of Direct Democracy](#), 99 YALE L. J. 1503, 1567 (1990) (footnotes omitted).

127. *Id.*

128. See *infra* text accompanying notes 129-217.

129. See *infra* text accompanying notes 130-217.

130. See Cal. Prop. 227, [§ 1](#), codified at Cal. Educ. Code ch. 3 (West Supp. 1999).

131. "English for the Children" was also the name of the principal group advocating passage of Proposition 227. Its chairman was Ron Unz, who drafted the initiative. See, e.g., BALLOT PAMPHLET, *supra* note 2, at 34 (Argument in Favor of Proposition 227).

132. Cal. Prop. 227, [§ 300\(b\)](#), codified at Cal. Educ. Code ch. 3 (West Supp. 1999) (emphasis added).

133. *Id.* [§ 300\(d\)](#) (emphasis added).

134. *Id.* (emphasis added).

135. *Id.* [§ 300\(e\)](#) (emphasis added).

136. See *supra* text accompanying notes 80-81.

137. See *supra* text accompanying notes 80-81. This does not include undocumented immigrants. In October 1996, the estimated undocumented population in California was about two million with immigrants from Mexico constituting roughly 54% of the total undocumented population. See U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 200 tbl.N (1999) [hereinafter INS STATISTICAL YEARBOOK].

138. See Hoang, *supra* note 81, at 1, 6 (reporting that, in 1995, 20% of all legal immigrants intending to settle in California were born in Mexico).

139. See California Basic Educational Data System, Public School Summary Statistics, 1998-99, at 3, available online at <<http://www.cdc.ca.gov/demographics/reports/-/statewide/sums98.htm>> (visited Aug. 3, 1999) (K-12 enrollment, by ethnic group).

140. See GEY ET AL., *supra* note 70, at 34 tbls.3-5. Almost one-fourth lived in Asian-language-speaking homes and five percent in other-language-speaking homes. See *id.*

141. See, e.g., [Valeria G. v. Wilson](#), 12 F. Supp. 1007, 1011 (N.D. Cal. 1998); see also *supra* text accompanying notes 84-86 (discussing increased numbers of Latina/o limited English proficient students in California schools).

142. See Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, at 51 n. 86 (relying on Exhibit B to Declaration of Christopher Ho), *Valeria G. v. Wilson*, Case No. C 98-2252 CAL

(N.D. Cal. 1998).

143. See *id.*

144. [Cal. Educ. Code § 300\(a\) \(West Supp. 1999\)](#).

145. See Aleinikoff & Rumbaut, *supra* note 123, at 11-14 (reviewing empirical data).

146. [Cal. Educ. Code § 305 \(West Supp. 1999\)](#).

147. See, e.g., [Pierce v. Society of Sisters, 268 U.S. 510 \(1925\)](#) (invalidating state law requiring all children to attend public school).

148. See, e.g., Betsy Streisand, *Is It Hasta la Vista for Bilingual Ed?*, U.S. NEWS & WORLD REP., Nov. 24, 1997, at 36, 38 (quoting University of California, Davis Professor Patricia Gandara, who has conducted extensive research on subject).

149. [Cal. Educ. Code § 310 \(West Supp. 1999\)](#).

150. *Id.* (emphasis added). For discussion of various issues that have arisen concerning waivers, see Thomas F. Felton, Comment, [Sink or Swim? The State of Bilingual Education in the Wake of California's Proposition 227](#), 48 CATH. U.L. REV. 843, 871-73 (1999) and *supra* note 3, citing cases involving Proposition 227, including one that involved parental waivers.

151. See Gregory Rodriguez, *English Lesson in California*, NATION, Apr. 20, 1998, at 15.

152. BALLOT PAMPHLET, *supra* note 2, at 34 (Argument in Favor of Proposition 227).

153. *Id.*

154. *Id.*

155. *Id.*

156. As it turned out, the polling was inaccurate; Latinas/os voted against the initiative by a margin of nearly two to one. See *infra* text accompanying notes 199-217.

157. BALLOT PAMPHLET, *supra* note 2, at 35 (Rebuttal to Argument Against Proposition 227). Along similar lines, Proposition 227 proponents argued that California lacked the financial resources to effectively implement bilingual education, which long had been criticized from many fronts. See Amy S. Zabetakis, Note, [Proposition 227: Death for Bilingual Education](#), 13 GEO. IMMIGR. L.J. 105, 120-22 (1998); see also *supra* text accompanying notes 41-62 (analyzing inequality in California public schools caused by school finance system).

158. See Johnson, *Immigration Politics*, *supra* note 90, at 654-58 (documenting disturbing anti-Latina/o statements made by drafters Ron Prince and Barbara Coe and by elected public officials).

159. See Benjamin A. Doherty, Comment, [Creative Advocacy in Defense of Affirmative Action: A Comparative Institutional Analysis of Proposition 209](#), 1999 WIS. L. REV. 91, 103-07 (describing racial messages in Proposition 209 campaign, including David Duke's racist appeals in support of the initiative).

160. John Marelius, *Wilson Bristles at Claims He's Playing Racial Politics*, Copley News Serv., May 20, 1998, at 1 (quoting Professor Fernando Guerra).

161. See *id.*; see also Lou Cannon, *Bilingual Education Under Attack*, WASH. POST, July 21, 1997, at A15 (quoting Unz as calling Governor Wilson's campaign for Proposition 187 "despicable" and as saying no one associated with that campaign, or others with "anti-immigrant views," would be permitted to join Proposition 227 campaign).

162. See Zabetakis, *supra* note 157, at 111.

163. See Nanette Asimov, *Bilingual Education Gets Foe*, S. F. CHRON., July 18, 1997, at A17.

164. See [Lau v. Nichols, 414 U.S. 563 \(1974\)](#); see also *supra* text accompanying notes 63-68, 110-14 (discussing *Lau v. Nichols*).

165. See Morning Edition (National Public Radio broadcast, Jan. 8, 1998) (transcript no. 98010806-210) (quoting Unz: "This is in no way an anti-Latino initiative or an anti-immigrant initiative or anything other than something that will benefit, most of all, California's immigrant and Latino population. "); Cannon, *supra* note 161 (quoting Unz: "It would be a disaster if this initiative was perceived as anti-immigrant because it is not.").

166. See Rodriguez, *English Lesson in California*, *supra* note 151, at 15 (quoting Unz to this effect).

167. Gregory Rodriguez, *Speaking in Tongues: Divining Why California Latinos Voted as They Did on Proposition 227*, NEW DEMOCRAT, July-Aug. 1998, at 18 (quoting Villaraigosa). Villaraigosa later touched off a firestorm of controversy among Latinas/os when he appointed Unz to a high-profile California panel on government finance. See Mark Gladstone, *Speaker Urged to Rescind Unz Appointment*, L.A. TIMES, Feb. 2, 1999, at A3.

168. They were: Gloria Matta Tuchman, a Mexican American school teacher, see Nick Anderson, *Latina Teacher Pushes Fight Against Bilingual Education*, L.A. TIMES, Oct. 20, 1997, at B2 [hereinafter Anderson, *Latina Teacher Pushes* (describing Matta Tuchman)], Jaime Escalante, an East Los Angeles high school teacher who served as honorary campaign chairman, see Phil Garcia, *Noted Teacher Backs Initiative*, L.A. DAILY NEWS, Oct. 19, 1997, at N10 (describing Escalante), made famous by the movie *STAND AND DELIVER* (Warner Bros. 1987) starring Edward James Olmos as Escalante, and Fernando Vega, a Democratic Party activist and former school board member who became honorary chairman of the Northern California campaign, see *BALLOT PAMPHLET*, *supra* note 2, at 34. The fact that certain supporters were Latina/o does not undermine the discriminatory intent analysis. See *infra* text accompanying notes 173-80. Minorities, as African American businessman Ward Connerly demonstrated in being the anti-affirmative action point person in California, frequently are placed in high-profile roles in defending discriminatory measures. See *infra* note 180 (referring to "racial mascot" phenomenon).

169. See Mark S. Barabak, *GOP Bid to Mend Rift with Latinos Still Strained*,

L.A. TIMES, Aug. 31, 1997, at B8 (quoting campaign letter sent by Unz for Proposition 227 -- "[Poor European immigrants [earlier this century came here to WORK and become successful ... not sit back and be a burden on those who were already here!]" -- and mentioning only one group, Latinas/os, and one non-English language, Spanish, as problematic).

170. CNN Talkback Live (CNN television broadcast, May 29, 1998) (transcript no. 98052900V14) (remarks of Ron Unz) (emphasis added).

171. Morning Edition (National Public Radio broadcast, Jan. 8, 1998) (transcript no. 98010806-210) (emphasis added). The fact that Unz and some supporters may have wanted to benefit Latinas/os should not make a legal difference so long as it is clear that language was used as a proxy for race. See *infra* text accompanying notes 250-64. Under current Supreme Court precedent, all racial classifications, even if arguably benign, receive strict scrutiny. See, e.g., [Adarand Constructors, Inc. v. Peña, 515 U.S. 200 \(1995\)](#). Such intentions, however, may be relevant to the discriminatory intent analysis. See *infra* text accompanying notes 225-42.

172. Asimov, *supra* note 163 (quoting Unz). Furthermore, Unz told one journalist that bilingual education "is a bizarre government program," see Cannon, *supra* note 161, at A15, and another that even the respectable academic research supporting it was "garbage," see Nick Anderson, Debate Loud as Vote Nears on Bilingual Ban, L.A. TIMES, Mar. 23, 1998, at A1 [hereinafter Anderson, Debate Loud].

173. See Nick Anderson, Latina Teacher Pushes Fight Against Bilingual Education, L.A. TIMES, Oct. 20, 1997 at B2 [hereinafter Anderson, Latina Teacher Pushes Fight].

174. English-Only Candidate, City News Serv., Feb. 12, 1998, at 1 (quoting Tuchman).

175. See *supra* text accompany note 145 (discussing English language acquisition by Latinas/os).

176. See generally **Kevin R. Johnson**, "[Melting Pot](#)" or "[Ring of Fire](#)"? [Assimilation and the Mexican-American Experience](#), 85 CAL. L. REV. 1259 (1997) (analyzing history of assimilation of Mexican Americans into U.S. society).

177. Nick Anderson, Latina Teacher Pushes Fight, *supra* note 173 (quoting Unz).

178. Phil Garcia, Noted Teacher Backs Initiative, L.A. DAILY NEWS, Oct. 19, 1997, at N10 (quoting Unz).

179. Gayle M.B. Hansen, When Bilingualism Is a Dirty Word, INSIGHT ON THE NEWS, Dec. 22 1997, at 18.

180. Minorities frequently find themselves employed as visible supporters for political ends considered by many to be antiminority. See Sumi Cho, [Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption](#), 40 B.C. L. REV. 73, 121 (1998) (referring to "increasing use

of people of color as spokespersons or 'racial mascots' for racially regressive policies").

181. The 1998 California "English of the Children" Initiative, <<http://www.onenation.org/facts.html>> (visited April 6, 1999) (emphasis added).

182. Terry, *supra* note 1, Long after the election, Unz wrote an article analyzing the racially-charged campaigns over Propositions 187, 209, and 227 and attributed the divisiveness in part to demographic changes brought by immigration. "Terrified of social decay and violence, and trapped by collapsed property values, many whites felt they could neither run nor hide. Under these circumstances, attention inevitably began to focus on the tidal force of foreign immigration. " Ron Unz, California and the End of White America, COMMENTARY, Nov. 1999, at 17.

183. See Laura M. Padilla, Internalized Oppression, Latinos and Law, at 44 (Unpublished manuscript on file with author).

184. See One Nation/One California, <<http://www.Onenation.org/aboutonoc.html>>.

185. See Padilla, *supra* note 183, at 45.

186. National English Campaign and California English Campaign <<http://www.people-sadvocate.org/ord/bmprimary98/prop227.html>> (on file with author).

187. Linda Chavez, Keeping Bilingual-Education Programs Intact Makes for Lucrative Business, CHI. TRIB., May 27, 1998, Commentary, at 21, at A4.

188. See Hansen, *supra* note 179.

189. See *infra* text accompanying notes 190-91, 199-217.

190. Doyle McManus, Clinton Hails Benefits of Legal Migration to America, L.A. TIMES, June 14, 1998, at A1 (quoting Dan Stein).

191. Ralph Z. Hallow, California Steeped in Identity Politics, WASH. TIMES, June 15, 1998, at A1 (quoting Glenn Spencer).

192. See Cannon, *supra* note 161.

193. Anderson, Debate Loud, *supra* note 172 (quoting Eliana Escobar).

194. Streisand, *supra* note 148 (quoting Joseph Jaramillo); see also Anderson, Latina Teacher Pushes Fight, *supra* note 173 (quoting MALDEF attorney Theresa Fe Bustillos to same effect).

195. Anderson, Debate Loud, *supra* note 172 (quoting Charles Kamasaki).

196. Ron Unz, Swimming Instructor, ECONOMIST, May 2, 1998, at 32 (quoting Becerra).

197. Marelius, *supra* note 160 (quoting Villaraigosa).

198. Unz, *supra* note 196 (quoting Torres).

199. See *supra* note 3 (citing authority). The official vote was 3.6 million (60.88%) for and slightly less than 2.3 million (39.12%) against. See BILL JONES, [CAL. SECRETARY OF STATE, STATEMENT OF VOTE: PRIMARY ELECTION JUNE 2, 1998, at 86 (1998).

200. See Los Angeles Times Exit Poll, California Primary Election, June 2,

1998, at 1 (showing that whites supported the measure by 67-33% and African Americans supported it by 57-43% while Latinas/os opposed it by 63-37% and African Americans by 52-48%); see also Rodriguez, *supra* note 167 (analyzing why Latinas/os voted against Proposition 227). Interestingly, 6% of the supporters recognized that Proposition 227 "discriminates against non-English speaking students" compared to 32% of the opponents. See Los Angeles Times Exit Poll, *supra*, at 3.

201. See Ramon G. McLeod & Mara Alicia Gaura, Proposition 227 Got Few Latino Votes: Early Polls Had Claimed More Minority Support, S.F. CHRON., June 5, 1998, at A19. According to polling data, Latina/o support for Proposition 227 eroded as election day neared. See FIELD POLL, VOTERS MOVING TO THE NO SIDE ON PROPS. 226 (UNION DUES) AND 223 (SCHOOL SPENDING LIMITS) 4 (May 29, 1998).

202. See Gerald P. Lopez, [Learning About Latinos, 19 CHICANO-LATINO L. REV. 363, 391 \(1998\)](#) (summarizing survey data to this effect); see also PETER SKERRY, MEXICAN AMERICANS: THE AMBIVALENT MINORITY 283-91 (1993) (summarizing survey data indicating general support of Mexican Americans for bilingual education).

203. See *supra* text accompanying notes 129-98.

204. See McLeod & Guara, *supra* note 201.

205. See, e.g., Streisand, *supra* note 148 (reporting results of L.A. Times poll).

206. *Id.*

207. See Deroy Murdock, Bye Bye Bilingualism, WASH. TIMES, Apr. 8, 1998, at A17.

208. See Unz, *supra* note 196 (reporting results of unidentified polls of Latinas/os and L.A. Times poll for all voters).

209. See, e.g., Gregory Rodriguez, The Bilingualism Debate Remakes California Politics, WASH. POST, Feb. 8, 1998, at C2 ("Surprisingly to some, early surveys by the Los Angeles Times and the Field Poll showed that Latino registered voters supported the initiative by a wide margin. ") Rodriguez also reported that "early polls" showed registered Latina/o voters supporting Prop. 227 "by as big a margin as 66 percent to 30 percent." See *id.*

210. BALLOT PAMPHLET, *supra* note 2, at 334 (Argument in Favor of Proposition 227).

211. Nick Anderson & Peter M. Warren, English-Immersion Initiative Makes Ballot, L.A. TIMES, Dec. 24, 1997, at B1 (quoting Unz).

212. See, e.g., Leonel Sanchez, Latino Views Differ Sharply on Question of Bilingual Education, SAN DIEGO UNION-TRIB., Mar. 15, 1998, at B1 (reporting poll results).

213. See Charlie Erickson, Media Misleading About Hispanic Vote on Prop. 227, HOUSTON CHRON., June 11, 1998, at A33.

214. See Louis Sahagun, Diversity Challenges Schools to Preserve Racial Harmony, L.A. TIMES, Feb. 14, 1999, at A1 (reporting on racial tensions at Los

Angeles public schools).

215. See Andrew Blankstein & Michael Luo, Principal, 65, Badly Beaten in Alleged Hate Crime, L.A. TIMES, Feb. 3, 1999, at B1.

216. See Jennifer Hamm, Oxnard Students Leave Class for 2nd Day in 227 Protest, L.A. TIMES (Ventura County ed.), June 9, 1998, at B1.

217. NATIONAL COUNCIL OF LA RAZA, *supra* note 98, at 5. Analysis of this incident is complicated by that fact that the attackers were Asian American. See *id.*

218. [12 F. Supp. 2d 1007 \(N.D. Cal. 1998\)](#).

219. See *id.* at 1023-24. The court of appeals rejected a similar challenge to Proposition 209. See *supra* note 11 (discussing nature of unsuccessful challenge).

220. See [Valeria G., 12 F. Supp. 2d at 1025](#).

221. *Id.*

222. 660 U.N.T.S. 195, entered into force Jan. 4, 1969, ratified by the United States June 24, 1994; see Gabriel J. Chin, [Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration](#), 46 UCLA L. REV. 1, 60-61 (1998) (arguing that Convention bars racial discrimination against "aliens" in immigration laws); Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, [Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform"](#), 71 S. CAL. L. REV. 547, 568-72 (1998) (discussing how various immigration and welfare "reform" laws violate Convention and other international law).

223. [Valeria G., 12 F. Supp. 2d at 1027](#).

224. See *id.* ("[As this court has already stated, the objective of both sides in this dispute is the same -- to educate all [limited English proficient children.]").

225. [426 U.S. 229 \(1976\)](#).

226. *Id.* at 242 (emphasis added); see [Reno v. Bossier, 520 U.S. 471, 489 \(1997\)](#) ("The important starting point for assessing discriminatory intent ... is the impact of the official action whether it bears more heavily on one race than another.") (citations omitted) (quotation marks in original deleted).

227. [Washington, 426 U.S. at 248](#).

228. [Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 \(1977\)](#) (emphasis added) (footnote omitted); see [Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 \(1979\)](#) (stating that discriminatory intent "implies that the decisionmaker ... selected ... a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (footnote & citation omitted).

229. [Arlington Heights, 429 U.S. at 266](#) (citing, *inter alia*, [Yick Wo v. Hopkins, 118 U.S. 356 \(1886\)](#) and [Gomillion v. Lightfoot, 364 U.S. 339 \(1960\)](#)).

230. [Arlington Heights, 429 U.S. at 267, 269](#); see [United States v. Fordice, 505 U.S. 717, 747 \(1992\)](#); see also [Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 819 \(4th Cir. 1995\)](#) (exploring such circumstances before finding that zoning decision was made without discriminatory intent); Todd Rakoff, [Washington v.](#)

[Davis and the Objective Theory of Contracts](#), 29 HARV. C.R.-C.L. L. REV. 63 (1994) (advocating objective test of social meaning of discrimination that considers multitude of factors).

231. [Garza v. County of Los Angeles](#), 756 F. Supp. 1298, 1349 (C.D. Cal. 1990) (citing [Rogers v. Lodge](#), 458 U.S. 613, 625 (1982)) (holding that Los Angeles County Board of Supervisors intended to discriminate against Hispanics in adopting redistricting scheme), aff'd in part, vacated in part, [918 F.2d 763](#) (9th Cir. 1990), cert. denied, [498 U.S. 1028](#) (1991).

232. See, e.g., [Hunter v. Underwood](#), 471 U.S. 222 (1985) (invalidating Alabama constitutional provision disenfranchising certain convicted criminals because it was designed with racial animus); [Rogers v. Lodge](#), 458 U.S. 613 (1982) (finding that at-large electoral scheme in Burke County, Georgia was maintained for discriminatory purposes); [Castaneda v. Partida](#), 430 U.S. 482 (1977) (holding that "key man" system for selection of grand juries proved prima facie case of race discrimination in violation of Equal Protection Clause); [United States v. Yonkers Bd. of Educ.](#), 837 F.2d 1181, 1226 (2d Cir. 1987) (finding that "racial animus was a significant factor motivating" white residents who opposed low income housing project), cert. denied, [486 U.S. 1055](#) (1988); [Smith v. Town of Clarkton](#), 682 F.2d 1055 (4th Cir. 1982) (finding that city decision to effectively bar low income housing facility was motivated by discriminatory intent); see also [Goosby v. Town of Hempstead](#), 180 F.3d 476 (2d Cir. 1999) (holding that town maintained at-large voting scheme with discriminatory intent in violation of Voting Rights Act and Equal Protection Clause); cf. [State v. Russell](#), 477 N.W.2d 886 (Minn. 1991) (invalidating state sentencing scheme under Minnesota Constitution because of stark racial disparities in sentencing that resulted).

233. See Johnson, *Immigration Politics*, supra note 90, at 664-67; see also Alan E. Brownstein, [Illicit Legislative Motive in the Municipal Land Use Regulation Process](#), 57 U. CIN. L. REV. 1, 46-47 (1988) (analyzing problems with determining "the motive of an institutional body comprising numerous decision makers"). See generally Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L. J. 107 (1995) (analyzing special difficulties discerning intent of voters in enacting initiatives).

234. See, e.g., Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Eule, supra note 126, at 1553; Lazos, *Judicial Review*, supra note 10; see also Sherman J. Clark, [A Populist Critique of Direct Democracy](#), 112 HARV. L. REV. 434 (1998) (questioning whether initiatives, as popularly believed, allow voters to clearly express views); Hans A. Linde, *When Is Initiative Lawmaking Not "Republican Government"?*, 17 HASTINGS CONST. L.Q. 159 (1989) (contending that initiative lawmaking violates constitutional guarantee of republican form of government). For analysis of the initiative process, see PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS*

(1998).

235. See, e.g., [Oyama v. California](#), 332 U.S. 633 (1948) (invalidating as applied "alien land law" passed by California voters designed to limit rights of persons of Japanese ancestry); [Pierce v. Society of Sisters](#), 268 U.S. 510 (1925) (finding unconstitutional initiative responding to immigration into Oregon of Catholics, who frequently attended parochial schools, by requiring all children to attend public schools); [Truax v. Raich](#), 239 U.S. 33 (1915) (striking down law passed by Arizona voters barring certain employers from employing fewer than 80% "qualified electors or native born citizens").

236. See, e.g., *Romer v. Evans*, 517 U.S. 670 (1996) (invalidating Colorado state constitutional amendment adopted by voters effectively repealing state and local provisions barring discrimination on basis of sexual orientation); [Equality Found. v. City of Cincinnati](#), 128 F.3d 289 (6th Cir. 1997) (rejecting challenge to voter-enacted city charter amendment barring "preferential treatment" for gays, lesbians, and bisexuals); see also Walter E. Adams, Jr., *Is It Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449 (1998) (analyzing adverse impact of initiative process on lesbians and gay men).

237. See Bruce Cain, *The Contemporary Context of Ethnic and Racial Politics in California*, in *RACIAL AND ETHNIC POLITICS IN CALIFORNIA* 9, 23-24 (Bryan O. Jackson & Michael B. Preston eds., 1991).

238. See THE FEDERALIST NO. 10, at 61 (James Madison) (Jacob E. Cooke ed., 1961); see also Hans A. Linde, [Who Is Responsible for Republican Government?](#), 65 U. COLO. L. REV. 709, 723 (1994) (analyzing Madison's concerns in this regard).

239. See [Ruiz v. Hall](#), 191 Ariz. 441, 957 P.2d 984 (1998) (invalidating Arizona English-only law on First Amendment grounds).

240. See [Yniguez v. Arizonans for Official English](#), 69 F.3d 920 (9th Cir. 1995) (en banc).

241. See [Arizonans for Official English v. Arizona](#), 520 U.S. 43 (1997); see also Cecilia Wong, Comment, [Language Is Speech: The Illegitimacy of Official English After Yniguez v. Arizonans for Official English](#), 30 U.C. DAVIS L. REV. 277 (1996) (analyzing First Amendment reasoning of Ninth Circuit in *Yniguez*).

242. See Johnson, *Immigration Politics*, *supra* note 90, at 670-71 (reviewing language in panel opinion in *Yniguez*, which was never published after it was vacated, that "[since language is a close and meaningful proxy for national origin, restrictions on the use of language may mask discrimination against specific national origin groups or, more generally, nativist sentiment.]" (footnote omitted); Karla C. Robertson, Note, [Out of Many, One: Fundamental Rights, Diversity, and Arizona's English-Only Law](#), 74 DENV. U.L. REV. 311, 329-32 (1996) (contending that Ninth Circuit should have invalidated Arizona law on Equal Protection, not First Amendment grounds, because it discriminated on the basis of

national origin).

243. [Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.](#), 429 U.S. 252, 252 (1977).

244. See supra text accompanying notes 106-217. Similar arguments have been made with respect to other state action that disparately affects racial minorities. See, e.g., Jill E. Evans, [Challenging the Racism in Environmental Racism: Redefining the Concept of Intent](#), 40 ARIZ. L. REV. 1219, 1277-87 (1998) (stating how intent is difficult to prove in environmental racism cases).

245. [347 U.S. 483 \(1954\)](#).

246. [Id.](#) at 494; see Paul Brest, [Foreword: In Defense of the Antidiscrimination Principle](#), 90 HARV. L. REV. 1, 8-12 (1976) (discussing harmful effects of discrimination and segregation, including stigmatization of racial minorities).

247. See Yxta Maya Murray, The [Latino-American Crisis of Citizenship](#), 31 UC DAVIS L. REV. 503, 546-59 (1998) (contending that English-only movement and rules stigmatize Latinas/os in the United States and help to ensure that they remain second class citizens); see also [29 C.F.R. § 1606.7\(a\) \(1998\)](#) (stating, in regulation under Title VII of Civil Rights Act of 1964, that "[the primary language of an individual is often an essential national origin characteristic" and that suppression of language may "create an atmosphere of inferiority, isolation and intimidation"); Jeffrey D. Kirtner, Comment, [English-Only Rules and the Role of Perspective in Title VII Claims](#), 73 TEX. L. REV. 871, 893-98 (1995) (identifying various harms to Latinas/os, including stigmatization, flowing from English-only rules in workplace).

In addition, Proposition 227 may ultimately have gender impacts that have been largely ignored. Because women often are the primary childcare providers, they may have to deal with children, who drop out of school due to the elimination of bilingual education. This may exacerbate the poverty that currently exists among many single Latina mothers. See Laura M. Padilla, [Single-Parent Latinas on the Margin: Seeking a Room with a View, Meals, and Built-In Community](#), 13 WIS. WOMEN'S L.J. 179, 197-206 (1998).

248. See supra text accompanying notes 16-105.

249. See, e.g., [People v. Naglee](#), 1 Cal. 232 (1850) (rejecting claim that "foreign miners tax" imposed on persons of Mexican ancestry violated the Treaty of Guadalupe Hidalgo).

250. See infra text accompanying notes 251-59.

251. See, e.g., [Cockrill v. California](#), 268 U.S. 258 (1925) (upholding California law); [Terrace v. Thompson](#), 263 U.S. 197 (1923) (upholding Washington law). See generally Keith Aoki, [No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment](#), 40 B.C. L. REV. 37 (1998) (analyzing history behind these laws and how they blazed a trail for Japanese internment during World War II).

252. See, e.g., [Arlington Heights](#), 429 U.S. at 252.

253. [McWright v. Alexander, 982 F.2d 222, 228 \(7th Cir. 1992\)](#); see e.g., [Slather v. Sather Trucking Corp., 78 F.3d 415, 418-19 \(8th Cir. 1996\)](#) ("Age discrimination may exist when an employer terminates an employee based on a factor as a proxy for age.") (citation omitted); [Metz v. Transmit Mix, Inc., 828 F.2d 1202 \(7th Cir. 1987\)](#) (holding that salary savings that employers sought to realize by discharging older employee and replacing him with younger one constituted age discrimination); [Gustovich v. AT&T Communications, Inc., 972 F.2d 845, 851 \(7th Cir. 1992\)](#) ("[Wage discrimination can be a proxy for age discrimination, so that lopping off high salaried workers can violate the" Age Discrimination in Employment Act). Discrimination by proxy has been recognized in the scholarly literature. See *supra* note 14 (citing authorities). One difficulty in application concerns the fact that some "classifications that correlate with race ... may further permissible objectives because of that correlation rather than despite it. Alexander & Cole, *supra* note 14, at 463. However, "irrational proxy discrimination, based upon inaccurate stereotypes or generalizations is morally troublesome because it imposes unnecessary social costs." Alexander, *supra* note 14, at 169; see also *id.* at 193 ("Proxy discrimination based upon inaccurate and usually bias-driven stereo-typing are intrinsically immoral for the same reasons as are the biases with which they are intimately linked.").

254. [Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 \(1993\)](#); see also Toni J. Querry, Note, [A Rose by Any Other Name No Longer Smells as Sweet](#): [Disparate Treatment Discrimination and the Age Proxy Doctrine After Hazen Paper Co. v. Biggins](#), 81 CORNELL L. REV. 530 (1996) (analyzing case law on age proxy doctrine).

255. [471 U.S. 222 \(1985\)](#).

256. See *infra* text accompanying notes 257-59.

257. See **Kevin R. Johnson**, "[Aliens](#)" and the U.S. [Immigration Laws: The Social and Legal Construction of Nonpersons](#), 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97); see also Ibrahim J. Gassama et al., [Foreword: Citizenship and its Discontents: Centering the Immigrant in the Inter/National Imagination \(Part II\)](#), 76 OR. L. REV. 207, 217-19 (1997) (describing "nativistic racism" encountered by immigrants of color in United States).

258. See INS STATISTICAL YEARBOOK, *supra* note 137, at 199 (estimating that Mexico is country of origin of 54% of undocumented immigrants in United States).

259. See Gabriel J. Chin, The [Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965](#), 75 N.C. L. REV. 273, 276 (1996) (noting that, since 1965, 75% of immigrants to U.S. have come from Africa, Asia, and Latin America).

260. See *supra* text accompanying notes 84-86.

261. See [United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n. 4 \(1938\)](#) ("[Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political

processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

262. See *supra* text accompanying notes 63-88.

263. See *supra* text accompanying notes 106-217.

264. See *supra* text accompanying notes 199-217.

265. See Richard Delgado, [Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino Critical Scholarship, and the Black-White Binary](#), 75 TEX. L. REV. 1181, 1189-92 (1997) (contending that current interpretation of Equal Protection Clause produces inequality for Latinas/os); Martinez, *supra* note 4 (to same effect).

266. [251 S.W. 2d 531 \(Tex. 1952\)](#).

267. See [id. at 535](#).

268. *Id.*; see George A. Martinez, [Philosophical Considerations and the Use of Narrative in Law](#), 30 RUTGERS L. J. 683, 686 (1999) (stating that Texas Supreme Court in Hernandez failed to "recognize harm [Mexican Americans suffered from having no Mexican Americans on juries.").

269. See Hernandez, 251 S.W. at 535.

270. [347 U.S. 475 \(1954\)](#).

271. See [id. at 477-79](#).

272. See Richard Delgado & Vicky Palacios, Mexican Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause, 50 NOTRE DAME L. REV. 393, 395 (1975).

273. See *id.* at 400-01.

274. [83 U.S.\(16 Wall.\) 36, 71-80 \(1872\)](#).

275. [Id. at 81](#).

276. See, e.g., Delgado, *supra* note 265; see also **Kevin R. Johnson** & George A. Martinez, [Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship](#), 53 U. MIAMI L. REV., 1143, 1157-59 (1999) (contending that studies of subordination of various racial minority groups has long been established in ethnic studies scholarship); Mary Romero, Introduction, in CHALLENGING FRONTERAS: STRUCTURING LATINA AND LATINO LIVES IN THE U.S. xiv (Mary Romero et al. eds., 1997) (criticizing "binary thinking of race relations in this country [that is so ingrained in the dominant culture that it continues to shape what we see.").

277. See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 159 (1990).

278. See NATHAN GLAZER, WE ARE ALL MULTICULTURALISTS NOW (1997); see also **Kevin R. Johnson**, [Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century](#), 8 LA RAZA L. J. 42, 64-66 (1995) (analyzing complexities of modern race relations, including many groups besides African Americans and whites); Eric K. Yamamoto, [Critical Race Praxis: Race Theory and Political Lawyering Praxis in Post-Civil Rights America](#), 95 MICH. L. REV. 821 (1997) (analyzing interracial conflict arising in impact litigation).

279. [252 U.S. 416, 433-34 \(1920\)](#). Holmes, viewed by many as "a legal icon in the history of American legal thought," Gary Minda, [One Hundred Years of Modern Legal Thought: From Langdell to Holmes to Posner and Schlag](#), 28 [IND. L. REV.](#) 353, 361 (1994), rejected formalistic approaches to law in favor of a jurisprudence that took account of human experience and social need. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) ("[The felt necessities ... and the intuitions of public policy ... have had a good deal more to do ... in determining the rules by which men should be governed.]). Professor Paul Brest wrote that:

According to the political theory most deeply rooted in the American tradition, the authority of the Constitution derives from the consent of its adopters. Even if the adopters freely consented to the Constitution, however, this is not an adequate basis for continuing fidelity to the founding document, for their consent alone cannot bind succeeding generations. We did not adopt the Constitution and those who did are dead and gone.

Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 [B.U. L. REV.](#) 204, 224 (1980).

280. Anthony Paul Farley, [All Flesh Shall See It Together](#), 19 [CHICANO-LATINO L. REV.](#) 163, 171 (1998).

281. See, e.g., BORK, *supra* note 277, at 143 ("In the legal academies in particular, the philosophy of original understanding is usually viewed as thoroughly passe, probably reactionary, and certainly the most dreaded indictment of all -- outside the mainstream").

282. See John O. Calmore, [Race/ism Lost and Found: The Fair Housing Act at Thirty](#), 52 [U. MIAMI L. REV.](#) 1067, 1073 (1998) ("[Racism introduces itself anew and covertly to the breadth of contemporary institutions, culture, and society. This advanced, insidious racism operates so effectively that we seldom distinguish serious racist harms from a variety of other harms that categorically run from 'bad luck' to 'natural catastrophes.'").

283. See, e.g., Darren L. Hutchinson, [Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse](#), 29 [CONN. L. REV.](#) 561, 636-41 (1999) (discussing connections between race, gender, and sexuality); Francisco Valdes, [Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society](#), 83 [CAL. L. REV.](#) 1 (1995).

284. OMI & WINANT, *supra* note 6, at 123-128.

285. See Daniel Yeager, *A Plea for "A Plea for Excuses": Exculpation and the Explication of Responsibility* 14-15 (unpublished manuscript on file with authors); see also Paul J. Gudel, [Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law](#), 70 [TEX. L. REV.](#) 17, 80, 84-85 (1991); note 10 (citing authorities criticizing discriminatory intent standard).

286. Yeager, *supra* note 285, at 15-16.

287. LOUIS M. SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIE: CONTEMPORARY CONSTITUTIONAL ISSUES 105 (1996); see also OWEN FISS, A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS 3-21 (1999) (contending that judiciary should invalidate laws, such as limits on benefit eligibility, making immigrants "pariahs"); Daniel Farber & Suzanna Sherry, The [Pariah Principle](#), 13 CONST. COMMENTARY 257 (1996); Cass R. Sunstein, The [Anti-Caste Principle](#), 92 MICH. L. REV. 2410 (1994).

288. See Sunstein, *supra* note 287.

289. See *supra* text accompanying notes 16-228.

290. See generally Richard Delgado & Jean Stefancic, [Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?](#), 77 CORNELL L. REV. 1258 (1992)..

291. History already is recording the many initiatives passed by California voters as a response to the increased minority population in the state. See generally PETER SCHRAG, PARADISE LOST, CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE (1998) (making this argument).

292. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 74 (trans. D. F. Pears & B. F. McGuinness, 1961).

7. Sumi Cho* and Robert Westley,⁺ *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377 (2000)

In this Article, we attempt to retrieve an obscured history, central to the development of critical race theory ("CRT"). This history tells one of the many stories of student activism for diversity in higher education from the 1960s to the 1990s. In particular, we focus on a longitudinal case study, U.C. Berkeley's Boalt Coalition for Diversified Faculty ("BCDF"). BCDF's local movement to increase law school diversity culminated in 1989 with the BCDF- coordinated Nationwide Law Student Strike for Diversity.

This Article also will analyze the cross-pollination of movement and theory -- assessing both achievements and failings of parallel efforts to raise race consciousness through student-led diversity struggle and CRT's scholarly interventions on race discourse. By linking histories of communal struggle with the individual agency of the initial critical race proponents, we demonstrate how antiracist practices and antiracist theorizing are metabolically intertwined. In the

course of making this linkage, we credit not only the BCDF movement, but also other local and national struggles that utilize race consciousness in defining their goals, devising their strategies, and organizing their groups. It is our hope that other local and national movement histories will be reclaimed and documented. Consistent with critical race praxis scholarship, we believe that combining these movements is beneficial and necessary to the ongoing task of sustaining linkage between theory and praxis and the *1378 development of a diverse, race-conscious jurisprudence and legal profession.

Recent praxis literature underlines the significance of linking progressive lawyering and critical race theorizing to produce more grounded and effective litigation and scholarship. We extend this analysis by highlighting the importance of political organizing for the critical race theory project, and vice versa. n. 1 Such an understanding of CRT's roots has significant implications for the mutual obligations between activists in the academy and political communities.

I. HISTORICAL SIGNIFICANCE OF DIVERSITY MOVEMENTS FOR CRITICAL RACE THEORY

A. Linking Antiracist Organizing and Antiracist Theorizing

Most accounts of the development of critical race theory as a movement emphasize the agency of individual scholars who were dissatisfied with both critical legal studies ("CLS") and traditional civil rights paradigms. These scholars happened to find themselves writing on similar themes from similar, critical perspectives at approximately the same time and place. For example, according to one of the leading anthologies on critical race theory, CRT becomes a "self-conscious entity" in 1989 when these scholars convened their first annual workshop. The editor of this anthology acknowledged the intellectual influence that CLS, feminist jurisprudence, continental social and political philosophy, and the political inspiration of the civil rights movements had on CRT. However, the editor failed to mention the role of student of color activism in CRT, despite his own personal nurturance of such movements. n. 2

*1379 The other leading text on CRT describes CRT's development and notes the importance of both the civil rights movement for "inspiration" and "direction," as well as the CLS leftist intervention into legal discourse as "elements in the conditions of [CRT's possibility]." The editors then identify two events central to the development of CRT as a movement -- a student protest at Harvard Law School in 1981 over an alternative course on race and law, and the 1987 Critical Legal Studies National Conference on race and silence. n. 3

The emphasis placed on the Harvard protest is suggestive and from our perspective, very useful, but incomplete. Why such protest emerged in 1981 and why there was a six-year gap between the two central events remain

unexplained. How the 1981 protest played a developmental or catalytic role in the rise of CRT "as a movement" is unclear. n. 4 Genesis stories of the CRT movement are generally about the scholarly writings that "formed the movement." This Article strives to complete the story and counter, to an extent, the "super-agency" approach to collective action that is frequently adopted in historical accounts of the CRT movement. n. 5

We attempt to ground CRT in actual resistance movements not to proliferate competing genesis stories, but rather to place the birth and growth of critical race theory in a broader political context. *1380 By confining the origins of CRT primarily to the scholarly output of "outsider" intellectuals, existing genesis stories serve, ironically, to obfuscate historic and ongoing power relations in legal academe. The stories perpetuate the notion of self-correcting institutional reform, specifically that the struggle over physical space for people of color on law school facilities was primarily a matter of prevailing in the "free marketplace of ideas." The implicit message is that so long as critical race theorists write and speak compellingly, legal academe will welcome them to the table. Instead, this Article retrieves a buried history of heated political contestation for space that forced momentary openings in a confident and purposive power structure. The openings, created by political confrontation, facilitated the entree of a critical mass of outsider scholars into law teaching.

B. Race-Conscious Models of Political Organizing: A Case Study (1964-1986)

There are quite a few students who have attended school at Berkeley who went South to work with the Student Nonviolent Coordination Committee, and who have been active in the civil rights movement in the Bay Area I was one of these returning students. We were greeted by an order from the Dean of Students' Office that the kind of on-campus political activity which had resulted in our taking part in the Summer Project was to be permitted no longer.

This is what gave the Free Speech Movement its initial impetus. n. 6

Mario Savio, June 1965

This fight now is ours as much as it is yours. If there had been no students, we would have had no Freedom Rides. n. 7

James Farmer, National Director of CORE, addressing a free speech movement rally of over 1500 students and faculty members at U.C. Berkeley, December 20, 1964

*1381 We begin this genealogical tracing in 1964 with the Free Speech Movement at U.C. Berkeley. n. 8 The Free Speech Movement, known primarily as a student rebellion against university attempts to restrict student speech, had a definitive but largely unknown racial origin.

Upon their return from the Mississippi Freedom Summer of 1964, the U.C. administration confronted Berkeley civil rights activist-students with a ruling that curtailed the substance and manner of speech on university grounds as well as fund solicitations and recruitment by civil rights and other political organizations. Led by civil rights organizations that understood the importance of northern financial and political support for the struggle in the South, nineteen organizations formed a coalition to challenge the ruling. When a police squad car summoned by the university administration attempted to arrest a member of the Congress of Racial Equality ("CORE") for violating the new regulation, hundreds of students spontaneously surrounded the squad car and prevented it from leaving for the next thirty-two hours. n. 9

The Free Speech Movement is significant to this inquiry because it is one of the first post-WWII campus movements to originate substantively from antiracist student organizing. n. 10 Although the movement was comprised largely of white students, its race consciousness roots persisted and laid the political groundwork for the earliest collective U.C. Berkeley student of color organizing effort -- the Third World Strike of 1969. n. 11

***1382** The Third World Strike at U.C. Berkeley was the longest, costliest, and arguably the most institutionally significant student strike in U.C. Berkeley's history. Although one of the least known movements of the sixties, the strike was a paradigmatic moment of late- or post-civil rights activism undertaken by multiple communities of color in a historically white educational institution. n. 12

Berkeley students of color who would comprise the "Third World Liberation Front" ("TWLF") responded to the call by their counterparts at San Francisco State; where the coalition demanded the establishment of Ethnic, Afro-American, Asian American, Chicano, and Native American Studies. In addition, the San Francisco State students made some of the earliest demands for faculty, student, and staff affirmative action programs in California. n. 13 The ***1383** Third World Strike at U.C. Berkeley led to the creation of the Ethnic Studies departments and affirmative action admissions and recruitment, among other racial reforms. In response to these and similar challenges by students of color nationwide, institutions of higher education across the country underwent dramatic changes in admissions, hiring, and curricular development policies during the next decades.

In form, the strike was also particularly noteworthy for providing a model of student of color organizing. The TWLF, which led the strike, was comprised of a coalition of student organizations representing the Afro- American Student Union, Asian American Political Alliance, Mexican American Student Confederation, and the Native American Students Association. The TWLF's leadership structure featured a steering committee with equal numbers of voting representatives from each of the member groups. Representatives made decisions by consensus whenever possible, and by majority vote when not possible. This

approach to coalitional leadership and decisionmaking was often replicated by student movements in the subsequent decades. n. 14

After the Third World Strike victory in 1969, two issues dominated 1970s campus politics: the anti-apartheid movement and affirmative action. n. 15 The Soweto uprisings in 1976 brought international *1384 attention to the human rights violations of the South African racial regime. Student organizers developed coalitions that reflected the connection between antiracist organizing at home and abroad. While predominantly white students organized for divestment of U.C. funds from South Africa, students of color generally organized resistance to racism on issues closer to home, particularly around the United States Supreme Court decision in *Regents of University of California v. Bakke* and the tenure denial of Harry Edwards, and African American professor and founder of sports sociology. n. 16 While students of color did score a victory with the award of tenure to Harry Edwards, the 1978 *Bakke* decision was seen as a setback that demoralized affirmative action organizers. Only later did civil rights organizations discover the "silver lining" of Justice Powell's opinion that would permit race-conscious admissions. n. 17

From the late seventies to the early eighties, student of color activism subsided, with most of the campus political activity focusing on antinuclear protests, Central American solidarity work, and environmental issues undertaken by predominantly white student organizations. By 1984, however, the anti-apartheid movement regained momentum. Three important factors contributed to its revival: first, the protests at the South African embassy in Washington, D.C. organized by Randall Robinson, Mary Frances Berry, and Walter Fauntroy captured the imagination of student activists across the country. Soon thereafter, students at Columbia University began a vigil outside an administration building, followed by students at U.C. Berkeley, who began a sit-in outside of Sproul Hall on the campus's main plaza. Second, Jesse Jackson's first bid for *1385 the presidency and the Rainbow Coalition inspired and energized communities of color, including students, because that initiative prioritized the formation of student of color political constituencies on campus. And, third, U.C. Berkeley observed the twenty-year commemoration of the Free Speech Movement ("FSM") in the fall of 1984. Returning veterans of that struggle met informally with student leaders and highlighted the little-known racial origins of the movement and advocated for the renewed student activism around anti-apartheid efforts. Soon after the FSM Commemoration, an anti-apartheid coalition developed. n. 18

U.C. Berkeley students of color established two important political structures in 1984. Borrowing from the TWLF, one structure took the form of a "race-plus" coalition model, uniting students of color and les/bi/gay organizations, which had felt marginalized by previous progressive coalitions, interested in slating candidates for student government positions. This electoral coalition remains as the oldest campus political party to this day. We use the term "race-

plus" to designate the centrality and historicity of race-based organizing that recognized a network of oppressions and embraces coalitional consciousness and solidarity with other outsider groups. Other potential bases for coalition include axes of antisubordination resistance, specifically (but of course, not exclusively) feminist projects, les/bi/gay/transgendered liberation, and progressive white identity formation. The other student structure, an individual member-based organization of progressive students of color, was known as United People of Color ("UPC"). UPC was the leading organization in the anti-apartheid movement until U.C. Regents voted to divest funds in the summer of 1986. n. 19

Like the early history of critical race theory in dialogue with critical legal studies, the contestation with the white Left was a *1386 formative experience for organizers in UPC. Some of the same debates on "formality" and "informality" occurred in the political as well as the intellectual arena. n. 20 For example, one key conflict between the predominantly white, anti-apartheid group, Campaign Against Apartheid ("CAA") and UPC was over the decisionmaking process to be followed in coalition meetings. CAA insisted upon an informal, consensus-oriented, decisionmaking process that rejected any hierarchical leadership structure. While reasonable in theory, those who had the most time on their hands could persevere through hours of discussion and effectively exclude or limit participation by those who had competing time pressures. Unfortunately, the impact of such a process worked to the detriment of many students of color, who found they generally had less time on their hands for such open-ended meetings, and less inclination for such an exercise in consensus-by-attrition. As a result, planning meetings and political actions such as the Sproul steps protest became virtually void of student of color participation in the name of radical, consensus-oriented decisionmaking. n. 21

As the anti-apartheid movement wound down after important victories such as the U.C. Regents' vote to divest U.C. funds from South Africa, there was a clear and open split between CAA and *1387 UPC. The former group was relying increasingly on tactics of confrontation and sensationalism to highlight the urgency of the struggle. CAA refused to instill any principles for direct action that would curb individual members' expression of protest, even if such methods included violence. Such a lack of discipline and noncommitment to nonviolence meant that joint activities of CAA and UPC would be unduly hazardous for UPC members. When, for example, anonymous CAA would spit or throw bricks at police from a crowd, those police would invariably seek targets, usually tall men of color from UPC, to exercise their disciplinary wrath. n. 22

In addition to placing students of color unnecessarily at risk under the guise of radicalism, most UPC members found such activities to be problematic because these protest tactics were not designed to build and grow the movement, but simply to defy authority. Often that authority was rather removed from the stated target of the movement, i.e., the South African apartheid regime. Like CLS's critique of rights as legitimation, the CAA's overriding substantive

commitment to defying authority and insisting upon its vision of informal, nonhierarchical process grossly underappreciated and obscured dynamics of racial oppression as a lived experience. In this way, the "radical" stance of both CAA and CLS bespoke white perspectivism and privilege. n. 23

*1388 C. Converging Histories: The Race-Conscious Infrastructure
for
Resistance to Mainstream Legal Education (1986-91)

Aqui, ayar, apartheid morira
■ 1980s UPC chant
■

The success of the anti-apartheid movement, measured by the end goal of divestment, validated race-conscious organizing that developed through UPC as well as the race-plus coalition model. This victory also opened up the vista of political possibilities for future student activism and cultural contestation since an organizational infrastructure was largely in place. In addition, the anti-apartheid movement established a student of color organization and a principle of self-determination because of its seasoned members with organizing skills. The linkage, well-established since the 1970s and continued in the 1980s, between apartheid abroad and at home made natural a transition from the focus on divestment to an engagement of racism closer to home. Anti-apartheid veterans focused on two areas of unfinished business from the Third World Strike agenda: curricular reform and the specific demand for an ethnic studies graduation requirement, and faculty diversity in terms of tenure denial defenses and affirmative action hiring and admissions. n. 24 These race-conscious movements (in both form and substance) at Berkeley and across the country became known more broadly as "diversity movements."

In this historical context, with a close linkage to the antiracist struggle against apartheid, the diversity movement at U.C. Berkeley's Boalt Hall began. Affirmative action admissions for African American, Asian American, Latino/o, and Native American students began in the fall following the Third World Strike in 1969. The first two years of affirmative action admissions yielded twelve and eighteen percent of students of color in the incoming first year law classes of 1969 and 1970. In the fall of 1971, the percentage of *1389 special admissions students increased to thirty-one percent of the entering class due to an unexpectedly high "show up rate" among those admitted. The Boalt admissions committee had clearly underestimated the pent-up demand for low-cost, quality legal education. According to Linda Greene, a Black Students Law Association ("BLSA") student leader at the time, this sudden change of student demographics was experienced as a "traumatic event" by Boalt faculty. The faculty had not expected such a large enrollment because there had been no commensurate increase in financial aid to support minority admittees. In response to this trauma,

the faculty proposed eliminating the special admissions program altogether, this prompting the 1972 strike organized by BLSA, and joined by the La Raza Law Students Association ("LRLSA"), Asian American Law Students Association ("AALSA"), and the one Native American enrolled at the school. The strike lasted for two weeks before the faculty proposed to continue the special admissions program, but with a lowered pre- Bakke target goal of twenty-eight percent for "Third World" students. BLSA and AALSA accepted the faculty proposal, effectively ending the strike. n. 25

While the 1972 strike produced a successful result, its lack of organizational structure fostered disunity among students of color. As a result, groups made decisions seemingly without regard to other allied groups. Chicana/o students, who refused to end the strike after BLSA and AALSA reached agreement, continued to *1390 press for "parity" in law school admissions with the state population percentages. LRLSA also organized a separate sit-in at the Boalt admissions office during the strike. Without any coalitional structure from 1972-78, individual groups organized as issues arose with limited success. n. 26 During the 1970s and early 1980s, student of color input into the Boalt admissions process was significantly curtailed, from full organizational voting rights on the admissions committee, to advisory rights for students of color organizations, to the most limited advisory rights for individual appointees from student of color organizations. n. 27

1. The Formation of the Coalition for a Diversified Faculty

1978 Boalt Faculty Composition

1 Asian American male
1 African American male
3 white females
37 white males

In terms of hiring, the school's affirmative action record is good. n.

28

■ Phillip Johnson, Chair of Boalt Hall Faculty Appointment Committee, March 1978

■

During this time, a significant race-based organization at Boalt emerged in fall of 1977 -- the Coalition for a Diversified Faculty ("CDF"). Like the before them, seven organizations representing the race-plus coalition issued a position paper with a number of proposals to rectify the racial problems students perceived. The faculty neither discussed nor mentioned the proposals at subsequent meetings. Furthermore, meetings between CDF members *1391 and the law school administration proved fruitless. Dean Sanford Kadish refused to permit CDF members to address a faculty meeting to discuss the issues raised in position paper. After determining that no productive dialogue with faculty was

possible, CDF called for an all-day teach-in and strike that seventy-five percent to ninety percent of Boalt students supported on March 21, 1978. n. 29

The 1970s CDF activity peaked with a Title VI and Title IX complaint filed with the Department of Housing, Education, and Welfare ("HEW") on April 9, 1979, alleging that Boalt's hiring policies resulted in a lack of minority and women faculty. The complaint contended that the faculty composition denied students differing perspectives on important legal issues, especially in the areas of public interest law and poverty law. To CDF's surprise, HEW officials decided to investigate the student complaint. n. 30 Using the standard of other elite law schools' hiring as a guide, the federal report concluded that Boalt's faculty was no less diverse than the nondiverse faculties of top law schools across the country! Like the political activity on the main campus, antiracist organizing at Boalt Hall declined at the close of the 1970s and early 1980s. Perhaps the decline was a result of similar meta-and micro-forces such as the increasing national political and cultural conservatism, internal divisions, student turnover, and political setbacks. n. 31

***1392** 2. The Reformation of CDF in the 1980s

In the fall of 1985, the United Law Students of Color ("ULSC"), the group that reinvigorated the diversity movement at Boalt Hall, benefited from the momentum, experience, leadership and organizational models of both the UPC and the anti-apartheid movement. ULSC formed various subcommittees to address specific law school issues, including a subcommittee on Faculty Diversity. Although ULSC was short-lived as an organization, the Faculty Diversity subcommittee reorganized subsequently under the name Boalt Coalition for a Diversified Faculty ("BCDF"). n. 32

The diversity movement grew at Boalt, gaining political and popular support. Specifically, Boalt's denial of tenure to both Marjorie Shulz in 1985 and Eleanor Swift in 1987, the two popular, white female law teachers, spurred on BCDF's efforts and propelled BCDF into focal organizational role at the law school. n. 33

In fall of 1987, BCDF highlighted the lack of progress over the decades in diversifying the law faculty. BCDF widely publicized that from 1967 to 1987, there was only one tenured faculty member of color at the law school. Moreover, there had been an increase over the same time period of the number of tenured (white) female faculty members from one to merely two and one-half. This appalling record graphically symbolized what was clearly a racial and gender caste system at Boalt. The following year, 1988, the school responded to the diversity demands and publicity of its straight, white, male faculty identity with an unprecedented four diversity hires out of five total hires. n. 34 Adding to the pressure to ***1393** diversify, Boalt faced the threat of a pending lawsuit from Eleanor Swift's tenure denial. In the fall of 1988, after Swift announced that the

Title IX coordinator at U.C. Berkeley had made an unprecedented prima facie finding of sex-based discrimination in her case, the Boalt faculty abruptly voted to reverse its denial of tenure to Marge Schultz. n. 35

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Three of these things are not like the others.

"Graphic A"

Caucus for a Desegregated Faculty

Wed. Oct. 1 5:00 pm

Anthony Hall

(Graduate Assembly)

***1394** While organizing the external struggle for diversity against the Boalt administration and faculty, an internal power struggle developed within BCDF. Students of color had generally felt resigned to the margins by the BCDF organizational structure, which was an individual membership organization open to anyone at Boalt. Outnumbered and alienated in the BCDF by a dominant majority of white liberals, who often approached the problem without an understanding of institutionalized forms of racism, student of color participation in BCDF diminished dramatically from the days of ULSC. In recognition of this internal contradiction, remaining active students of color called for a reorganization of the BCDF leadership structure, to a group-based coalitional model that would initially include members of the BLSA, LRLSA, AALSA, and Women's Law Caucus on the steering committee. n. 36

Critical race theory offered theoretical tools that proved useful to organizers during this time. Critical race theorists had identified twofold challenges shared by UPC and BCDF organizers: (1) to undertake a race intervention into Left (CLS) discourse, and (2) to undertake a left intervention into liberal, civil rights discourse. n. 37 An early theoretical intervention materialized in a Harvard Civil Rights-Civil Liberties Law Review volume devoted to "Minority Critiques of Legal Academe" published in 1987. n. 38 This classic volume exposed the white paternalism that too often characterized relations between the white Left and communities of color. While the CLS's critique of rights as legitimating existing legal power structures was at times powerful, it could also be experienced as disempowering and condescending. The

naming by race crits of this dynamic between the white Left and people of color, even in progressive circles, legitimated the claims of minority organizers in other venues, including Boalt. The emphasis of the TWLF on self-determination, the public split of UPC from CAA, and dominance of race-based political organizing in the 1980s are indicative of the difficulty of the white Left to respect the leadership of people of ***1395** color and the goal of communal self-empowerment. Having the analytical descriptions of similar dynamics occurring within critical legal academe, students and other organizers of color confidently asserted the necessity of political structures that would account for, and protect against, the importation of deeply ingrained racial patterns of subordination into the antiracist struggle.

Similarly, the second race crit intervention in the civil rights community inserted a more progressive politic into traditional rights-based strategies, and was useful to diversity movements contending with liberal factions for agenda setting and strategizing. White liberals had a different orientation toward the white faculty than more disaffected students of color. Accordingly, white, liberal BCDF members advocated what was essentially a strategy of "constructive engagement" while progressives of color were ready to engage direct action in the spring of 1987. The BCDF agenda in these early days emphasized talking with faculty, surveying what kind of minority faculty they might like to hire, and making rather mild demands, which even when formally granted, could not be enforced. Such strategies and assumptions seemed to endorse the dominant view that the problem lay not with the institution, but with the minuteness and diminished quality of the minority faculty pool. Following the restructuring of BCDF to an "outsider" organization-based coalitional structure, the participation and leadership of students of color increased dramatically, as did the coalition's successes.

Under this new structure, BCDF continued its numerous educational events, often involving critical race, feminist, and critical legal scholars, organizational meetings, and presentations of demands that led eventually to a direct action strategy. Coincidentally, almost ten years to the day of the 1978 UPC strike, on March 22, 1988, BCDF called for a student strike and teach-in that over eighty percent of the Boalt student body participated in. The event culminated in twenty-eight arrests in Dean Jesse Choper's office. The following year, BCDF called for a nationwide strike of law students on April 6, 1989 that was even more successful than the previous year's strike as measured by its impact on legal education nationally. Law schools across the country observed the day of action with various activities, sending a clear message to their faculties ***1396** to diversify. In the summer after the nationwide strike, the campus-wide administration awarded tenure to Eleanor Swift. n. 39

The nationwide strike of 1989 represented the crest of BCDF's resurgence. At the microlevel, tactical missteps, including a shift away from base-building through educational events to an almost exclusive focus on direct action,

and the perceived success of the movement and commensurate reforms dissipated the once wide-spread popular support of BCDF among the student body and community. n. 40 At the macrolevel, other larger forces contributed to the decline of the diversity movement at Boalt and elsewhere. Specifically, the organized Right's effective strategy to delegitimize diversity movements through its "political correctness" campaign *1397 and the United States Supreme Court's retrenchment on race jurisprudence. n. 41

Every generation of law students experiences a legal development during its time that shapes its disposition toward law and legal practice in a profound, possibly career-altering way. For the BCDF generation, it was [City of Richmond v. J.A. Croson Co.](#) n. 42 Not so much for what it said, but more for what it symbolized, Croson dropped like napalm onto the burgeoning diversity movement at Boalt Hall. By 1989, after years of frustrated efforts to diversify the faculty, the movement began to enjoy successes at home and national recognition of the problem of the lack of diversity in law school faculties. As police arrested students for "trespassing" on law school property in acts of civil disobedience, Croson seared the political imagination, demoralized, and debilitated. The retreat from racial remedies was evident in the Court's application of strict scrutiny for state and local classifications, i.e., affirmative action. The case symbolized retrenchment at a higher level of authority within the legal profession and the system of justice against the principles of diversity that had recently guided the movement to modest success. n. 43

*1398 Not long after Croson came [Adarand Constructors, Inc. v. Peña](#), n. 44 *Podberesky v. Kirwan*, n. 45 and *Hopwood v. Texas*. n. 46 The U.C. Regents soon voted to end affirmative action, and a majority of California voters passed Proposition 209 with no further possibility of federal judicial review. In light of these events, the Boalt administration's old slogan "our hands are tied," now seemed like a self-fulfilling prophecy. These developments forced faculty who were committed to diversity at Boalt and elsewhere in California, into the difficult position of "managing the resegregation" of public education. n. 47

Despite its decline and unfulfilled potential, the historic political intervention in one of the top public law schools forced into the open the informal hiring and promotion practices that tended to exclude outsiders from membership within the white, male law faculty club. Law school faculties heard the message sent by race-plus student organizing for diversity at Berkeley and elsewhere, loud and clear across the nation.

D. Outcomes

Organized political resistance challenged the structure, substance, and culture of U.S. legal education and provided a fertile ground for the proliferation of an institutional-cultural n. 48 resistance *1399 to the reigning analyses of race and law. The vibrant political contestation in law schools across

the country in the late 1980s and early 1990s directly impacted critical race scholars' access to top law reviews, their legitimacy and popularity, and subsequently, placement in top law schools. n. 49 Prior to its spread as a form of legal scholarship, race-consciousness had already proven itself as a viable approach to law school organizing, and thus served as an empirical reference point upon which theorists could base a race-conscious jurisprudence.

What impact did the diversity movement initiated by BCDF and the Nationwide Law Student Strike have on legal education and critical race theory in particular? In partial answer to this question, we offer the following empirical analysis of material gains attributable to diversity movement politics. While one objective in this Article is to acknowledge student activism for these changes, we recognize that a multitude of actors including organizations and individuals worked to bring about a law faculty that is more representative of society. n. 50

According to a Society of American Law Teachers ("SALT") survey conducted in 1981, thirty percent of the nation's law schools belonged to the "Zero Club" in that they had hired not even one person of color onto their faculties. Another thirty-four percent had made one token hire. n. 51 In other words, almost two-thirds of *1400 law schools responding had zero or just one law faculty of color. The record for hiring women was similarly dismal. Ninety percent of law schools responding to a 1982 SALT survey recorded that they had zero to twenty percent tenured or on the tenure track female faculty. Over one-third of respondents had zero to ten percent women on the tenured or tenure-track faculty. n. 52 From the mid-1970s throughout the 1980s, faculty of color hovered around four to six percent of the full-time law teachers. As late as 1988-1989, full-time law teachers of color made up only 5.4%, with women comprising only twenty-three percent, of the total number of full-time law professors. n. 53

The spurious "pool argument" that there was no diverse pool of qualified law school graduates from which to hire was not credible. At the time, people of color and women represented 11.8% and 42% respectively of all enrolled J.D. students, which were approximately twice the levels reported for faculty members. n. 54 At some schools such as Boalt Hall (with one tenured faculty of color and 2.5 women in 1986), the disjuncture between student and faculty diversity was particularly appalling where students of color and female law students comprised twenty-five and forty percent of Boalt students respectively. n. 55

In the first hiring year following the 1989 Nationwide Law Student Strike, the percentage of full-time law faculty of color shot up to a total of 8.7% in one year. Seemingly overnight, the pool appeared to have become much deeper than previously imagined. *1401 Given the low turnover rates of faculty, this dramatic increase in the overall total pool represented a marked change of law school's hiring habits. n. 56 Within two years of the nationwide strike, the percentage of people of color teaching in law schools increased by eighty-five

percent. The percentage continued to increase steadily for the next six years to a 1996-97 high of thirteen percent full-time faculty of color, a 141% increase from the 5.4% of 1988-89. n. 57

Table 1

Percentage of Full-Time Law Teachers of Color (1975-97)

[Note: The following TABLE/FORM is too wide to be displayed on one screen.

You must print it for a meaningful review of its contents. The table has been

divided into multiple pieces with each piece containing information to help you

assemble a printout of the table. The information for each piece includes:

(1)

a three line message preceding the tabular data showing by line # and character # the position of the upper left-hand corner of the piece and the position of the piece within the entire table; and (2) a numeric scale following the tabular data displaying the character positions.

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1975-1976	1980-1981	1982-1983	1986-1987	1988-1989	1989-1990	1990-1991
3.78%	3.8%	5.63%	5.4%	5.4%	8.7%	10.0%
1...+...10...+...20...+...30...+...40...+...50...+...60...+...70.....+.						

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77 of table line 1. *****

1992-1993	1996-1997
11.4%	13.0%
77.....+...90.....+..	

Graph 1
Percentage of Full-Time Law Teachers of Color (1975-97)

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***1402** Evidence of the importance of the diversity movements to law faculty hiring is most compelling when we examine the years of entry of Latinas/os, into law teaching. Between 1966-1987, no more than four Latina/o faculty had entered law teaching in a given year, with an average of 1.27 Latinas/os entering for the period for a total of twenty-eight in twenty-two years. From 1988-97, the average jumped to 8.8 Latinas/os entering law teaching per year, with a high of thirteen in 1990, the first year to reflect the impact of the nationwide strike in its hires. The number of Latina/o faculty hired in law schools in the last ten years of diversity activism, for a total of eighty- eight hires, is more than three times the twenty-eight hired in the preceding twenty-two years of affirmative inaction. The marked increase in the last ten years mirrors the decade of intense politicization by student activists on the diversity issue at Boalt and other law schools across the country. n. 58

Table 2

Number of Latinas/os Entering Law Teaching by Year

1966	2	1977	2	1988	6
1967	0	1978	1	1989	9
1968	0	1979	0	1990	13
1969	0	1980	2	1991	18
1970	1	1981	0	1992	10
1971	1	1982	2	1993	11
1972	0	1983	2	1994	6

1973 1 1984 4 1995 8

1974 2 1985 4 1996 5

1975 1 1986 0 1997 2

1976 2 1987 1

1403 While the simple correlation does not empirically prove that student activism "caused" the spate of diversity hires, the statistics combined with the history presents more than a striking coincidence. The diversity movements are partly responsible for the opening of a closed hiring and promotion system in law schools that had never before been subject to such sustained public scrutiny. In the face of BCDF-instigated turbulence, Boalt's Dean lost his firm grip on the reins of power and had to give way to more liberal or moderate actors who could negotiate between protesting students, and an entrenched old guard momentarily losing its balance.

Concerned about the negative publicity generated by protests at Boalt, many law schools undertook aggressive measures to avoid Boalt's fate by incorporating at least token representation into their ranks. In this political context, critical race theory ("CRT") as a scholarly movement proliferated and achieved more national publicity and acclaim. Furthermore, newly hired law teachers of color and junior race crits supported the work of CRT by canonizing ***1404** the early works of those who are now considered senior race crits. To be sure, the quality of work by early race crits was impressive for its theoretical insight, methodological innovation, and analytical depth and breadth. But the student-catalyzed transformation of the institutional culture of legal education fostered, in part, the popularization and legitimation of the intellectual movement through publication in premier student-operated law journals and installation of leading race crits into top law schools.

To overlook the role of local and national student organizing in bringing about these changes is dangerous to CRT as a long-term project. Such oversight buttresses the liberal myth of self-correcting societal institutions that respond to "better argument." In this narrative, law schools diversified when exceptional candidates of color miraculously presented and proved themselves worthy. Sustained and heated political activism was merely incidental or detrimental to the process. As critical race scholars, we should be wary of

histories of our inclusion that perpetuate the myth of institutional openness to racial justice.

The activism at Boalt for faculty diversity in the late 1970s and late 1980s should be understood not as episodic, but as part of a tradition of race-conscious resistance at U.C. Berkeley. This Berkeley tradition, beginning with the Free Speech Movement of 1964, valorized political self-historicization and, thereby, promoted a positive culture of coalitional activism among its student body. At Boalt Hall, the student diversity movement constituted itself as a membership organization committed to diversity in three primary spheres: faculty, student body, and curriculum. In part that focus reflected a practical strategy, which we might call "continuous diversity mobilization." To achieve this goal, a coalition model developed among student groups that required us as students to bridge lines of difference through self-education, cooperation, risk-taking, and solidarity.

The group of scholars of color and women that emerged during and out of the new era of student activism on law school campuses and racial retrenchment in the courts confronted a rapidly shifting set of political and intellectual assumptions about the significance of race. On the Left, white radicals associated with the critical legal studies movement provided practically no critique of institutional racism. Theoretically, they were oriented towards trashing the formalism dominant within the liberal legal academy. In terms of ***1405** praxis, however, this position opened up relatively little institutional space for identity politics and instead led to a politics of anarchic resistance reminiscent to our mind of white, CAA-led, anti-apartheid actions. In the middle, white liberals remained wedded to an integrationist paradigm that could afford to be indulgent of marginal demands for greater inclusion of people of color and women, so long as the basic structure of opportunity remained the same and praxis did not involve confrontation. And on the Right, white conservatives, sensing that any serious reflection upon the legitimacy of the structure of opportunity within legal or university education might signal the "fall of civilization," trumpeted the virtue of meritocracy and colorblind jurisprudence and denounced the vices of political correctness and multiculturalism. n. 59 Through these means, they attacked affirmative action, academic support programs, campus speech codes, and ethnic studies.

In retrospect, part of the decline of BCDF in the nineties can be traced to historical amnesia and the failure to heed the centrality of race-consciousness forwarded by critical race theorists. The race-plus model rooted in the Third World Strike responds to the pervasive problems of racism, white privilege, and white pa(ma)ternalism in progressive coalitions historically, by affirmatively designing a coalitional structure that does not permit marginalization of racial minority groups. This form of "affirmative action" in coalitional structures could also be applied to other subgroups that have historically faced similar marginalization.

***1406 II. MOVEMENTS AND CRITICAL THEORY**

This Article first considered the development of a race-conscious infrastructure for political resistance in higher education, and points of articulation with the development of CRT. In Part II, we offer some thoughts on the need to understand movement history as part of valuable subjugated knowledge, discuss possible synergism between movement politics and theory, and finally, register a warning against the dangers of sublimating movements.

A. Movement History as Subjugated Knowledge and Movement Histories

The new student [African American, other minority, women's and radical white groups changed the atmosphere at Boalt Hall, not only because many of them tended to be militant and distrustful, but because they often did not respond to traditional law school teaching methods

The strained relationships of the 1980s were confirmed in faculty interviews.

Whatever the contrasts in motivation or approach, it was generally agreed that the dozens of confrontations that had occurred over the previous [twenty years had taken a heavy toll on the environment at Boalt Hall and that the warm, collegial atmosphere of earlier days had been replaced with formality, distrust and hostility.

-- Sandra Epstein, author of *LAW AT BERKELEY: THE HISTORY OF BOALT HALL* n. 60

Since its foundation in 1882, the School of Law (Boalt Hall) has demonstrated through progressive admissions policies its commitment to diversity in legal education.

-- Cecilia V. Estolano et al., *NEW DIRECTIONS FOR DIVERSITY: CHARTING LAW SCHOOL ADMISSIONS POLICY IN A POST-AFFIRMATIVE ACTION ERA* n. 61

***1407** Instead of shutting down the school or protesting at the dean's office, we are doing heavy duty lifting of policy analysis.

-- *CHICAGO TRIBUNE* article quoting *New Directions for Diversity* co-author, September 29, 1997 n. 62

The work of student diversity activists constitutes a form of subjugated knowledge defined by Foucault as "a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: naive knowledges, located low down on the hierarchy, beneath the required level of cognition" n. 63 The task of critical opposition is to disinter such knowledge in order to "establish a historical knowledge of struggles and to make use of this

knowledge tactically today." Subjugated knowledge challenges unitary theories, from both the Right and the Left, that purport to offer a totalizing picture of how societies are ordered.

A recent work on "the history of Boalt Hall" shows the process by which a dominant discourse absorbs and invisibilizes the illicit knowledge produced by a movement of resistance. Sandra Epstein writes about the 1980s movements only briefly in her lengthy celebration of Boalt's past and without citing to a single member of BCDF. Instead, the story is told through the eyes of the faculty and administrators who resisted the student challenge to white, straight, male supremacy. Epstein describes "angry students" for whom "confrontation became a way of life" crafting "manifestos" and "disrupt[ing] classes." Remember that this broad-based movement garnered eighty to ninety percent student support for its nonviolent boycotts of Boalt classes and changed, at least for a time, faculty hiring policies. Epstein characterizes negatively the U.C. Berkeley central administration's close scrutiny of Boalt's hire and tenure policies. Epstein "blames" not the law school's concerted intransigence in the face of student demands for a modicum of diversity on the Boalt faculty, nor the faculty's denials of ***1408** tenure to two women that later had to be reversed, but student protesters, who "seemed to be setting the law school agenda." n. 64

Perhaps a more disappointing example of the erasure and disparagement of student activism in service of the self-correcting institution narrative appears in a Boalt student-authored report, *New Directions for Diversity*. n. 65 In this otherwise ground-breaking, critical report on the Boalt admissions process in the wake of Proposition 209, the authors imagine an institution that they claim has demonstrated its "commitment to diversity in legal education" by virtue of the forty percent student of color enrollment in pre-Proposition 209 California. n. 66 The report presents a history of admissions at Boalt that fails to note the 1972 admissions strike, the 1977-79 HEW investigation, or the BCDF struggles of the 1980s and, not surprisingly, concludes by extolling Boalt's prodiversity tradition. n. 67 While extremely useful for its policy analysis and concrete recommendations, the report plays a dangerous game by stipulating to a sanitized institutional history, presumably in exchange for greater currency with the administration and faculty. Such a "policy not protest" approach may produce short-term gains, but at the cost of debilitating the very movement politics that make possible meaningful student input toward progressive reform policies. In other words, a "good cop/bad cop" strategy can only work if the good cop does not begin to believe that the bad cop is truly bad and expendable. n. 68

Generally, critical race theory scholarship seeks transformation through recovery of, and placing emphasis on, excluded and marginalized elements of the body politic. CRT participates in the production of knowledge through the creation of a counter-discourse. n. 69 The counter-discourse of CRT stands opposed to powerfully ***1409** entrenched systems of totalizing knowledge

that function through selection and exclusion of data. The system of domination that CRT opposes cannot bear having its history told. History is such dangerous territory because it cannot sustain the shopworn alibis of existing power arrangements: steady progress from barbarism to civilization, principled application of neutral rules, participatory democratic decision making, meritocratic reward systems, making the victim whole, the dignity of the individual, etc. Each alibi is contradicted by U.S. society's treatment of women, people of color, and other historically disparaged groups. These narrative alibis legitimate existing power arrangements through the purgation of history and the subjugation of illicit knowledge produced in resistance experiences.

To engage in relevant and effective oppositional theorizing, critical theorizing must be geared toward combating dangers to, and helping create the conditions of solidarity necessary for, progressive political community formation. The antagonisms and alliances lived by movements should become both the site of critical intervention and the place from which we speak as counter-discursive subjects. CRT has taken seriously the power/knowledge coupling recognized by critical theory and remembered that movements have long been a primary effect and constituent of power/knowledge configurations.

B. Between Synergism and Sublimation

We have tried to establish closer developmental linkages in this Article between contemporary race-conscious political struggles and critical race theory, suggesting how the former have been foundational to the latter. In this final section, we explore two models for relating movement histories to CRT -- "synergism" and "sublimation." CRT's next decade should adopt more synergistic modes of interacting with movements and movement histories because synergism, unlike sublimation, is congruent with CRT's commitments to community formation and social transformation.

***1410** 1. The Benefits of Synergism: Weaving Theory, Praxis, and Politics

Synergism refers generally to an interaction of agents or conditions that produces a combined effect that is greater than the sum of the individual effects. In this Article, we use the term as a metaphor. Here, the term signifies a conscious commitment to linking subjugated forms of knowledge with the scholarly practices of CRT. We envision a mode of synergistic movement theorizing that contains both substantive and methodological commitments. Synergism represents the contestation with power by racially conscious political movements by "doing" race conscious theory whose "scientism" -- data, logic, and verifiability grows organically from political context. As outsider intellectuals, our goal and strategy articulation should become an open process, a

dialogue, intersubjective and genealogically wed to the resistant discourses and practices that perform the movement.

Synergism is a vitally important possibility for a project, such as CRT, that attempts to impact the political world through discursive intervention. Such a project is necessarily collaborative, requiring information and insights gleaned from movements in order to formulate discursive strategies that must ultimately be tested in the context of actual struggle. The intersubjective nature of the CRT project reveals its political-theoretical essence. The moment that critical race theorizing loses its grounding in the political and the communal is the moment that it ceases to be an antisubordinationist project. Subjugated knowledge preserves the history and the meaning of struggle and the context of movement politics so vital to the synergistic approach to critical theorizing. Such an ahistorical pursuit of the "theoretical" represents an abdication of political engagement and the relinquishment of the full promise of anti-subordinationist intellectual production.

The imperatives of synergism operate on two levels. First, we must be accountable in our work to the people, goals, and ideas of movements in a concrete and direct way. As academics, we must acknowledge the difficulty of maintaining the immediate connection to "movement politics." To the extent that we are to perform as "disenchanted intellectuals," n. 70 it should be mainly through disenchantment *1411 with ourselves! Furthermore, we should remain audacious in our demands to power and in speaking simple truths to power. However, we should not have the arrogance to tell communities in struggle how to dream, imagine their empowerment, or narrate their political identity, especially insofar as we remain in the gilded cage of academe. We cannot presume that their voices speak through us. We have to achieve a certain humility and accountability vis-a-vis those who live the struggle outside of academe.

Second, and concomitantly, we must strive to overcome the tendency to construct with our work an intertextual universe that is, at best, in a "virtual" relation to struggle. The intersubjectivity, not intertextuality of the synergistic approach, insures that our work will grow under more congenial "relations of production." The utter alienation of purely intertextual scholarship from political struggle is an outgrowth of the legitimating function played by professionalized intellectuals working within academe's "social structures of accumulation." n. 71

Much of the first wave of CRT scholarship represents the synergistic approach in its relationship to antiracist organizing. In fact, *1412 many CRT founders wrote about movements or with movements in mind, intervening through their writings to produce new understandings of old problems in order to generate better theory. To name just a few examples, Derrick Bell directly confronted civil rights lawyers' conflict of interest in representing their clients in the movement for school desegregation. Mari Matsuda grounded her call for a jurisprudential methodology that would "look to the bottom" by

analyzing the Japanese American redress and reparations movement. Matsuda, Charles Lawrence, Richard Delgado, and Kimberle Crenshaw addressed the problem of "balancing" hate speech against First Amendment rights. n. 72 Based on his years of organizing, especially in the Chicano community, Gerald Lopez developed a new orientation toward "rebellious" community lawyering that emphasized collaboration and empowerment, rather than the paternalistic, noblesse oblige model of civil rights lawyers. n. 73 As a final example, Angela Harris critiqued feminist legal theory as falsely universal based in part on experiences of women of color. n. 74

Recent degeneration of equality jurisprudence and longstanding political rhetorical attacks on the diversity ethic cry out for a close, critical association between antistatutory theory and practice. Right-wing political rhetorical strategies, such as the political correctness attack on diversity activists, underscore the need for oppositionalist intellectuals to thematize and make tactical use of movement history to sustain and nurture progressive change. Movements are forged against both structural and material limitations with which legal scholars typically do not contend. But scholars must remain cognizant of these "little histories" of *1413 resistance, and so themselves resist essentializing the "History" of social change.

2. The Dangers of Sublimation: Before and After Postmodernism

To sublimate is to divert the expression of an instinctual or impulsive desire in its primitive form to one that is considered more socially or culturally acceptable. Sublimation in its psychoanalytic use has a structural form in which a primary realm (primitive desire) is subordinated to a secondary realm (socially acceptable behavior). By analogy, sublimation may characterize a particular structuring of the relationship between CRT and movement history. Knowledge and retellings of activist histories in one's work are often viewed within critical intellectual circles as the crude expression of desire, a faux pas to be suppressed or forgiven. n. 75 We offer the current fascination with anti-essentialist theorizing as an example of sublimation and the resulting danger of progressives politically capitulating to conservative agendas.

Sublimation took shape in CRT through the "postmodern turn" and the adoption of anti-essentialism as a primary intellectual stance and dominant cultural norm. Scholars hoped that this postmodern turn would lead to empowerment of people of color by restoring an autonomy of self-definition, which had been historically denied. For example, Angela Harris recounts how African American women too often were absorbed, invisibilized and marginalized within predominating white, straight, middle-class feminist movements. n. 76 One of the most significant outcomes of the postmodern turn for race critics was that "race," as it had been understood historically had been put under erasure. Critics on the Right and Left questioned the coherence of the race concept, the

assumption of its immutability, and the fiction of its transparency. Scholars retooled race variously as a social construction, a dangerous trope, a performance, in contrast to outdated and discredited ***1414** notions of race as a biological fact of difference among groups. The retooling resulted in overturned essentialisms and unmasked incoherent group classifications as a stratagem of oppressive power. Implicit in this turn was a deconstructive and restorative promise; it would reveal the discursive and actual violence of modernist racial practices and open up genuine space for the flourishing of the diverse, the multicultural, and coalitional possibilities for autonomously defined identities. n. 77

We understand the rise of anti-essentialism as a dominant theory and culture within CRT in a particular political context. At about the same time that the diversity movement peaked around 1990, a substantial segment of the academic Left was in the midst of the postmodern turn. This turn took place across disciplines, including, but by no means primarily, within the legal academy. While the turn seemed mainly to affect the scholarly and methodological approaches of left-leaning academics, its anti-essentialism resonated as well with certain aspects of the Right's attack on race consciousness. n. 78

In response to the effectiveness and rapid growth of diversity movements on college campuses in the late 1980s, right-wing publicity machines and the media at large seized upon highly sensationalized, often fabricated or misrepresented, incidents of alleged abuses by diversity activists. Following what would be the peak of the diversity movements in the spring of 1990, the New York Times published a pivotal article entitled, *The Rising Hegemony of the Politically Correct* in fall of 1990. This article made using the term "political correctness" ("PC") popular and the articulation of sexuality, gender, and racial justice demands taboo. n. 79 The recasting of diversity activism as PC undermined the moral claims of such movements and allowed conservatives and institutions to rebut the ample data and the obviousness of race and gender exclusion.

***1415** The charge of PC repression was incendiary, unfair, and utterly effective with no semblance of "equal time" given to student activists to respond to the slander through the mass media. Conservative intellectuals, not critical theorists, practiced synergistic theorizing at this time by assisting the right-wing movements' recapture of the moral high ground on race politics. Aided by the crusading disparagement of "identity politics" by academics on the Left, conservatives generally made it difficult and unpopular, worse yet "un-chic," to respond to charges of "political correctness" with a forthright defense of race-conscious politics and law. n. 80

In this political context, the postmodern turn in academe did not help diversity movement politics that faced formidable administrative aggression, targeting student leaders for arrest and prosecution, and political/judicial retrenchment on race and rights. n. 81 A more intersubjective relationship

between theorists and movements may have provided insights into the diversity movement's actual strengths and weaknesses. Such insights, presumably, would have preempted CRT's internalization of myths and caricatures generated by the white Left and Right about student of color organizing. *1416 A synergistic approach to critical race theorizing might have avoided two key misunderstandings embedded in the antiessentialist ethic.

a. Underestimating Structures of Power and the Power of Structure in Movement Politics

Anti-essentialist theorists have based their conclusions in part on the experiences of the marginalized. n. 82 As stated previously, Angela Harris has critiqued mainstream feminist movements for their invisibilization and marginalization of African American women. In this sense, insights drawn from movement experiences are consistent with our synergistic approach as well as our experiences within and anti-essentialist critiques of leftist, women's, and GLBT organizations. But what starts as a bold critique of racism or other forms of exclusion within a larger progressive movement ends in Harris' troubling call to reject "shared victimization" in favor of more "positive," relational, contingent identities. n. 83

Thus, anti-essentialism calls for the deconstruction of falsely universalistic group identities that obscure minority group particularities. Yet once set in motion, anti-essentialism unmodified has no limiting principles to prevent minority groups from being deconstructed until all that remains are disunited and atomized individuals themselves. These individuals are understood as unstable constructs, who attain identities only through a process of perpetual reperformance. The anti-essentialist critique has placed in question the viability of communities, valorizing instead "coalitions" of individuals. The theoretical anti-essentialist grounding of such a coalition of individuals purports to offer a more advanced and more accurate account of both the political subject and politics. However, in light of our study, this proposition deserves to be *1417 approached with skepticism. n. 84 For example, we cannot figure out what political organizing structures anti-essentialists propose as the alternative to group based political formations. How are they to be built under the formulation of a contingent, temporary, and relational identity? Upon what foundation can difference and creativity will political formations? How will such a program be effective in challenging established structures of subordination that are powerful and organizationally structured -- the reality of Eurohet-eropatriarchy?

Many critical anti-essentialist theorists tend to underestimate the power and force of racism and other forms of supremacy as formidable political structures. Focusing primarily on the realms of ideologies and cultures of racism, these anti-essentialists seek to combat racial oppression with conceptual reframings, counter-discourses, paradigmatic shifts, creative performances, and

cultural contestations. Unmodified anti-essentialists tend to ignore the entrenched political institutions and structures of racism that require more strategic confrontation, disciplined organization, and coordinated follow-through. Accordingly, such theorists also generally underestimate the need for political unity and particular group-based, "essentialist" structures of political organization to respond to such structures of oppression. Sublimationist approaches miss an important insight that is well understood by activist intellectuals: successful multiracial coalitions and movements that respond to daunting forces of oppression are as fragile and fleeting as they are effective and deeply satisfying.

Had critical race theorists challenged, rather than embraced the "identity politics" critique, perhaps their lively public defense of "identity" or race-based politics might have sustained the movement. Critical theorists needed to do more to study, understand, promote and nurture successful movements and coalitions. Unfortunately, some race critics lost their transgressive voice. Movement ***1418** politics fell victim to sublimation through the rush to unmodified anti-essentialist theorizing.

To avoid political quietism, a theory of anti-essentialism must paradoxically combine with a provisionally universalistic structure for political organizing that unites contingent, transitory, and relationally defined individuals on the basis of interests rather than putative fixed group identities. But the proposed alternative of "getting beyond identity politics" and moving toward "radical and plural democracies" based on "interests," as a step up in the evolution of political group formations, begs the question of an historic and ongoing dynamic of racism within progressive political movements. This movement form of racism often expresses itself in the inability of white activists to respect or accept the autonomy of people of color, even when organizing around issues of racism, such as agenda setting, political strategizing, or leadership development.

We suggest that the essentialism/anti-essentialism debate represents a false dichotomy that reflects not so much a theoretical problem, but a political one. This problem is correctly identified by Angela Harris in her critique of feminist jurisprudence: "[In feminist legal theory, as in the dominant culture, it is mostly white, straight, and socio-economically privileged people who claim to speak for all of us." Rather than championing creative individualism and attacking group-based political formations that have produced some relief from hegemony, we should insist on political accountability from the unrepresentative group that is speaking for all of us. Such an approach would have challenged, rather than capitulated to the attack on group identities through the Right's political correctness campaign and the Left's critique of identity. n. 85

***1419** The anti-essentialist critique misdiagnoses the classic tension within progressive movements -- solidarity v. accountability. The sublimation of the political problem of accountability into the more socially acceptable theoretical expression of anti-essentialism within legal academe does a disservice to solidarity. Unmodified anti-essentialists remain wary of political

solidarity by equating it with the flattening of difference. Because a movement's political survival is not the immediate concern of theorists, even to critical race theorists, the importance of solidarity falls by the conceptual wayside.

In demanding accountability we should not lose sight of movement ethics and the long-term goals of antiradicalization and community formation. What this may mean, in light of the long history of factionalism within radical movements, is that scholars must adopt protocols for debate and disagreement to help avoid the spiral of sectarianism that led to the decline of many of the promising movements of the 1960s and 1970s. The importance of both solidarity and accountability demands that the racial critique of feminism be communicated, but in a way that makes greater political unity more, rather than less likely. We believe that closer work with movements will heighten our appreciation for both the dialectical advantages of the accountability/solidarity tension as well as the formidable structures of power we confront.

b. Overestimating Regression in Race-Based Movements

Another danger of the sublimationist treatment of movements is the overestimation of both the extent and scope of regressiveness within race-plus organizational models. By virtue of its distantiation, the anti-essentialist focus of CRT tended, ironically, to essentialize racial political formations as crudely nationalistic, sexist, and homophobic. Detachment from such movements prevented theorists from appreciating the wide range of race-based political organizing, from progressive-coalitional to chauvinist-nationalist forms.

Anti-essentialist rhetoric is a useful critique when the categories within which progressive politics takes place have become too rigid to ground useful coalitions. But anti-essentialist rhetoric represents a platitude already evident to and internalized by conscientious *1420 essentialists. For only by recognizing, addressing, and transforming differences into political solidarities could one hope to go forward with a successful movement. In light of the twin hazards of the political correctness charge and the identity politics critique, the fascination with anti-essentialism was a luxury available only to those who did not have to deal with the increasing difficulties of race-plus political organizing and coalition building in the face of 1990s backlash. Race-plus organizers, operating under the principle of "conscientious essentialism," already learned and applied the lessons of anti-essentialism and "strategic essentialism" as suggested by the movement slogan, "unified, but not uniform."

As we have seen, the coalitions that formed within the Boalt student diversity movement were based upon autonomously chosen racial or gender affiliations that nevertheless represented essentialist notions of community. To take one example, not every Black law student identified with or belonged to the BLSA, but every member was Black. Although BLSA students may have seen themselves as a coalition rather than as a community, it was an

essentialist coalition. Moreover, this conscientious essentialism was not a deficit in the context of the diversity struggle. On the contrary, conscientious race and gender essentialisms were indispensable to the credibility of the diversity movement and its demands. A diversity movement in which principles and practice are not structurally bound together would either fail to mobilize change or bring change that disserves the interests of the diverse communities it purports to represent.

Critical race anti-essentialists could have learned from movements to distinguish between those conscientiously (or strategically) essentialist political groupings that formed precisely as a response to anti-essentialist critiques of existing movements and those crudely essentialist political groupings whose narrow nationalisms or (hetero) sexism subverted progressive political formations. Through greater interaction, CRT scholars would have known that diversity movements at the time were largely led by students of color, and women's and gay/lesbian/bisexual groups that performed qualified anti-essentialism out of political necessity. This knowledge through interaction might have curbed scholarly skeptical tendencies to overestimate regression in race-based movements.

***1421 C. Some Demographic Musings on the Synergism/Sublimation Divide**

We recognize that neat categorizations of first and second wave CRT do not give a complete picture, yet there are analytical distinctions of value to be explored by dichotomizing between recent and established race crits. What follows is an impressionistically drawn and somewhat superficial set of hypotheses regarding a possible generational/demographic explanation of the synergism/sublimation divide identified above. We undertake a generous reading of the first wave CRT scholars and a critical reading of the second wave because we belong to the second wave and feel it is important, as method, to start with self-critique in the hopes of reconciling tensions between the two generations of CRT.

Much of the first wave of CRT scholarship adopted a synergistic approach that incorporated and reflected movement sensibilities into the analysis of legal issues and problems. The second wave of CRT scholarship by contrast, is marked, to an extent, by a dominant ethic of anti-essentialism. This ethic seeks to break apart the whole for closer inspection of the constituent parts. While many second wave race crits draw from movement dynamics, they may favor their role as "disenchanted intellectuals" with the more mediated relationship to political engagement that such a metier implies.

Does the synergism/sublimation divide correlate with generational and demographic differences? Racial demographics of second wave race crits differ markedly from those of the predominantly African American first wave of

CRT, which reflects the broad pattern of law school hiring. In 1986-87, for example, faculty of color comprised but 5.4% of total law school faculty nationwide, of which African Americans constituted approximately seventy percent. n. 86 Up until the decade from 1987-97, law schools employed mostly white men, with only token hires of white females and African Americans. n. 87 Latina/o and Asian Pacific American ("APA") percentages during this era averaged less than one percent each of the overall law faculty. n. 88 Native American hiring was and continues to be infinitesimal. n. 89

***1422** To illustrate these changes using the Michael Olivas's data on Latina/o hiring in the last three decades, law schools hired eighty percent of all Latinas/os (88 out 110 total) in the last ten years (1988-1997). n. 90 According to another study, approximately seventy percent (11 out of 16 total) of American Indian law faculty entered in the last decade. n. 91 And roughly half of the current APA law professors entered law teaching since 1986. n. 92 Women of color increased even more dramatically of late. For one striking example, ninety-four percent of all APA women law faculty started teaching since 1980. As a result of changing demographics and politics, second wave crits were significantly more diverse along the lines of race, gender, and sexuality. Unsurprisingly, this second wave is interested in exploring the subcomponents in the category of race, a category that had been constructed by liberal whites as almost exclusively "Black and white," and as default male and heterosexual. The clash of demographics with the extremely narrow historic construction of race by the legal academy was an important condition of possibility for the postmodern/anti-essentialist endeavors of second wave race crits.

In addition, CRT's founders and first wave for the most part fall within the "baby boomer" generation, born roughly between 1945 and 1962. The second wave race crits, mostly born after 1962, largely entered legal academe after 1990. The intellectual "coming of age" for these two generations differs significantly. The second wave was schooled at the height of the postmodern turn and viewed political skepticism as a progressive intervention. To this ***1423** second wave, group identity took the mantle of cultural performance in order to avoid irrelevance as passe "modernist" form. By contrast, the first wave's instruction was taken in structurally-oriented, race, class, or gender- based theorizing that was much more receptive to community organizing in addressing institutions and systems of power.

Moreover, important changes in the social environment affected junior race crits as scholars. For the early founders, CRT was a dangerous activity, one that could result in further marginalization and outright exclusion, based on the experience of their CLS counterparts who were being denied or fighting bitter battles to gain tenure. Only after an impressive initial body of scholarship emerged did critical race theorizing achieve a measure of safety and success for its practitioners. Second wave race crits benefited from the elevated status and newfound theoretical ascendancy of CRT. Accordingly, they faced

pressures and rewards when entering the "race for theory," not necessarily a race that is conducive to the synergistic ethos we described above. n. 93

As a final consideration, the founders and first wave scholars came of age during an era of social protest and race-based contestation/resistance, with the civil rights movement, the Black Power movement, the Black Panther Party, La Raza Unida Party, the Brown Berets, the American Indian Movement, I Wor Kuen, Line of March, and other radical, nation-based political organizations. Many of CRT's first wave participated in these or other race-based formations, internalizing the various positive lessons and ethics of the movement, such as unity, solidarity, audaciousness, self-determination, critique and self-critique, and coalition. n. 94 However, they also experienced the movement's negative excesses and weaknesses: sexism, ethnocentrism, homophobia, fratricide, sectarianism, *1424 vanguardism. The power of institutions such as the media, entertainment industry, and universities to disparage, invisibilize, and defame such movements combined with movement instilled traits of modesty and self critique to result in a one sided, negative characterization that even its participants are hesitant to rebut publicly.

In order to balance these possible generational differences, greater interaction between early and later race crits is needed. Senior race crits who have engaged newer arrivals to the CRT project, are supportive as well as gracious in the face of various explicit and implicit criticisms of first wave CRT's "Black-white" paradigmatic, heterosexism, and elitism. And in fact, many of these criticisms do not apply with the same force to those engaging with the second generation of CRT. Two unfortunate consequences should be noted: first, there has been a lack of open engagement with some that could benefit from the second wave demands for accountability. Second, junior crits, who could learn important lessons from those whose struggles paved the way, pass over the political histories and wisdom of those who allowed themselves to be critiqued. The alienation and distance between much of the first and subsequent waves of CRT has produced a regrettable chasm and loss of historical memory so vital to the regeneration of community race-based resistance.

Race crits should reclaim not only the fragilities of our movements, but also their magical and sublime qualities. Black freedom struggles should be not be seen primarily as examples of outdated "Black-white" dichotomization, or chauvinist nationalism that epitomizes all that is wrong with traditional race theorizing. Rather, the commitment, courage, sacrifice, and strategic brilliance of its many participants should be unromantically retrieved to inspire and inform contemporary resistance movements and oppositional theorizing. At the same time, we should continue to strengthen the movement, in academic sites and beyond, by ensuring that our priority of solidarity among oppressed communities does not obscure the necessity of accountability for greater intergroup justice.

First wave race crits can disabuse junior race crits of hegemonic

notions that radical, race-based movements were somehow more sexist, classist, and homophobic, than society-at-large. Moreover, through the sharing of subjugated knowledge and repressed *1425 movement histories, we should understand how even imperfect movements have forwarded the struggle we inherit today, just as our flawed efforts will nevertheless provide a basis for future resistance. Through such an understanding of our fragility and ability to prevail against overwhelming odds, CRT might inculcate a greater appreciation for an intersubjective method that will promote greater expression of the "political" in our search for the "theoretical."

CONCLUSION

The goal in this Article is to ground CRT in the history of resistance movements in order both to reveal the political context of CRT's emergence and to raise for further reflection the strengths and weaknesses of the historical cross-pollination between praxis and theory. We sought to do so not simply to add one more legend to the genesis stories that are told about a successful and powerful institutional innovation. Rather, we suggest ways in which CRT-identified scholars might act collectively to contend with the continuing and coming storm of backlash and retrenchment against racial and social justice in which we are already significantly engulfed.

Antiracist organizing shares some of the same frustrations of antiracist theorizing, but the strengths and weaknesses of the former are different from those of the latter. One of the great strengths of antiracist organizing within the student diversity movement at Boalt was its adoption of organizational methods forged in the practical, everyday concerns of political struggle. In particular, the approaches of prior successful student of color movements led to an organizational coalition model linked to membership organizations made up of individuals from a range of people of color and women's groups. This structure of race-plus organizing enabled students of color to contend with the entrenched power structure of legal education for significant institutional changes.

The strength of antiracist theorizing is in its ability to fulfill its critical discursive function. As we have argued, when oriented toward movements, that function should entail looking for the main dangers to antiracist organizing and showing the ways in which such dangers may be avoided or undermined. However, to maintain merely a distanced stance as critic of movements places the critical race theorist in the paternalistic position as a judge, issuing *1426 verdicts on formations, agendas, and strategies that reflect a one-way gaze. Instead, we propose a more intersubjective methodology for CRT's interaction with movements in the third wave of scholarship -- one that seeks to provide a research/theory arm to contest and open up structures of power for communities in struggle, and to acknowledge a two-way relationship between intellectual activists and activist intellectuals.

Looking forward to the second decade of CRT, our synergistic approach to CRT work links theory with the lived experience of the subordinated and political resistance. Concretely, this approach may entail replacing the dominant culture of anti-essentialism in CRT, reclaiming the moral high ground for identity-based political organizing, and reaffirming the centrality of collective agency in the creation of political and counter-epistemic space. This approach may require rejecting the primacy of postmodernism's radical antifoundationalism in favor of a theorizing perspective rooted in the history of community-based antistatist struggles. Finally, this approach may necessitate rethinking and reworking the norms of access to administrative and legal interpretive power, while possibly revaluing, in light of developments, prior discursive interventions or noninterventions. In the context of student diversity struggles, the practical turn for CRT scholars could mean continuous diversity mobilization through shared power and strategies for developing race-plus coalitions.

In closing, we raise some questions for the future of CRT as an organization. We see CRT in its current form of workshops and conferences as an individual membership organization of progressives of color, not a coalition. In the future, this political formation may be superseded in favor of other forms of organization. Hopefully, the historical movement lessons of the significance of political structure, as well as the ongoing salience of racial paternalism in progressive movements is heeded. If so, CRT should approach the call to open itself up to become a membership organization of progressives with caution. Under such a model, how will members respect leadership development, agenda setting, and strategic decisionmaking of people of color -- especially women of color, gay/lesbian/bisexual/transgendered people of color, among other multiply identified peoples? Is a race-plus coalitional structure in order? To further develop CRT, might we encourage the establishment of LatCrit, APA Crit, and other racial subgroupings ¹⁴²⁷ that will interact on an egalitarian basis with other established law crits, i.e., fem crits, CLS, and New Approaches to International Law ("NAIL"), to name a few? Should we take seriously the challenge of collective political engagement, synergistic theorizing and intersubjective methodology? CRT in its next decade may very well need to address these organizational-structural questions.

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LatCrit IV works-in-progress session. And we are honored by the thoughtful comments by **Kevin Johnson**, Bob Chang, and Mary Romero in this volume. Finally, we acknowledge our Boalt Coalition for a Diversified Faculty allies, with whom we fought the good fight.

1. See Eric Yamamoto, [Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America](#), 95 MICH. L. REV. 821, 869, 874 (1997) (observing that disjuncture between "high theory" generated by critical race theorists and "frontline practice" exercised by progressive lawyers tends to result in abstracted theories that are untested and untestable through either practical experience or material gain for those who are racially subordinated). While Yamamoto does integrate the role of community activists into his formulation of critical race praxis, throughout the article, and in the title, he emphasizes the interaction between legal race theory and political lawyering. See [id.](#) at 830-39.

2. Richard Delgado, editor of one of the first two leading anthologies on Critical Race Theory ("CRT"), begins his genesis story in the mid-1970s with an acknowledgment of the "early work of Derrick Bell and Alan Freeman" -- both legal scholars writing on race. Professor Delgado notably identifies the American civil rights movement and other nationalist movements as providing "inspiration" to CRT. He further acknowledges CRT's intellectual debt to Critical Legal Studies ("CLS"), feminism and continental social and political philosophy. See CRITICAL RACE THEORY: THE CUTTING EDGE at xiii-xiv (Richard Delgado ed., 1995) [hereinafter CUTTING EDGE; see also Angela P. Harris, [Foreword: The Jurisprudence of Reconstruction](#), 82 CAL. L. REV. 741, 741 (1994) (identifying July 1989, at first annual CRT Workshop, as the birth date and birthplace of CRT).

Indeed, Richard Delgado was one of a handful of early faculty supporters of the 1980s-1990s student movement for diversity. He supported the Boalt Coalition for a Diversified Faculty by speaking at our educational events and rejecting forcefully the standard rationalizations offered by the administration for its failure to diversify. Most recently, he performed the same function for a national group of students organizing to maintain diversity in legal education in the wake of Hopwood and Proposition 209.

3. See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiv, xix (Kimberle Crenshaw et al. eds., 1995) [hereinafter KEY WRITINGS].

4. One first wave race crit provided a useful counterpoint to other versions by acknowledging that the material gains won by student-led diversity movements directly affected CRT's existence. Professor Matsuda identified as part of the CRT genesis the "resurgence of student activism," including "sit-ins, rallies, and guerrilla actions" at Boalt, Stanford, Harvard and Columbia that resulted in "affirmative action hiring" and racethemed conferences. See MARI MATSUDA, WHERE IS YOUR BODY? 50 (1996).

5. We are also concerned that the Crenshaw et al. version overemphasizes the Harvard-centricity of CRT with the foundational attention focused upon Harvard's 1981 Alternative Course protest, and the Harvard-based CLS movement generally. See generally KEY WRITINGS, *supra* note 3, at xx-xii.

6. Mario Savio, *Berkeley Fall: The Berkeley Student Rebellion of 1964*, in *THE FREE SPEECH MOVEMENT AND THE NEGRO REVOLUTION* 15 (News & Letters, Detroit, MI 1965) [hereinafter *THE FREE SPEECH MOVEMENT*].

7. *Id.* at 7.

8. One could go back even further to the House on UnAmerican Activities Committee ("HUAC") hearings conducted in San Francisco in 1960 that were protested by U.C. Berkeley students. However the racial origins of that protest were more nebulous. While there was chronological overlap between the HUAC protest and civil rights struggles in the South, the linkages between participants were much more tenuous. See Raya Dunayevskaya, *FSM and the Negro Revolution*, in *THE FREE SPEECH MOVEMENT*, *supra* note 6, at 21, 22. We start with the Free Speech Movement as one of the earliest, defining moments of mass antiracist student protest.

9. The 19 organizations spanned a wide range of the political spectrum, and included Student Nonviolent Coordinating Committee, Congress of Racial Equality, Young Socialists of America, Students for a Democratic Society, the DuBois Clubs, the Young Democrats, the Young Republicans, and Students for Goldwater. These organizations were among the first warned by the administration of their violations of the new regulations, followed by suspensions of eight students from coalition groups. See *id.* at 23-24.

10. Only later was the movement abstracted from its origins to become the signifier of a contested and redeemed freedom of expression.

11. See Eugene Walker, *Mississippi Freedom Summer*, in *THE FREE SPEECH MOVEMENT*, *supra* note 6, at 12 (noting that leadership of Free Speech Movement "were those who had been part of the Mississippi Freedom Summer Project"). It is interesting to note that the abstraction of the racial focus of the FSM was foreseen and resisted by its leaders, who, like later critical race theorists, had a power-based critique of liberals' understanding of free speech:

The liberal University of California administration would have relished the opportunity to show off in the national academic community a public university enjoying complete political and academic freedom and academic excellence. And if student politics had been restricted either to precinct work for the Democrats and Republicans, or to advocacy (by public meetings and distribution of literature) of various forms of wholesale societal change, then I don't believe there would have been the crisis there was The corporations represented on the Board of Regents welcome[d] Young Democrats and Young Republicans as eager apprentices, and sectarian "revolutionary" can be tolerated because it is harmless. The radical student activists, however, are a mean threat to privilege. Because the

students were advocating consequential actions (because their advocacy was consequential); the changing of hiring practices of particular establishments, the ending of certain forms of discrimination by concrete acts -- because of these radical [acts, the administration's restrictive ruling was necessary.

THE FREE SPEECH MOVEMENT, *supra* note 6, at 16; see also *id.* at 18 (observing that Free Speech Movement "gained its initial impetus from the very different involvements of what are mostly middle-class students in the struggles of Negro people").

12. The San Francisco State Third World Strike triggered other similar protests across the country. See Campus Protests Rock California, *Nation*, DAILY CALIFORNIAN, Jan. 10, 1969, at 1 (reporting on Black/Third World student unrest at Brandeis University in Massachusetts, and San Jose State College and San Fernando Valley State College in California); Unresolved Demands Spark U.S. Protests: One Week of Student Strike, DAILY CALIFORNIAN, Jan. 13, 1969, at 1, 4 [hereinafter Unresolved Demands Spark U.S. Protests (updating reports on Brandeis and San Fernando Valley student strikes, and reporting on further actions taken by students of color at Swarthmore College, Queens College in New York and Northwestern University in Illinois).

13. The San Francisco State Third World Strike began in the fall of 1968, prompted in part by the firing of an African American professor and Black Panther, George Murray. A coalition of African American, Asian American, Chicano, and Native American student organizations comprised the Third World Liberation Front that organized the strike. San Francisco State strikers challenged their Berkeley counterparts to demand similar changes in higher education. Prior to the strike, a 1966 survey of the racial composition of the undergraduate student body at U.C. Berkeley revealed that African Americans, Chicanos and Native Americans together comprised a mere 1.5% of the student population, while constituting 24% of the California State population. See Matthew Dennis, *Defeat in Victory, Victory in Defeat: The Third World Liberation Front Strike of 1969*, at 1-2 (June 1987) (unpublished manuscript, on file with authors) (noting that of over 26,000 students, 1% or 226 were Black, 0.36% or 76 were Chicano, and 0.28% or 61 were Native American); see also Phil Semas, *San Francisco State Strike Dies: White Strikers Return to Class*, DAILY CALIFORNIAN, Mar. 14, 1969, at 1, 8 (reporting on partial victories of strike, including establishment of Black Studies department and school of ethnic Studies, and increased minority student admissions); Unresolved Demands Spark U.S. Protests, *supra* note 12 (covering agreement by San Fernando Valley State College to establish two ethnic studies departments and to make greater efforts to hire faculty of color).

14. See, e.g., *infra* notes 18-19 and accompanying text.

15. These two issues were linked in student protests by organizers from each movement. For example, one May 18, 1977 Daily Californian newspaper ad for an anti-apartheid rally read:

Victory to the People of South Africa!

US, UC Out Now

Defeat the Bakke Decision

Similarly, in a 1977 sit-in at which 56 members of Campuses United Against Apartheid were arrested, the two demands of protesters were: (1) U.C. and U.S. out of South Africa, and (2) defeat Bakke. See Cops Arrest 56 at Sproul Sit-In, DAILY CALIFORNIAN, June 3, 1977.

16. The 1970s anti-apartheid coalition included primarily the white student Left (i.e., Campuses United Against Apartheid, Students for Economic and Racial Justice, the Revolutionary Student Brigade, the Council for Economic Democracy, and the Young Socialists Alliance), and secondarily organizations of students of color (United Students Against the Bakke Decision, the Third World Coalition, the Pan Africanist Student Board, and the Ethnic Studies Fee Committee). See Sumi Cho, A History and Analysis of the Anti-Apartheid Movement at U.C. Berkeley 4-11 (Dec. 1986) (unpublished manuscript, on file with authors); see also Blacks Lack Campus Unity, DAILY CALIFORNIAN, May 3, 1978 (quoting Erica Huggins of Black Panther Party stating, "I am ashamed white students are organizing a movement which should be full of blacks."). The article later quotes the president of the Black Law Students Association who explained that Black students had to combat the paternalistic assumption that they were at U.C. Berkeley simply out the generosity of liberals, thus they had to work harder to "prove" themselves and consequently did not have extra time to invest in outside activities.

17. However, the upside of Bakke would be quietly enacted not by activists, but by administrators in admissions offices.

18. See MANNING MARABLE, RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1990, at 214 (1991) (providing information on South African embassy protests); see also MANNING MARABLE, BLACK AMERICAN POLITICS: FROM THE WASHINGTON MARCHES TO JESSE JACKSON 247-305 (1985) (discussing Jesse Jackson's first presidential bid).

19. The race-plus electoral coalition known as Cal Students for Equal Rights and Valid Education ("Cal-SERVE") included African Students Association, Asian Student Union, Inter-Tribal Council, Lesbian Gay Bisexual Alliance, and Movements Estudeantil Chicanos de Aztlen ("MECha"). UPC organized the key events in the anti-apartheid movement of the 1980s, including a ten-hour sit-in and the "largest number of students arrested at any one protest since the 'early 1970s,'" the student-faculty meetings with the U.C. Regents, and the Bishop Tutu visit to the Greek Theater. See Chris Krueger, UC Police Make 138 Arrests at Sproul Divestment Protest, DAILY CALIFORNIAN, Nov. 7, 1985, at 1, 5.

20. See KEY WRITINGS, *supra* note 3, at xxii-xxvii (providing thorough summary of CRT's contestation with CLS). The formality-informality debate is perhaps best captured by the mini-story told by race crit Patricia Williams recounting the experience of looking for a New York apartment with Peter Gabel, a CLS scholar. Gabel quickly located an apartment and sealed the deal with a "\$900 dollar deposit, in cash, with no lease, no exchange of keys, and no receipt." Patricia Williams, *Reconstructing Ideals from Deconstructed Rights*, in CUTTING EDGE, *supra* note 2, at 86-87. In contrast, Williams signed a "detailed, lengthily negotiated, finely printed lease." See *id.* Commenting on their vastly differing approaches to apartment-hunting, Williams observed: Peter, I speculate, would say that a lease or any other formal mechanism would introduce distrust into his relationships and that he would suffer alienation, leading to the commodification of his being and the degradation of his person to property. In contrast, the lack of a formal relation to the other would leave me estranged

...

Peter's language of ... informality, of solidarity, of overcoming distance -- sounded dangerously like the language of oppression to someone like me who was looking for freedom through the establishment of identity, the form-ation of an autonomous social self. To Peter, I am sure, my insistence on the protective distance which rights provide seemed abstract and alienated.

Id. at 87-88.

21. See Melissa Crabbe, *Anti-Apartheid Forces Join but Cultures, Tactics Differ*, DAILY CALIFORNIAN, Apr. 29, 1986, at 11 (chronicling different decisionmaking processes between UPC and CAA).

22. See *id.* at 1, 6, 11 (detailing open split on tactics between UPC and CAA). One U.C. official stated his opinion that CAA believes that "they have to create a situation where confrontation will occur so they can get media attention The feeling is that legitimate protest, which does not disrupt, will not get sufficient attention, therefore it is not effective." *Id.* at 11. CAA leader, Andrea Pritchett, commenting on CAA's lack of direct action principles, stated, "[the fact that we don't have a rigid program is good because it allows us to be influenced by other political views, but it's also a problem because in dealing with a situation like a riot, we don't have a unified position. " *Id.* Organizational leaders agreed that there was an increased vulnerability for men of color during protests. See *id.* ("Third World students receive the brunt of police violence in any demonstration. ").

23. In rebuttal to the CAA charge of conservatism, UPC member Patricia Vattuone commented on the differing agendas and perspectives of the two groups: "[We've been labeled less militant, and that's a problem [We're not about rebelling against our parents and the institutions -- those aren't the issues." *Id.*; see also Pedro Noguera, *Fighting Racism Doesn't End with Your Diplomas*, DAILY CALIFORNIAN, May 15, 1986, at 4-5 ("[We're trying to win our people over not just to struggle for divestment. We're trying to win them over for life, because we

want them to be in this struggle after they graduate from school For those of you who would say that we are conservative for taking this on as our task, I challenge you. I ask what will you be doing in 10 years?"); Statement of Purpose by UPC, DAILY CALIFORNIAN, Apr. 29, 1986, at 6 ("[We do not view this movement as a struggle against authority. For us, the anti-apartheid movement, like the ... tutorial program run by students in the Berkeley elementary schools or our efforts to improve affirmative action on the campus, are all related to the overall purpose of our organization: to work for and support the liberation of our people and all people.").

24. See Crabbe, *supra* note 21, at 6, 11 (noting that UPC agenda items and demands for improved graduate affirmative action and institution of Ethnic Studies graduation requirement were adopted by other anti-apartheid groups for the sake of unity); Keith Palchikoff, Celebration and Rally: Activists Laud Divestment, Call for Action, DAILY CALIFORNIAN, Sept. 4, 1986 (observing that "[b]esides celebrating the July divestment vote, the [anti-apartheid activists also called upon the crowd to support the institution of a required ethnic studies course"); After Divestment, What's Next? Ethnic Studies!!!!, UPC Flyer (undated) (on file with authors); see also *infra* note 32 (discussing flyer which describes linkage of U.C. support of apartheid in South Africa and United States).

25. A 1969 Daily Californian article reported on an illegal rally staged by Boalt students to protest the administration's ban on rallies during the Third World Strike, and observed that "law students are becoming actively involved in campus politics for the first time." Mathis Chazanov, Boalt Students Stage Rally, Protest Administration Ban, DAILY CALIFORNIAN, Feb. 29, 1969, at 1, 16; see also Telephone Interview with Linda Greene, Professor of Law, University of Wisconsin (Nov. 1997) (transcript on file with authors) (supplementing information on 1972 Boalt strike with first-hand knowledge gained as strike participant and former BLSA President and founding CRT workshop member); Interview with Gerald Horne, in Flushing, N.Y. (Oct. 11, 1997) (notes on file with authors) (providing supplemental information on 1972 Boalt strike from personal experience as strike participant). The 1972 Boalt strike received a great deal of coverage. See, e.g., Black Students OK Boalt Offer, DAILY CALIFORNIAN, Apr. 28, 1972, at 1; Boalt Faculty Response, DAILY CALIFORNIAN, Apr. 27, 1972, at 1; Ed Coyne, Chicano Law Students End Boalt Hall Sit-In, DAILY CALIFORNIAN, Apr. 21, 1972, at 1, 16; Hazel Harper, Black Students Confront Faculty, DAILY CALIFORNIAN, Apr. 25, 1972, at 1, 12; Hazel Harper, Black Students Strike at Boalt, DAILY CALIFORNIAN, Apr. 20, 1972, at 1, 16; Hazel Harper, Boalt Decision, DAILY CALIFORNIAN, Apr. 25, 1972, at 1, 16; Hazel Harper, Boycott Continues at Boalt, DAILY CALIFORNIAN, May 2, 1972, at 12; Hazel Harper, Third World Cutbacks at Boalt Hall Black Law Student Association Protests, DAILY CALIFORNIAN, Apr. 19, 1972, at 1, 16; Jeanette Harrison & Robert Joffe, Boalt Hall Blacks, Asians Vote to End Strike, DAILY CALIFORNIAN, May 1, 1972, at 1, 12; Negotiations at Boalt, DAILY

CALIFORNIAN, Apr. 21, 1972, at 12; Open Challenge to Boalt Faculty, DAILY CALIFORNIAN, Apr. 20, 1972, at 7.

26. In 1975, for example, Asian American students protested the admissions committee recommendation of full elimination for Japanese Americans and the 50% cutback for Chinese Americans in special admissions policy absent any study. Despite AALSA's impressive organizing efforts, the policy was implemented.

27. See Coyne, *supra* note 25, at 1, 16; Jaime Gallardo & Gonzalo Rucobo, Chicano Response to the Sullivan Memorandum, DAILY CALIFORNIAN, May 5, 1972, at 7; Harrison & Joffe, *supra* note 25, at 1, 12; Chicano Boycott Still on at Boalt, DAILY CALIFORNIAN, May 5, 1972, at 12; see also SANDRA EPSTEIN, LAW AT BERKELEY: THE HISTORY OF BOALT HALL 278, 281 (1997) (discussing AALSA protest and declining student input into admissions decisions).

28. See Grant Mercer, Boalt Hall Students Plan Strike, Teach-In for Today, DAILY CALIFORNIAN, Mar. 21, 1978, at 1 (quoting Johnson).

29. The seven organizations comprising the coalition included the Asian American Law Students Association, the Black American Law Students Association, the Boalt Hall Students Association, La Raza Law Students Association, the National Lawyers Guild, the Native American Law Students Association, and the Women's Association. See Diversified Faculty Issue Intensifies, SUSPENDED SENTENCE, Apr. 1979, at 1, 3 [hereinafter Diversified Faculty Issue (on file with authors)]; see also Tom Pecoraro, Boalt's Minority Recruitment Effort Lagging, DAILY CALIFORNIAN, Feb. 28, 1978, at 3. The 1978 strike received much coverage. See, e.g., Diversified Faculty Issue, *supra*, at 1, 3; Barbara Franklin & Grant Mercer, Boalt Hall Hit by Sit-In, Strike, DAILY CALIFORNIAN, Mar. 22, 1978, at 1, 12; Mercer, *supra* note 28, at 1. Dean Kadish refused to begin the "official" February 1978 faculty meeting before Coalition for a Diversified Faculty ("CDF") members spoke in order to avoid "setting a precedent" for student participation and input. See Diversified Faculty Issue, *supra*, at 1. For a record of CDF's activities for 1977-1978, closing the year with the March 21, 1978 strike, see *id.* at 3, 8.

30. But the investigation was discredited when the Boalt administration discovered that a Department of Labor investigator had monitored three law classes without their knowledge or permission. Seriously undermined by the controversy, the investigation failed to confirm the students' charges.

31. Several authorities discuss the HEW probe. See EPSTEIN, *supra* note 27, at 282-83; Sue Feldman, Agent Secretly Attends Boalt, DAILY CALIFORNIAN, Jan. 25, 1980, at 1, 22; Sue Feldman, Boalt Hiring to Be Probed by HEW, DAILY CALIFORNIAN, Sept. 26, 1979, at 1; see also Mike Casey, Groups Seek to Unify Berkeley Left, DAILY CALIFORNIAN, Dec. 4, 1979, at 1 (discussing internal divisions within Berkeley Left).

32. See Founding Meeting, ULSC Flyer (Nov. 19, 1985) (on file with authors)

(advertising first meeting of United Law Students of Color to discuss "minority and women faculty, divestment, racism in the classroom, and affirmative action"). As a result of the formation of ULSC and its connection to the campus wide anti-apartheid movement, Boalt students sponsored a strike on April 7, 1986 to "protest U.C. support of apartheid in South Africa and at home," noting the "fruits of U.C. philosophy" to include "\$2.5 billion in U.C. investments in South Africa, exactly 2 tenured Boalt minority faculty, and only 9.7% graduate students of color at U.C. Berkeley." See Boalt Strike Flyer (Apr. 7, 1986) (on file with authors). Neither of the co-authors recalls any consciousness of a previous CDF at the reformation of BCDF in the 1980s.

33. See Dan Ashby, Marjorie Shultz: First Woman Granted Tenure at Boalt in the 1980s, *BERKELEY GRADUATE*, Oct. 1989, at 18-20 [hereinafter Ashby, Marjorie Shultz (discussing denial of tenure to Marjorie Shultz)]; Dan Ashby, Eleanor Swift Becomes the Second Woman in the 1980s to Be Granted Tenure at Boalt, *BERKELEY GRADUATE*, Oct. 1989, at 14-17 [hereinafter Ashby, Eleanor Swift (providing information on Eleanor Swift's tenure denial)].

34. The fall 1988 hiring included Boalt's first critical race theorist, Angela Harris, as well as feminist scholar Reva Siegel, outspoken BCDF ally, Bryan Ford, and the first Latino male hired at Boalt, Dan Rodriguez. This set of hires represented the most heterogeneous in Boalt's history.

35. The information for the 1967 and 1987 faculty data was provided by the Boalt administration. For information on the Swift press conference, see Ashby, Marjorie Shultz, *supra* note 34, at 18-19, and Letter from Marjorie Shultz to Sumi Cho (Sept. 1989) (on file with authors).

36. As two of the few students of color still involved with BCDF, the authors intervened to propose a race-plus coalitional structure to BCDF that was passed by the membership. Cho and Westley served as two of the four original steering committee members of the newly-structured BCDF as members of the Asian American Law Students Association and the Black Law Students Association, along with Renee Saucedo of La Raza Law Students Association, and Juliet Davison of the Boalt Hall Women's Association.

37. See *KEY WRITINGS*, *supra* note 3, at xix.

38. See generally [22 HARV. C.R.-C.L. L. REV. 301 \(1987\)](#).

39. See Sandy Louey, Boalt Professor Wins Discrimination Fight, *DAILY CALIFORNIAN*, Aug. 28, 1989 (reporting on independent panel's unanimous finding of sex discrimination and U.C. Berkeley Chancellor Heyman's subsequent offer of tenure to Professor Swift); see also Ashby, Eleanor Swift, *supra* note 34, at 14. In exchange for the chance to have her case reviewed by an independent committee outside of the law school, Professor Swift agreed to drop her gender discrimination lawsuit against the university.

The 1988 strike received much local media coverage. See Roland De Wolk, Students Protest Shortage of Minorities and Women on Boalt Hall Faculty; 28 Arrests, *OAKLAND TRIB.*, Mar. 23, 1988, at B1; Ellen Goodwin, 28 Cited in

Six- Hour Sit-In Protesting Bias in Hiring, SAN JOSE MERCURY NEWS, Mar. 23, 1988, at 1B. The authors credit BCDF co chair Renee Saucedo for conceiving of and coordinating the Nationwide Law Student Strike of 1989. There was some concern among the BCDF leadership that expanding the movement to a national level was premature and threatened to destabilize the local movement. Sumi Cho, one of the authors, felt that BCDF should solidify its base and ally more closely with the campus wide movement for diversity before "going national." In retrospect, both positions seemed legitimate. The nationwide strike forced a sea change in law school hiring culture, discussed below. On the other hand, the very next year, the second nationwide strike threatened to be a failure at Boalt were it not for the strength of the campus wide diversity movement through the United Front. Whether BCDF could have withstood the conservative onslaught of the early 1990s through a more focused local campaign is unclear.

40. One of these missteps involved a letter from BCDF leaders to an academic couple being hastily recruited by the Boalt faculty for tenure track positions. BCDF charged that the waiver of standard search procedures was designed to eliminate student input in the name of affirmative action recruitment (of a white female candidate and her white husband). Further, students felt that the "target of opportunity" ("TOP") affirmative action positions, used to convey additional funds to departments fielding diversity candidates, were being misused, as the female candidate was being hired in the "regular" position, with her spouse being hired through TOP funds. In light of this history, BCDF and other student leaders wrote to the candidates who were extended offers and asked them not to accept based on the need for greater racial diversity and for the process-based failures in their hiring. The letter to the candidates created an uproar from Boalt faculty and from a considerable segment of the student body. BCDF strategy seemed to emphasize increasingly ill-conceived direct actions with no clear link to attainable demands, and commensurate defense of those arrested. Ironically, BCDF's major successes (in reversing two tenure denials and winning four of five diversity hires in one year) led to a perception among many students that the administration was now in good faith willing to diversify the faculty, or that the faculty had been adequately diversified.

41. The conservative "political correctness" campaign proliferated rapidly after a New York Times magazine article in the winter of 1990-91. See Richard Bernstein, The Rising Hegemony of the Politically Correct, N.Y. TIMES, OCT. 28, 1990. NEXIS citations in "arcnews/curnews" reveal only 70 total citations in articles to "political correctness" for all of 1990. One year later, after the Bernstein article, NEXIS records over 1500 citations, with a steady increase to over 7000 citations by 1994. See Sumi Cho, Essential Politics, 2 HARV. LATINO L. REV. 433, 450 nn. 33 & 36 (1997).

42. [488 U.S. 469 \(1989\)](#).

43. Prior to 1989, it could be said by diversity activists that no controlling legal authority had determined that publicly sponsored race- conscious remedies

were illegal in an educational or academic setting. In 1989, Croson held that local racial set-asides in public construction contracts were subject to strict scrutiny. See [Croson, 488 U.S. at 490-91](#). The narrative of Croson which viewed the case as one about a majority minority black-white coalition seeking to ensure relatively modest but meaningful minority participation in a lucrative publicly funded enterprise only saw the light of day in Justice Marshall's exasperated dissenting opinion. See *id.* at 528-61 (Marshall, J. dissenting). The majority, by contrast, only saw "reverse discrimination." See *id.* at 491. What Croson seemed to say to diversity activists in particular was that our generation could not rely on the high Court to support our politics in the way that a previous generation of civil rights activists could. In the language of Justice O'Connor's opinion, our politics would be viewed as "racial politics," and that was a bad thing as well as constitutionally forbidden to the state. See *id.* at 493-95. For BCDF members, the message of Croson was even clearer: time had run out on judicial tolerance of result-oriented diversity politics.

44. [515 U.S. 200, 227 \(1995\)](#) (holding that all racial classifications imposed by government actors are subject to strict scrutiny analysis).

45. [38 F.3d 147, 160 \(4th Cir. 1994\)](#), amended and reh'g denied, [46 F.3d 5 \(4th Cir. 1994\)](#), cert. denied, [514 U.S. 1128 \(1995\)](#) (holding that Black- only scholarship program was not narrowly tailored to asserted goal of remedying present effects of past discrimination).

46. [78 F.3d 932, 944 \(5th Cir. 1996\)](#), reh'g denied, [84 F.3d 720 \(5th Cir. 1996\)](#), cert. denied sub nom. [Texas v. Hopwood, 518 U.S. 1033 \(1996\)](#) (holding racial preferences in state university law school's admission program violates equal protection).

47. On June 26, 1997, it was revealed that not one of the 14 Black students admitted to Boalt Hall under the new policies adopted after passage of the anti-affirmative action measure had decided to enroll. See Amy Wallace, UC Law School Class May Have Only 1 Black, L.A. TIMES, June 27, 1997, at A1 (discussing resegregation); see also DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 381-389 (2d ed. 1980) (chronicling varieties of massive resistance pursued by southerners opposed to desegregation facilitated by Supreme Court's "all deliberate speed" order in *Brown v. Board of Education II*).

48. We use the term "institutional-cultural" to draw on "new institutionalist" forms of analyses from the social sciences. These approaches emphasize the importance of social institutions as both constraining action and constituting actors and interests. "Institution-cultural" struggle by CRT and student activists was thus at once struggle against the institutional constraints of deracialized modes of pedagogy and legal analysis and struggle for a constituting culture wherein radical subjects of color could flourish. See generally THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Paul J. Dimaggio & Walter L. Powell eds., 1991); INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY, AND THE INDIVIDUAL (George M.

Thomas et al. eds., 1987). The authors thank Gil Gott for bringing this body of literature to their attention.

49. See, e.g., MATSUDA, *supra* note 4, at 74 ("In April 1988, law students across the country held a national day of protest. They sat in to demand changes in hiring practices That same year, I got a call inviting me to teach as a visitor at Stanford Law School.") Although Professor Matsuda had the wrong year for the first nationwide strike, which was 1989 instead of 1988, the first (Boalt-only) law student strike called by the Boalt Coalition for a Diversified Faculty did occur in April of 1988 and received considerable local, regional, and national publicity.

50. As merely a partial listing, some of these actors include the Society of American Law Teachers and their members' surveys and reports that provided a wealth of information on the exclusionary effects of the closed system of hiring. In particular, the work of David Chambers, Charles Lawrence, and Richard Chused deserve special mention. Michael Olivas's "dirty dozen" list, an annual data compilation and resource base, and patient prodding/scolding, prompted Latina/o hiring at many schools. The AALS Minority section, formed in the early 1970s, turned its attention early and often to the issue of minority hiring, issuing reports and sponsoring recruitment conferences for prospective candidates. We believe a serious study of these diversity efforts by faculty and other constituencies would complement our study of student diversity activism.

51. See David Chambers, SALT Survey: Minority Group Persons in Law School Teaching, SALT NEWSL. (Society of American Law Teachers, Washington, D.C.), Nov. 1982, at 5 [hereinafter Chambers, Minority Group Persons; see also David Chambers, SALT Survey: Women in Law School Teaching, SALT NEWSL. (Society of American Law Teachers, Washington, D.C.), July 1983, at 1, 3 [hereinafter Chambers, Women in Law]. The research of the liberal-progressive SALT, the largest membership organization of law faculty, produced some of the most useful research for the diversity movement, beginning with the Chambers survey. Charles Lawrence analyzed the Chambers survey in a law review article calling for voluntary affirmative action hiring in light of the dismal statistics unearthed. See Charles R. Lawrence, III, Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas, 20 U.S.F. L. REV. 429, 437-38 (1986). In 1988, Richard Chused conducted a follow-up report to Chambers' on hiring and retention of women and minority law faculty. See generally Richard H. Chused, The [Hiring and Retention of Minorities and Women on American Law School Faculties](#), 137 U. PA. L. REV. 537 (1988).

52. See Chambers, Women in Law, *supra* note 51, at 6.

53. See Telephone Interview with Richard White, Statistician, AALS (Nov. 14, 1997) (transcript on file with authors).

54. AMERICAN BAR ASS'N, APPROVED LAW SCHOOLS, 1998 EDITION: STATISTICAL INFORMATION ON AMERICAN BAR ASSOCIATION APPROVED LAW SCHOOLS 451 (1997).

55. See Sumi K. Cho, [Multiple Consciousness and the Diversity Dilemma](#), 68

[U. COLO. L. REV. 1035, 1052 n. 63 \(1997\)](#) (citing memorandum confirming Boalt's faculty statistics from Nola Yee, Coordinator, Publications and Communications, Boalt Hall School of Law).

56. To illustrate, there were 273 full-time law faculty of color in 1988-1989 out of 5075 total. See Telephone Interview with Richard White, *supra* note 54. The following year, there were 451 out of 5202 -- a total increase of 178 additional faculty of color. See *id.* The 65% increase in the number of law faculty of color occurred in a year of nominal increase in overall faculty size, which grew at a rate of only 2.5%. See *id.* In 1990-1991, the percentage of full-time faculty of color increased to 10% or 662 of 6638 total law faculty. See *id.*

57. See *id.*

58. See Michael Olivas, The [Education of Latino Lawyers: An Essay on Crop Cultivation](#), 14 [CHICANO-LATINO L. REV. 117, 130 \(1994\)](#). This information was updated in a handout for a panel discussion at the LatCrit III conference, May 7, 1998. This set of data is not kept by any organization such as the American Bar Association or the Association of American Law Schools. Rather the labor-intensive statistical research is conducted each year by Michael Olivas, a senior Latino law professor, an early and ongoing advocate for Latina/o hiring in law teaching.

59. At least since publication of the influential work on racial formation by Michael Omi & Howard Winant, race has increasingly been viewed in intellectual academic circles as a social construction that is neither biological nor static, but rather in the process of change over time and subject to certain hegemonic paradigms of analysis. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (1986); see also Anthony Appiah, The Uncompleted Argument: Du Bois and the Illusion of Race, in "RACE," WRITING, AND DIFFERENCE 21 (Henry Louis Gates, Jr. ed., 1985); Mark Tushnet, An [Essay on Rights](#), 62 [TEX. L. REV. 1363, 1394-1402 \(1984\)](#) (providing example of "trashing"); Robert Westley, White Normativity and the Racial Rhetoric of Equal Protection, in *EXISTENCE IN BLACK: AN ANTHOLOGY OF BLACK EXISTENTIAL PHILOSOPHY* 91 (Lewis R. Gordon ed., 1997) (exploring usurpation of social construction thesis to serve ends of white supremacy through color-blind jurisprudence). But cf. Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, in *KEY WRITINGS*, *supra* note 3, at 110 (critiquing CLS trashing of ideology "as the only path that might lead to a liberated future" for those who are racially oppressed). In the early 1990s, there was a media frenzy over political correctness. See Cho, *supra* note 41; see also DINESH D'SOUZA, *ILLIBERAL EDUCATION* (1991) (lamenting rise of campus movements in late 1980s that urged affirmative action faculty hiring and student admission, ethnic studies requirements, hate speech codes, and gay and lesbian studies).

60. EPSTEIN, *supra* note 27, at 276, 322. Epstein's sources on this period of

heated contestation never cite to a student, but are confirmed by "faculty interviews," "one emeritus professor," as well as various deans. See *id.* at 322.

61. CECILIA V. ESTOLANO ET AL., *NEW DIRECTIONS FOR DIVERSITY: CHARTING LAW SCHOOL ADMISSIONS POLICY IN A POST-AFFIRMATIVE ACTION ERA* 7-8 (1997).

62. V. Dion Haynes, *Lone Black in Law Class Fights End of Preferences*, *CHI. TRIB.*, Sept. 29, 1997, at C1.

63. Michel Foucault, *Two Lectures*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977*, at 82-83 (Colin Gordon ed., 1980).

64. See EPSTEIN, *supra* note 27, at 283, 322-23 (discussing "angry students" and "law school agenda"). Epstein does note that the class boycott strategy was developed at Boalt and followed elsewhere, but the context is not one of ringing endorsement of the movement.

65. See generally ESTOLANO ET AL., *supra* note 61.

66. See *id.* at 7.

67. See *id.* at 6-17.

68. See *supra* notes 61, 65-67 and accompanying text (discussing New Directions for Diversity authors' erasure and disparagement of Boalt student activism). We acknowledge our own role in this historical movement amnesia and seek to correct it in part through this Article.

69. We use the term "counter-discourse" in the sense suggested by Nancy Fraser: "members of subordinated social groups have found it advantageous to constitute alternative publics ... parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses." Nancy Fraser, *Politics, Culture, and the Public Sphere: Toward a Postmodern Conception*, in *SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS* 287, 291 (Linda Nicholson & Steven Seidman eds., 1995). A counter-discourse, then, interprets social reality in a manner opposed to subordination. See *id.*

70. Angela Harris coined the term "disenchanted intellectual" to refer to the contemporary critical theorist. See Harris, *supra* note 2, at 778.

71. Radical economists refer to the set of mutually reinforcing social and economic institutions as the "social structure of accumulation" ("SSA"). See John Miller & Chris Tilly, *The U.S. Economy: Post-Prosperity Capitalism?* 23 *CROSSROADS* 1, 2 (July/Aug. 1992) ("Successful accumulation requires a set of mutually reinforcing ... institutions -- rules of the economic game, implicit and explicit agreements, and the organizations that carry them out, including government agencies, business groupings, and popular organizations."). Such structures are fluid, have a limited lifetime, and are constantly being disassembled and reconstructed. For example, the post-World War II SSA involved three main components: (1) a "capital-labor accord" which offered labor stability to key economic sectors by offering "productivity plus" pay formulas in exchange for "no-strike" provisions in bargaining agreements; (2) a "capital-citizen" accord that

provided the safety net of New Deal programs in exchange for social stability, and; (3) a Pax Americana accord which relegated the U.S. to the dominant role in the world (capitalist) economy with its attendant role as global policeman. These three "pillars" permitting smooth accumulation of capital remained solidly in place until the early 1970s. Each pillar began to "crack" at this time, leading to the disruption in the social structures of accumulation and economic instability. See *id.* at 2-3; see also David M. Gordon et al., *Power, Accumulation, and Crisis: The Rise and Demise of the Postwar Social Structure of Accumulation*, in *RADICAL POLITICAL ECONOMY: EXPLORATIONS IN ALTERNATIVE ECONOMIC ANALYSIS* 226 (Victor D. Lippit ed., 1996).

The professional intelligentsia, especially in a field like law, may have their own particular labor-capital/capital-citizen accords. Because of their generous remuneration (relative to other academics) and elevated social status, law professors -- even antiliberalism law professors -- may feel obliged to honor the implicit agreement of "collegial discourse," at times a euphemism for the normalization of nonresistance to oppressive forces. The corporate academic institution, in exchange for its inclusion of the subaltern, can head off attacks of exclusionary practices from outside critics, and thus guarantee its smooth accumulation process.

72. See MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993) (addressing hostility that students of color often faced in campus environments).

73. See generally GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); MARI J. MATSUDA ET AL., *supra* note 72; Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976); Mari J. Matsuda, [Looking to the Bottom: Critical Legal Studies and Reparations](#), 22 *HARV. C.R.-C.L. L. REV.* 323 (1987).

74. We believe Harris's critical insights in *Race and Essentialism* were based on contestation of racism within the women's movement and certainly had potential to be synergistic, but ultimately ignored the larger political dynamic and danger of the Right and segments of the Left essentializing race-based movements as we shall discuss below. See generally Angela Harris, [Race and Essentialism in Feminist Legal Theory](#), 42 *STAN. L. REV.* 581 (1990). We view much of the later Harris work as an eloquent corrective to her earlier sublimationist work. See generally Harris, *supra* note 2. Although somewhere between the first and second generations, Eric Yamamoto's work deserves mention here. See generally Yamamoto, *supra* note 1 (discussing critical race praxis).

75. See *WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY* 1174 (9th ed. 1988) (defining sublimation). On sublimation in its psychoanalytic use, Freud developed the controversial sublimation thesis, and we should point out that

our appropriation of the term in no way is an endorsement of its application in psychoanalytic theory. Rather, as the text states, our use is a kind of structural analogy. See SIGMUND FREUD, *INTRODUCTORY LECTURES ON PSYCHOANALYSIS* 23, 345-46 (James Strachey ed. & trans., 1966).

76. Harris, *supra* note 74, at 585-90.

77. See IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) (explaining race as sociological construction); Robert Chang, *The End of Innocence or Politics After the Fall of the Essentialist Subject*, 45 *AM. U. L. REV.* 687 (1996) (advocating for shift away from identity politics to political identities); Diana Fuss, "Race" Under Erasure? Poststructuralist Afro-American Literary Theory, in *ESSENTIALLY SPEAKING* 73 (1989) (discussing erasure); Harris, *supra* note 2, at 745-58 (elaborating on deconstructive and restorative promise of postmodernism); Cheryl I. Harris, Whiteness as Property, in *KEY WRITINGS*, *supra* note 3, at 276 (discussing essentialism's pitfalls).

78. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (Scalia, J., concurring).

79. See Cho, *supra* note 42, at 450-51 nn. 33-37 and accompanying text (discussing rapid proliferation of discourse of political correctness).

80. See generally Richard Delgado & Jean Stefancic, *NO MERCY* (1996) (discussing rise of right-wing think tanks and their role in constructing regressive civil rights discourse); see also Cho, *supra* note 42, at 443-53 (analyzing simultaneous rise and popularization of attacks on "identity politics" and "political correctness" by academic Left and political Right).

81. To be sure, the postmodern turn opened up progressive space, at least within the academy, for alternative approaches to analysis beyond dualistic paradigms. In particular, the postmodern turn has opened up racial discourses within the white-over-Black dichotomy, with the establishment of "LatCrit" theory, and the proliferation of Asian Pacific American and Native American scholarship. See, e.g., Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 *CHICANO-LATINO L. REV.* 1 (1997); Colloquium, *International Law, Human Rights, and LatCrit Theory*, 28 *U. MIAMI INTER-AM. L. REV.* 177 (1997); Symposium, *LatCrit Theory: Latinas/os and the Law*, 85 *CAL. L. REV.* 1087 (1997); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 *HARV. LATINO L. REV.* 1 (1997); Colloquium, *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 *LA RAZA L.J.* 1 (1996). Race and gender anti-essentialism, supported by the radical antifoundationalism of the postmodern turn, has had the welcome effect of disarming those on the Left that believed that coalition or movement politics necessarily took account of race and gender identity. Indeed, the failure to take account of identity had fatally flawed earlier student diversity movements.

It is more than ironic that at the historical moment that people of color began

entering the halls of higher learning in appreciable numbers, and making demands for greater inclusion, we are asked to check our identities at the door, when our identities were the excuse for denying us entrance in the first place. Up until this moment, it was the almost exclusive prerogative of white power both to subordinate and exclude people of color and women, and then tell us in a basically white communication how it was done. See, e.g., Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, in *KEY WRITINGS*, supra note 3, at 46 (decrying dominance of white male authors in leading law reviews writing about civil rights and only citing one another).

82. There are many excellent anti-essentialist critiques of allegedly universalistic movements. See generally Elvia R. Arriola, [Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory](#), 9 *BERKELEY WOMEN'S L.J.* 103 (1994); Pat Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 *BERKELEY WOMEN'S L.J.* 191 (1989-90); Harris, supra note 75; Darren Lenard Hutchinson, [Out yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse](#), 29 *CONN. L. REV.* 561 (1997); Peter Kwan, *Intersections of Race, Ethnicity, Class, Gender, and Sexual Orientation: Jeffrey Dahmer and the CoSynthesis of Categories*, 48 *HAST. L.J.* 1257 (1997); Francisco Valdes, [Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation,"](#) 48 *HASTINGS L.J.* 1293 (1997).

83. See Harris, supra note 75, at 612 (asserting black women can help feminist movement "move beyond its fascination with essentialism" through "creative action," not "shared victimization").

84. This thought is counterintuitive for some feminists who have found the basis of a political community built around women to be the common situation of women. See Kate Soper, *Feminism, Humanism and Postmodernism*, in 55 *RADICAL PHILOSOPHY* 11 (1990) (asserting that feminist politics implies movement based on solidarity and sisterhood of women and doubting whether there can be specifically feminist politics under antifoundationalist assumptions of postmodernism). Also left nonplussed are racialized group members that experience race as belonging to a racially defined community with common interests and perspectives.

85. One of the main dangers to theory and movements posed by anti-essentialism is its potential to promote an abstract and endless expedition into the misrecognition of individual particularity. We believe that an autonomous theory of anti-essentialism with no limiting principles plays too easily into the hands of the enemies of progressive politics. Such rhetoric is simply beside the point in a political arena where those opposed to inclusive change are themselves virulently essentialist. Even if such insights of difference are true, or are truisms, i.e., "we are all unique individuals," such a theoretical stance places a normative priority on radical and skeptical antifoundationalism that emphasizes individual prerogative at the expense of community political empowerment and group solidarity. In the highly essentialized world of contestatory diversity politics, the

misplaced priority of escaping such group confinement reveals itself to be a scramble in a cage. It is not that conscious interventions are incapable of changing the meaning- content of categories in order to respond to new circumstances and create new opportunities. But what the elasticity of meaning-content cannot do is alter fundamentally the referential force of the categories themselves or normalize passage out of one category into another. The recruitment to essentialized racial and gender categories continues apace in spite of antifoundationalist longings.

86. See Chused, *supra* note 51, at 538.

87. See *id.*

88. See *id.*

89. See *id.*

90. See Olivas, *supra* note 58 (providing data on Latina/o law faculty).

91. See G. William Rice, [There and Back Again -- An Indian Hobbit's Holiday "Indians Teaching Indian Law,"](#) 26 N.M.L. REV. 169, 182 (1996). Professor Rice's data covers through the 1994-95 academic year. One tenured respondent to his survey did not provide the number of years in law teaching, so we excluded that response to the data reported in this paragraph. We updated the Rice study using AALS data on hiring for 1995-96 and 1996-97. This was a rather easy task as there were no successful American Indian/Alaska Native law teaching candidates reported in those two years.

92. See Pat K. Chew, [Asian Americans in the Legal Academy: An Empirical and Narrative Profile,](#) 3 ASIAN L.J. 7, 18, 32 (1996) (reporting that 40% of all APA law professors entered since 1986, and that 94% of APA women entered legal academy since 1980). Since Professor Chew's data covered up to the 1992-93 academic year, we again supplemented her data with more recent AALS data. If 40% of the 61 identifiably APA law faculty between 1986-92 were recent entries, that would be about 24 faculty. In the years 1993-97, there have been 23 additional APA hires, bringing the current ratio of recent entries to 47 (24 from 1986-92 plus 23 from 1992-97) out of 84 (61 total in 1992 plus 23 additional since), which is about 56%. However, because we do not have the number of APAs leaving the academy between 1992-97, our 50% updated figure is a rough, though somewhat reliable estimate.

93. While there have been high profile attacks on CRT scholarship of late, those criticisms in major media outlets may actually testify to the institutionalization of CRT as a significant force in legal scholarship.

94. As a result, we believe first wave race crits are more likely than the second to have a greater appreciation for the 1980s diversity movements that brought about vast changes in legal academe. Second wave CRT scholars who would benefit most from these movements may be least aware of the sea change in law school culture under which the first wave was hired, tenured, or not tenured. The sharply increased success rates of people of color seeking teaching positions since the Nationwide Strike for Diversity in 1989 represent a clear break in the business as usual approach to pre-1989 hiring. But this clear break is invisible to recent hires, who may attribute their entry to the magnanimity of the legal academy, their own racial exceptionalism and/or unexplainable luck. Under any of these attributions, the significance of the political is obscured.

8. Chantal Thomas; *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV. 1451 (2000)

Over the past decade, the federal government has increasingly taken steps to lift barriers to trade and financial flows into and out of the United States. This liberalization of U.S. economic barriers has been mirrored by similar efforts of governments around the world. These steps, together with gains in technology, have ushered in an era of "globalization." n. 1 The global liberalization of economic flows, according to classical economic theory, should maximize the efficient allocation of world resources and generate benefits for all. Even if globalization brings increased aggregate gains, however, it is not clear that the distribution of those gains accords with social justice. Without intervention, globalization may instead lead to increased socioeconomic inequality and economic volatility. n. 2

One troubling aspect of globalization is that it may tend to concentrate costs on populations that are already socioeconomically disadvantaged. Globalization is reorganizing industrialized economies into hierarchies in which income is increasingly related to skill level. At the same time, long-existing barriers to entry into high-skill occupations have not subsided, and arguably continue to strengthen. Racial minorities disproportionately occupy the low-skilled ranks of the workforce. Consequently, their impoverishment may be disproportionately likely to remain entrenched, even as the globalization-driven economy booms. This disproportionate vulnerability arises from socioeconomic dynamics not just of race *1452 but also of income and geographical space. Together, these dynamics disproportionately relegate racial minorities to impoverished neighborhoods in inner cities. n. 3

This Article warns against the temptation among policymakers to view the costs of adjustment to the new globalized economy as natural and inevitable. Many of these costs, particularly in the case of inner-city racial minorities, derive from a socioeconomic hierarchy that lawmakers have helped to create and maintain. Thus, this Article looks at the impact of globalization on racial minorities. In doing so, it responds to two central inquiries of the LatCrit IV Conference. The first inquiry searches for connections that link Latina/o communities to other racial minorities. While the particular dynamics described in this Article differ across groups, the general dynamic of disproportionate vulnerability affects African Americans, Latina/os, and other racial minorities. A second inquiry of LatCrit IV looks beyond conventional boundaries of civil rights

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discourse, as does this Article by looking at contemporary economic realities for racial minority groups.

If "laissez-faire" policy accompanied and justified the harsher results of the early Industrial Age, n. 4 it may well reemerge to accompany and justify those brought on by the rise of the Information Age. n. 5 The policy implications of such latter-day laissez-fairism would be that government should not "intervene" to prevent the casualties of globalization, even if those casualties occur disproportionately *1453 within certain socioeconomic groups, because such casualties are the result of an economic "evolution" that is both natural and necessary. n. 6 Classical and neoclassical proponents of the market tend to portray certain economic processes -- industrialization in the old days, globalization in the new as independent of government. President Clinton's statement that the "technology revolution and globalization are not policy choices, they are facts" is a good example of the view of globalization as an autonomous phenomenon. n. 7 From this perspective, such economic processes are also said to be "necessary" aspects of economic progress despite the costs they impose. According to this view, the best course for government is to allow these costs because of the long-term benefits of the process. n. 8 Contrary to this perspective, in his famous dissent to *Lochner v. New York*, Oliver Wendell Holmes criticized the Supreme Court's attempts to portray an "unregulated" market and its outcomes as natural and inevitable. n. 9 After a century of realist and critical legal theory following from Holmes' early insights, n. 10 *1454 such a portrayal should not be revived.

This Article demonstrates that legal rules, and therefore legal decisionmakers, are deeply and directly implicated both in economic globalization and in the distribution of benefits and costs that globalization creates. The premises of the argument are straightforward. First, legal rules have facilitated economic globalization. n. 11 Second, legal rules have helped to construct the socioeconomic hierarchy that is the field on which economic globalization occurs. The lower rungs of this hierarchy are disproportionately occupied by poor urban minorities. n. 12 Third, economic globalization may exacerbate this hierarchy. n. 13 If legal rules helped to produce economic globalization, and legal rules helped to produce a socioeconomic hierarchy, and economic globalization exacerbates this hierarchy, then legal rules, and legal decisionmakers, are partially accountable for this result and the harms it imposes on poor urban minorities.

This Article mounts evidence supporting each of the premises leading to this conclusion. Part I of this Article will show how federal, state, and local law and policy created preexisting conditions of vulnerability among racial minority groups, segregating them disproportionately into impoverished inner cities. n. 14 Part II describes globalization and the law and policy creating it. Part III discusses the effect of globalization on poor urban minorities given their pre-existing vulnerability.

If logic compels the conclusion that legal rules are partially responsible for creating this problem, justice compels holding lawmakers

accountable for resolving it. There is no question of *1455 whether the government should intervene to reduce the problematic impact of globalization on certain populations, because, as Parts I and II show, government has always and already been involved. Consequently, there is only the question of what kind of intervention is most just. Part IV offers some prescriptions for American law and policy in the globalization era.

Before continuing, I note that this Article accepts for present purposes, and despite continuing disagreement, that globalization brings increased economic gains to the United States economy as a whole, n. 15 and consequently that facilitating globalization may represent a more viable policy alternative in the long-term than resisting it. Even if this is true, however, history and justice require that specific measures are taken to ensure that racial minorities are not disproportionately barred receipt of the dividends that globalization may bring. This Article can therefore be placed in the structuralist tradition, which posits that -- in contrast to the highly flexible and fluid economy in the liberal hypothesis -- the economy is, in fact, susceptible to inegalitarian rigidities. This Article concludes by advocating law and policy for the reform of such rigidities.

I.. CONDITIONS PREEXISTING GLOBALIZATION

Over the last century, a variety of federal, state, and local laws have entrenched social inequality between whites and minority populations in the United States. Such laws have rendered minorities as a whole worse equipped than whites to benefit from the particular gains brought about by globalization. Part I.A. describes the law and policy of suburbanization -- arguably the key factor in the deterioration of inner cities. Part I.B. describes law and policy that more directly created or facilitated racial segregation. Part I.C. briefly lists other areas of law and policy that played a role in the *1456 deterioration of the inner cities into separate and unequal communities.

A. Suburbanization: "Incidental" Racial and Economic Segregation

"Starting in 1945, one of the Great Migrations of American history took place": this was the migration of the middle classes away from city centers after World War II. n. 16 From 1950 to 1980, the United States national population grew by fifty percent, but the populations of the northeastern and midwestern city centers declined, by percentages from ten to over fifty percent. n. 17 While Western and Southern greater metropolitan areas were more likely to grow over this period, they did so in a pattern of "sprawl" replicating the suburban growth in the Northeast and Midwest. n. 18

In her exhaustive analysis of the modern city, Saskia Sassen observes that, on one hand, suburbanization signaled progress because it was "associated with the expansion of a middle class and understood as an increase in

the quality of life associated with economic development." If the suburbs signaled prosperity, however, "the inner city became an increasingly powerful image ... to describe central areas where low-income residents, unable to afford a house in the suburbs, were left behind." n. 19

Whites were disproportionately large participants in the exodus from the city. During the same era that New York City's overall population declined by eleven percent, for example, its racial composition went from ninety-four percent white in 1940 to forty-nine percent white in 1985. n. 20 Similar transformations occurred in cities all across the nation. n. 21 Left behind were racial minorities *1457 comprised of African Americans, many of them relatively recent arrivals into city centers from their own migrations out of the southern United States; and, increasingly over the postwar era, of African, Asian, Caribbean, Latina/o, and Middle Eastern populations resulting from immigration into the United States. Suburbanization thus split the socioeconomic fortunes of middle-class, previously urban whites on the one hand, and poorer, urban minorities on the other. Once created, the rift continued to deepen over the length of the postwar era.

In part, suburbanization resulted from a popular desire to leave the crowded city behind and stake out new territory. n. 22 Keith Aoki has recounted that this desire was, in turn, driven partially by aesthetic and moral preferences for the town life ideal, and partially by concern about unhealthy living conditions in parts of the city. n. 23 The move to the suburbs also resonated with the geographical expansionism so closely identified with American culture. n. 24 Yet to view suburbanization as a cultural phenomenon unaided by law would be deeply erroneous. Throughout the twentieth century, law and policy encouraged and at times literally subsidized suburbanization -- and therefore segregation.

This section focuses on federal law and policy that indirectly exacerbated racial segregation by promoting suburbanization. n. 25 In the twentieth century and particularly in the postwar era, the federal government undertook many initiatives intended to increase home ownership. The home ownership agenda was shaped in part by alarm at population growth in the cities and a perceived need to control the problems that would arise from increased population density. A strong social consensus also endorsed home ownership *1458 as inherently desirable and therefore a worthy end of government action. As one commentator remarked, "[home ownership is the American dream." n. 26

Most important of all was the goal of economic growth. Increased home ownership could stimulate national economic growth and development through new construction and increased investment. Economic growth resulting from massive new home ownership would be relatively evenly distributed, and would encourage saving and investment across a broad swath of the population. These seemingly admirable goals, however, had disastrous consequences for inner cities.

First, and least objectionably, federal tax law promoted economic

growth through home ownership and therefore incidentally promoted segregation even though there was no explicit preference for non-urban areas. At a second level, federal lending, housing and transportation law and policy did target areas outside cities, and therefore more directly facilitated racial segregation. In both these instances, increased racial segregation was not the express goal of federal law and policy; given the strong connection between race and economic status, however, it was a predictable result of policies that drew the middle classes out of the city.

1. Incidental Promotion of Suburbanization

A cornerstone of federal home ownership policy was the federal income tax deduction for interest on home mortgages -- in the aggregate, a massive tax subsidy for homeowners. n. 27 Despite the relatively broad group of beneficiaries of the federal income tax deduction among the middle and upper classes, the deduction has necessarily also reinforced economic divisions between these and the lower classes. n. 28 The deduction "much more heavily subsidizes *1459 the well-to-do than the poor," since the more valuable the home, the larger the amount deducted. n. 29 It also multiplies the income differential between those that are able to buy homes, and those that are not and must pay all of their money over into rent. The threshold difference of being able to make a down payment and obtain financing increases over time through the appreciation of real estate assets, and through the income refunded under the tax deduction. n. 30

The home mortgage interest deduction not only increased class divisions but also accelerated movement of the middle class away from the city. The increased demand for residences for sale as opposed to residences for rent translated into a demand for construction of new property. New property development occurred overwhelmingly outside the city. n. 31

In establishing a subsidy for homeowners, federal tax law did not explicitly seek to concentrate new economic growth outside cities, nor did it explicitly seek to create geographical barriers between whites and racial minorities that would both reflect and entrench segregation along race and class lines. Yet that is precisely what it did. n. 32 By helping to engender the suburbanization of the middle classes and failing to correct associated racial disparity, federal tax law helped to concentrate minorities in the inner cities and to set the stage for a downward spiral of urban poverty that would play itself out over the next several decades.

2. Direct Promotion of Suburbanization

While the tax law discussed above caused suburbanization only incidentally, federal loan and housing regulations directly promoted it. In the area of federal lending law, for example, federal *1460 appraisal standards applied by

the federal Home Owners Loan Corporation "systematically favored suburban neighbourhoods over those in the central city." n. 33 Probably the most influential loan regulations, however, were the preferences incorporated by the Federal Housing Administration (FHA) into its mortgage insurance program. n. 34 The FHA program allowed lenders to "originate home loans free from the risk of loss." n. 35 Intended to benefit "first home buyers or purchasers of relatively inexpensive homes," n. 36 the FHA program constituted "one of the most important federal programs of the past century." n. 37

Michael Schill and Susan Wachter have argued that the FHA mortgage insurance program also played a role in the deterioration of inner cities. n. 38 For example, the agency's "guidelines disfavored 'crowded neighbourhoods' and 'older properties,' both of which were much more prevalent in cities than in the newly forming suburbs." n. 39 This "bias of the [FHA program toward lending in the suburbs, as compared to the cities, encouraged middle-class households to leave the city and exacerbated the income and fiscal disparities between urban and suburban municipalities." n. 40 The ***1461** FHA program exacerbated segregation along economic and racial lines in housing markets. n. 41

In addition to law and policy relating to home ownership, the federal government encouraged suburbanization through its massive transportation project of building a national highway system, deemed by some "the nation's most extensive and expensive continuing public works program." n. 42 In 1956, pursuant to a committee appointed by President Eisenhower (and chaired by a General Motors executive), Congress mandated the construction of an interstate highway system stretching more than 40,000 miles. n. 43 The interstate highway system continues to rely on a web of federal, state and local governmental support. n. 44 According to one estimate, the highway system is only sixty percent "self-financed" through tolls and gas taxes, with the additional forty percent provided through government subsidy. n. 45

Like tax and lending policy, federal transportation policy supporting highway subsidization aspired to worthy goals. "Governmental expenditure on ... highways had the well-intended objective of connecting the country and facilitating commerce through a system of national highways. More roads meant more jobs in construction and maintenance, more business along highways, more personal convenience, and an easier delivery of freight." n. 46

And yet, the highway system created universally recognized costs for cities. n. 47 Highways encouraged residential exodus to the suburbs by making it easier for city workers to commute into cities. n. 48 Highways also reduced the "relative advantage of a central city location" ***1462** and contributed to the relocation of "wholesale trade, trucking, and warehousing outside the city." n. 49

Federal tax, loan, housing, and transportation regulations entrenched geographic and economic mechanics of racial segregation by encouraging middle- class families and white-collar industries to move into the

suburbs. In effect, suburbanization deepened racial segregation. None of these policies were explicitly designed to reinforce racial segregation. Yet the "housing and finance subsidies which favored the suburban, white middle class tilted the playing field against the central cities and older areas of the nation. " n. 50 In doing so, they helped to skew the capacity of poor urban minorities not just to thrive in then-existing conditions, but also to be able to adjust positively to change, including changes wrought by economic globalization.

B. Intentional Racial Segregation

By realigning economic classes along geographical divides, federal tax, housing and transportation policy also reinforced racial segregation. The federal government was also implicated by varying degrees in explicit racial segregation. First, the federal government in certain cases allowed nonstate actors and state and local governments to pursue racial segregation in housing and lending. Second, there was some explicit racialism in the federal housing policies that helped shaped today's metropolitan areas.

1. Federal Noninterference in Racial Segregation by Local Governments

Racial Segregation in Public Housing. Federal housing regulations encouraged the concentration of public housing in the inner city. Public housing regulations allowed local governments to keep federally funded housing away from white, middle-class areas and to concentrate it in already poor and predominantly minority areas. Given that disproportionately large numbers of those eligible for public housing were racial minorities, this decision cemented segregation *1463 for them and reinforced it for the larger communities out of which and into which they were directed by local governments. n. 51

Several components of federal housing law and policy combined to allow segregation by local governments. First, the Housing Act of 1937 established that "[it is the policy of the United States to ... vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." n. 52 Under this "local control" policy, local government had virtually free rein to relegate "undesirable" public housing residents to already "undesirable" areas. n. 53 In many cases this federal lenience allowed local decisionmakers to create city slums. The federal government was therefore complicit with racial segregation by local housing agencies. n. 54 In New York, for example, "power broker" Robert Moses energetically pursued segregation in public housing. n. 55 In Chicago, the local housing authority's persistent racial discrimination caused Dr. Martin Luther King, Jr. and other civil rights activists to lead "open housing protests" in the 1960s. n. 56

Second, the Housing Act contained an "equivalent elimination requirement" n. 57 that required that one unit of "substandard" housing be eliminated for every unit of public housing built. Because most suburbs had little substandard housing, this requirement rendered them ineligible for public housing construction. n. 58 Finally, segregation became acute in 1949 with more stringent income limitations in public housing. n. 59 (These income restrictions *1464 continue in present day regulations). n. 60 The result of all of these components of federal housing law and policy was a deeply entrenched dynamic of segregation of public housing.

Thus, by 1962, "eighty percent of federally supported developments were completely segregated." n. 61 In the 1960s, reformers attempted to put an end to the federal government's reinforcement of segregation through its housing and home-ownership policies. Litigation arising from the Chicago open housing protests found HUD's complicity with local discrimination unconstitutional. n. 62 The Fair Housing Act of 1968 required the Department of Housing and Urban Development (HUD) to take into account the segregative effects of locating housing. n. 63 HUD regulations now provide that a project should generally not further racial concentration. n. 64 Although some courts have attempted to enforce these reforms strictly, n. 65 most courts deferred to HUD site selection. n. 66 The result of such deference, according to some, is that HUD site selection continues to exacerbate race and class divisions. n. 67 Even assuming *1465 HUD site selection since 1968 has been ideal, the deeper problem is that the patterns of racial and economic segregation along city- suburb lines had already been drawn by the time the HUD stopped purposely reinforcing them.

Discrimination Through Exclusionary Zoning. According to Richard Ford, "[exclusionary zoning is a generic term for zoning restrictions that effectively exclude a particular class of persons from a locality by restricting the land uses those persons are likely to require." n. 68 The Supreme Court has struck down both explicitly racial exclusionary zoning and state enforcement of racially restrictive covenants as violative of the Fourteenth Amendment of the federal Constitution. n. 69 However, the Court has upheld local governments' right to exclusionary zoning mechanisms with racially discriminatory effects, such as prohibitions of multifamily housing that exclude lower-income and public housing. n. 70 Richard Schwemm has observed that "[the Court's deferential attitude towards municipal zoning decisions that raise only economic issues has continued to the present day." n. 71

***1466** 2. Federal Noninterference with Racial Segregation by Nonstate Actors

A considerable body of legislation, regulation and case law has developed to combat discrimination in lending and housing, both of which

critically affect the concentration of racial minority groups in the inner city. Despite this, however, discrimination has persisted. n. 72 Some commentators believe this persistence is at least partially attributable to wrong-headed legal approaches to discrimination. n. 73

Failure to Correct Discrimination in Home Sales. Racial discrimination in home sales exacerbated the dynamics of racial segregation described in Part I.A. The racial segregation that arose incidentally as a result of economic disparities between whites and non-whites was secured and reinforced by intentional racial discrimination. Intentional racial discrimination further concentrated racial minorities in inner cities by impeding those proportionately few minorities that wanted and were financially able to leave the inner city from doing so. Federal law and policy is deeply implicated in the question of racial discrimination in home sales.

Congress and the courts have become gradually more willing to prohibit racial discrimination in real estate transactions. Courts have applied the Thirteenth Amendment n. 74 of the federal Constitution to prohibit racially driven refusals to sell or rent to or negotiate with black home seekers; n. 75 discriminatory terms, conditions or services in property sales or services; n. 76 and "racial steering," or "directing *1467 prospective home buyers interested in equivalent properties to different areas according to their race." n. 77

Established a century later, the Fair Housing Act of 1968 ("1968 Act") strengthens the prohibition against racial discrimination in housing. n. 78 Courts applied the 1968 Act to outlaw racially motivated refusals to sell, rent or negotiate regarding property, n. 79 or otherwise make property unavailable. n. 80 Courts have generally agreed that a prima facie case for violation can be made by showing discriminatory effect only, without any showing of discriminatory intent. n. 81

Despite the range of anti-discrimination law described above, in 1995 a federal official conceded federal fair-housing law to be "weak and inadequate." Another lamented that the federal government had been "deeply involved in the creation of the ghetto system, and it has never committed itself to any remedial action". n. 82

One difficulty is that the coverage of the law is incomplete. The Act exempts from its antidiscrimination provisions "single-family houses sold or rented by the owner without the use of a real estate agent or discriminatory advertising"; as well as "units in dwellings where the owner lives that are occupied by no more than four families. n. 83 Moreover, enforcement of the fair-housing laws has proved to be very difficult because it depends almost entirely on individual lawsuits. "Although the 1968 Fair Housing act outlawed discrimination on the basis of race in housing-market transactions, *1468 it placed most of the burden for recognizing and combating illegal discrimination on the victims themselves." n. 84

Failure to Correct Discrimination in Lending. Controversy

continues to surround the question whether the federal government prevents discriminatory and racially segregative lending by private institutions. Discrimination in lending solidifies geographical segregation along racial lines and concentrates poverty in the inner city by hindering those who are otherwise qualified to purchase new homes or otherwise invest in housing from doing so. Such discrimination both reduces minority influx into new homes in the suburbs and prevents redevelopment of existing housing stock in cities.

Several federal statutes prohibit "redlining," the practice by which lenders deem borrowers from certain neighborhoods unfit for normal loans on the basis of the racial composition of those neighborhoods. n. 85 The Community Reinvestment Act of 1977 ("CRA") n. 86 moved beyond merely prohibiting discrimination and affirmatively required financial institutions to ensure that they are providing adequate services to minority neighborhoods. n. 87 The enforcement mechanism for the CRA was to be the power of federal agencies regulating financial institutions to disapprove proposals by those institutions for bank charters, mergers, deposit insurance and investment in other financial institutions. n. 88

Unfortunately, enforcement of both the antidiscrimination and the "affirmative action" federal lending regulations has been limited. *1469 n. 89 Enforcement of the antidiscrimination statutes proved difficult because discrimination in lending was hard to prove empirically. n. 90 Given that racial minorities were also often poor and unfamiliar to lending officers, it was difficult to show that racial disparities in lending did not reflect prudent lending policy based on race-neutral criteria. Inadequate enforcement for many years plagued the CRA as well. CRA enforcement consisted of reporting requirements that were criticized by industry as burdensome and by activists as ineffective. n. 91

In the early 1990s, however, two influential empirical studies found that race did significantly affect likelihood of obtaining home ownership financial assistance, even controlling for disparities in non-racial criteria variables that would create racial disparities in lending. n. 92 It cannot be said that the federal government turned a blind eye to the problem. Yet, the 1990s reports showed that race (even controlling for associated factors that might affect lending outcomes, such as income level) still significantly affects lending policy. n. 93 Anthony Taibi has argued that federal lending law has failed because it has overlooked existing structural inequalities and therefore perpetuates economic and racial segregation. n. 94 Taibi concluded that neither the "equality paradigm" nor the "affirmative action paradigm" in current federal law can address *1470 the "structural disinvestment" that plagues inner cities, because neither paradigm recognizes the systematic market failure that drives such disinvestment. Taibi's argument mirrors a theme of this Article: without concerted correction, structural inequality persists in liberalized market conditions. n. 95

3. Promotion of Segregation on the Basis of Race

In addition to acting as an unintentional engine of racial segregation, federal law and policy at times facilitated intentional racial segregation by local authorities. At other times federal authorities have actually promoted racial exclusion.

The term racial redlining discussed above with respect to nonstate actors, at least according to some commentators, originated with federal governmental practices. n. 96 Early versions of the Federal Housing Administration's underwriting manual, for example, "warned against making loans in areas with 'inharmonious racial groups'" n. 97 in order to prevent "instability and a decline in values." n. 98 Until 1950, the Federal Housing Administration and Veterans Administration mortgage insurance programs not only permitted, but actually recommended racially restrictive property covenants. n. 99 Thus, early "racially discriminatory underwriting practices engaged in by the FHA promoted racial segregation in American cities and contributed to the creation of urban ghettos." n. 100

In 1962 President Kennedy directed the federal government to prevent discrimination in the use, rental or sale of all residential *1471 property that it financed, operated or owned, n. 101 and his order was later reinforced by the Civil Rights Act of 1964. n. 102 These remedies, however, were prospective and not retrospective. That is, they prohibited the creation of racially segregated public housing facilities but did nothing to redress the segregation that already existed. Some have even argued that "[the federal government intentionally established the public housing program on a de jure racially segregated basis." n. 103

In sum, a number of regulatory structures in the postwar period directly or indirectly fuelled the exodus of the middle classes from the suburbs. Because the middle classes were predominantly white, this created not only economic but racial segregation between the cities and suburbs. The racial aspects of suburbanization were not entirely secondary. Early federal housing and lending policies purposely entrenched this racial dynamic. Also damaging was an absence of effective federal policies designed to correct discrimination not only by private actors but also by state and local governments. Although courts attempted to eliminate overt racial restrictions, government did very little to break the link between economic and racial status, so that despite antidiscrimination law racial segregation remained deeply entrenched. n. 104

The above discussions shed light on a grimly comprehensive set of interlocking dynamics that tie together racial, economic and geographical segregation. Historical conditions produced socio-economic inequality between whites and racial minorities. Federal law and policy intended to spur economic growth exacerbated these inequalities by placing white middle-class families in suburbs and poor minority families in the inner city. In addition to acting as an unintentional engine of racial segregation, federal law and policy at times

facilitated intentional racial segregation by local ***1472** state and nonstate actors; at other times federal authorities explicitly promoted racial exclusion. Against these formidable structural dynamics, federal antidiscrimination law has proved relatively ineffectual in undoing segregation.

C. Deterioration of City Infrastructure

The hierarchy of race, income and geography created in part by the law and policy described in Parts I.A. and I.B. renders urban poor minorities disproportionately vulnerable to adverse effects of globalization. This section indicates additional contours of this hierarchy and the vulnerability it creates.

With the middle class leaving in record proportions from the cities during the postwar period, urban areas deteriorated. While the causes were complex and manifold, legal rules played a role in facilitating the progression of urban malaise. First, federal jurisprudence allowed state and local governments to maintain disparities in spending on infrastructure and public services, including education and police protection. Second, disparities in lending inhibited business and residential development.

1. The Deterioration of Urban Infrastructure and Public Services

Suburbanization led to severe deterioration of the housing stock, infrastructure, and educational systems and economies of inner cities. Because of the jurisdictional separation of cities from suburbs, the tax base that could sustain basic infrastructure and public services crumbled in many cities as the middle classes left for the suburbs. n. 105 This has often been seen as a natural, if unfortunate, result of such jurisdictional divisions. That perception, however, uncritically accepts the legal separation of the city and suburban tax bases. Richard Ford has shown how courts have reinforced the power of local governments to define their tax bases and revenue distribution as they see fit, even though local governments are mere subdivisions of states and have no special constitutional right to self-determination. In this way, courts have reinforced territorial demarcations and dismissed their effect of entrenching racial segregation. n. 106

***1473** The jurisdictional and distributional divisions entrench inequality in basic public goods provided to urban as opposed to suburban populations. Inner cities often suffer from disproportionately low state funds to maintain infrastructure in comparison to suburbs. n. 107 With respect to other public services, perhaps the most prominent example is education. *Milliken v. Bradley* held, for example, that courts could not order desegregation school busing between Detroit schools and Detroit's predominantly white suburban school districts. n. 108 Further entrenching this disparate relationship between suburban and city schools, *San Antonio Independent School District v. Rodriguez*

held that a school-financing system could maintain large disparities in tax-burden/expenditure ratios among districts without violating the Equal Protection Clause. n. 109 These decisions have played a role in what one commentator has called the federal government's "quiet abandonment" of the goal of desegregating the public schools. n. 110

These dynamics have allowed the gap between suburban and inner-city schools to grow over the years, to the point where the deplorable conditions of many urban school systems are well-known. "[Schools in impoverished areas tend to have much lower test scores, higher dropout rates, fewer students in demanding classes, less well-prepared teachers, and a low percentage of students who will eventually finish college." n. 111 Public schools attended predominantly by children who are racial minorities are sixteen times more likely to be in areas of concentrated poverty than those schools that are not predominantly attended by racial minorities.

Education systems in suburbs also often benefit disproportionately from state spending. In New York, for example, state spending on education outside New York City is higher per child than within the city. At the same time that little has been done to address *1474 these inequalities, courts have rolled back affirmative action at the postsecondary level. n. 112

2. Deterioration of Business and Housing Development

Business faces a number of obstacles if it wants to put down roots and thrive in the inner city. First, capital formation in depressed urban communities remains disproportionately low. As Part I.B. indicated, capital lending to minorities is lower than for whites. While some of this disparity may be explainable on race-neutral grounds, some of it is not. n. 113 Second, the human capital so crucial both to entrepreneurship and to a productive work force is eroded in the inner city by poverty and inferior education. Third, the deterioration of infrastructure and public services make business prospects in the inner city even more unappealing.

The early bias of federal home ownership programs led to an "unavailability of mortgage capital for purposes of home improvement or home purchase in inner-city neighbourhoods [that may have contributed to the disinvestment in housing and decline in property values experienced by most American cities in the second half of the twentieth century." n. 114 Even now, homeowner lending to minorities is lower than to similarly situated whites, despite the federal prohibition of racially segregative lending. n. 115 Redlining has *1475 made it difficult to obtain loans for renovation or redevelopment. Privately owned housing stock further deteriorated as inner-city landlords became increasingly absentee, and expectations of declining property values led to declining maintenance. As for public housing, "[inefficient management and systematic under-maintenance ... contributed to [its ghettoization. " n. 116 All of

these dynamics have caused privately owned housing stock in many urban minority neighborhoods to deteriorate over the postwar era. n. 117

Other Causes of Inner-City Economic Depression. At the same time that the physical infrastructure and capital stock of the inner city deteriorated, suburbanization moved management-level corporate jobs out of the city. Proximity to skilled workers, better infrastructure, and even tax breaks n. 118 encouraged this trend; as manufacturing relocated, n. 119 there was little to impede it. In New York, for example, the "massive decline in manufacturing" was accompanied by a "massive loss of headquarters and hence of office jobs." n. 120 Thus, cities have become increasingly irrelevant to traditional industrial production, as the manufacturing sector has left cities and the management has moved out to the suburbs.

With low levels of capitalization and deteriorating infrastructure and public services, the economic stimulus to the inner city that might have come from new business or home development replacing the proprietors and homeowners that left did not occur. The rest of the story is not hard to imagine. Decreased employment opportunities further weakened the socioeconomic system left behind. Not surprisingly, the concentration of poverty was not attractive to entrepreneurs. Crime resulting from this concentration further hastened the departure of business and relatively mobile families out of the cities. These factors all conspired to create what Douglas and Massey famously called "American Apartheid." n. 121

***1476** All of these dynamics created conditions of vulnerability among urban poor minorities that rendered them less-equipped to gain from globalization. Part II below describes globalization, and Part III describes the impact of globalization on urban poor minorities.

II. GLOBALIZATION

Part II begins by describing the economic characteristics of globalization in terms of the increase in international flows in trade, investment and finance. Part II.B. describes federal law and policy facilitating globalization. Part II.C. describes the particular ramifications of globalization for the United States economy. This will provide the basis for determining what the implications are of a "globalized" U.S. economy for relatively vulnerable populations in the U.S., including inner-city racial minorities.

A.. The Nature of Globalization

Globalization might preliminarily be defined as the increasingly international nature of production and consumption. n. 122 Although international production and consumption is as old as the nation-state, the new era of globalization differs from previous eras in the scale and complexity of

international flows involved. n. 123 These differences in turn shape the impact of globalization on the composition of the U.S. economy.

Scale. In the past few decades, international flows of both the "current account" (trade in goods and services) and "capital account" (investment and finance) types have multiplied exponentially. n. 124 In the area of capital flows, cross-border transactions have increased exponentially in the past few decades. International bank lending increased almost sixteen-fold between 1970 and *1477 1995. n. 125 Worldwide foreign direct investment in the late 1990s achieved "seven times the level in real terms in the 1970s." n. 126 "Indirect" investment -- the securities markets -- grew even more remarkably. Worldwide annual short-term capital flows "now total more than \$2 trillion in gross terms, almost three times those in the 1980s." n. 127 Finally, trading in foreign currency has skyrocketed: the "daily turnover in foreign exchange markets increased from around \$10-20 billion in the 1970s to \$1.5 trillion in 1998," an increase of approximately one hundred-fold. n. 128

The United States has heavily participated in these aspects of globalization. An IMF Survey entitled "Globalization: Opportunities and Challenges" ("IMF Globalization Survey") reports that United States foreign direct investment "more than tripled between the first half of the 1980s and the first half of the 1990s." n. 129 Total United States capital flows grew over fifty-fold between 1970 and 1996, from 2.8% of gross domestic product to 151.5%. n. 130

On the current-account side, world trade grew at a rate twice as fast as the overall world economy in the postwar era. n. 131 In the United States, trade volume multiplied nearly twenty-fold between 1970 and 1998. n. 132 In 1970, the combined value of exports and imports was less than fifteen percent of total gross national product; by 1997 that figure had more than doubled. n. 133

Exports have grown, but imports have grown by more: hence another distinct trait of the late twentieth-century U.S. economy is its *1478 persistent trade deficit. n. 134 The increase in imported goods that has caused the trade deficit has been partially offset by a healthy surplus in trade in services. n. 135 Important export services include information services, telecommunications services, financial services, and professional services such as lawyering and accounting. Saskia Sassen has dubbed these "producer services," n. 136 to distinguish them from "consumer services." However, trade in services, though increasingly important, still only accounts for a fraction (around one-fourth) of total U.S. trade. n. 137

Complexity. The trade and finance vectors of globalization described above regularly combine in multiple ways. For example, domestic production might come from a U.S. subsidiary of a foreign company, financed by a syndicate of domestic and foreign banks or private investors. Imported products might come into the United States from a foreign subsidiary that is owned by a U.S. company financed by capital raised on world markets. Lan Cao has

documented in detail the increasingly global nature of production. n. 138 This globalization has often been manifested in the very industrial sectors dominated by U.S. producers in the early postwar era. In the automobile industry, for example, Cao observed that:

A Chevy may be built in Mexico from imported parts and then re-imported into the United States; a Ford built in German plants by Turkish workers and sold in Hong Kong and Nigeria; a Toyota Camry designed by an American designer at Toyota's Newport Beach California Caltex Design Research Center, assembled at the Georgetown, Kentucky plant from American-made parts (except *1479 that the engine and drive trains are still Japanese) and then test driven at Toyota's Arizona proving ground. n. 139

This growing complexity in production is so widespread that it accounts for a significant portion of the postwar increase in international trade. As "the volume of world trade has grown, the traditional role of national markets is increasingly eclipsed by an alternative system: trade generated within multinational companies themselves as they export and import among their own ... subsidiaries." n. 140 Within the U.S. economy, over forty percent of exports and almost fifty percent of imports are "actually goods that travel not in the open marketplace, but through these intrafirm channels." n. 141 The IMF Globalization Survey admitted that the "structure of foreign trade has increasingly become intra-industry and intrafirm." n. 142

B. Law and Policy Creating Globalization

Accounts of globalization tend to portray it as autonomous -- a self-powered juggernaut whose appearance on the horizon has caught governments off-guard. n. 143 Yet globalization does not naturally *1480 or inevitably result from market-driven developments in technology. Certainly, stunning improvements in market-driven technology over the past few decades have played an undeniable role in driving globalization. Communications and information technology advances have made it easier to move money and know-how internationally and to coordinate production internationally. n. 144

At the same time, however, law and policy have played an important role in spurring globalization forward. International trade agreements have probably been the most important instruments the federal government has used to catalyze globalization. The General Agreement on Tariffs and Trade, established in 1948, provided for six rounds of trade-liberalizing negotiations between 1948 and 1979 that reduced the average level of tariffs imposed by its member states by more than half. n. 145

The United States federal government has also lowered barriers to trade in goods and services in bilateral agreements and regional agreements. In the 1990s two highly visible such steps were the North American Free Trade Agreement with Canada and Mexico, n. 146 and the agreements establishing the

hundred-plus member World Trade Organization in 1995. n. 147 Each event marked far-reaching liberalizing reforms in both trade and investment.

These reduced trade barriers have allowed not only for greater competition in the U.S. by foreign producers, but also for the off-shore relocation of production facilities by U.S. manufacturers who seek the production-cost advantages offered elsewhere. This consequence of trade liberalization agreements was memorably characterized in 1992 by Presidential candidate Ross Perot as a "giant sucking sound." n. 148 Whatever the accuracy of Perot's characterization, and whatever the ultimate desirability of the trend, it seems indisputable that the reduction in trade barriers has enabled both foreign competition and U.S. relocation, thereby reducing U.S. manufacturing and accelerating U.S. deindustrialization.

In finance, the federal government created a number of regulatory devices that helped globalize securities markets. n. 149 Thus, while some of the fuel driving globalization came from technological innovation, a good portion of it also arose from deliberately pursued policies by governmental actors. In the United States, the executive and legislative branches implemented into law a host of liberalizing measures in trade, investment and finance that facilitated the internationalization of the U.S. economy. n. 150 To point this out is not to compel a conclusion that globalization is desirable or undesirable; it is only to compel the conclusion that globalization cannot be viewed as a natural or inevitable phenomenon. Rather, the dynamics that the term "globalization" encompasses result at least in part from governmental practices, and governmental actors must therefore be held at least partially accountable for their ill effects.

***1482** Of course, these liberalizing measures were pursued in the belief that they would generate positive effects. Classical economic philosophy holds that the liberalization of market activity will increase both national and international efficiency. Because efficiency maximizes wealth creation, such policies could also be said to maximize social welfare.

To equate social welfare with aggregate social wealth, however, is to adopt only one of a number of potential measures of social welfare. Even if one ignores measures of welfare not related to wealth, the equation of social welfare with national wealth overlooks distributive concerns. Indeed, efficiency-increasing measures such as economic liberalization may exacerbate preexisting distributive inequalities. Classical economic measures of efficiency and welfare are simply "indifferent to the distribution of income and wealth." n. 151

In the United States among the groups that bear the brunt of this distributive inequality and therefore potentially of the costs of liberalization are racial minorities in the inner city. Part II.C. will articulate the specific effect of globalization on inner cities. Part III will indicate how these specific economic effects exacerbate a preexisting socioeconomic hierarchy of race, income and geography.

C. Transformations Resulting from Globalization

The dynamics discussed in Part II.A. above describe two deeply significant macroeconomic transformations in industrialized countries: the global dispersion of goods production, and the shift from goods export to goods import and services export.

One of the most visible aspects of globalization is the degree to which geographically diverse economies are participating in types of production that had previously been concentrated in the West. "Manufacturing employment as a share of total employment has declined continuously in most advanced economies since the beginning of the 1970s." n. 152 The U.S. trade deficit in goods n. 153 has resulted ***1483** in part from increasing competition with non-U.S. manufacturers and in part from the offshore relocation of U.S. manufacturing. Whether due to western-company relocation or the growth of nonwestern competitors, manufacturing is now much less economically significant in the West and much more significant in medium and low income countries in Asia and Latin America.

At the same time, as noted above, the West is increasingly specializing in services. n. 154 Among the industrialized world, according to the IMF, "the share of employment in services in the United States is highest, at about seventy-three percent currently." n. 155 These dynamics reinforce each other: as manufacturing disperses globally, an increasing array of intermediary services becomes necessary to coordinate global production, and the emergence of such service production in turn facilitates further manufacturing dispersal. n. 156

This shift from goods to services production has been called "deindustrialization" and it has "coincided with the growing global integration of economies." n. 157 The transformation of the U.S. economy -- ***1484** from an economy with major goods exports and negligible services activity circa 1970, to a major goods-importer and services-exporter circa 1990 -- has played a major role in the impact of globalization on the inner city. Connecting deindustrialization with the urban deterioration described in Part I, several adverse trends for inner cities emerge.

Because city centers harbored most traditional manufacturing, "deindustrialization" has affected them most acutely. In the 1970s and 1980s, Philadelphia, Chicago, New York and Detroit respectively lost 64% (resulting in the elimination of 160,000 jobs), 60 percent (326,000 jobs), 58% (520,000 jobs), and 51% (108,000 jobs) of their manufacturing sectors. n. 158 This was also true more generally for the "ten largest old metropolitan areas of the Northeast and north central states." n. 159

Although the traditional industrial sector left cities, cities developed a new niche in the increasingly important provision of producer services. n. 160 These financial, telecommunications and professional intermediary services are necessary to any large-scale enterprise, whether

manufacturing or service- sector. They are distinct from in-house management services of corporations, many of which have moved to the suburbs. n. 161

Producer service-providers have consolidated in urban areas. n. 162 Accordingly, producer services have become a much higher percentage *1485 of employment in these areas. n. 163 Various cities may have specialties in one or another area of services, but in the U.S. producer services are overrepresented in all the major cities. n. 164

Thus, cities now "command and [are at the heart of a globally dispersed production system." n. 165 One consequence is that cities have become more connected internationally and less generative of growth for the national economy. Although conventional wisdom dictates that cities function as "seedbeds" that "promote the diffusion of growth across the national territory," n. 166 this traditional dynamic may be obsolete "[now that manufacturing has declined significantly as a share of employment in major cities and ... producer services have ... become a leading sector." n. 167 The new role of the city may be determined by a global economy that diverts economic flows away from lower strata around the city. Saskia Sassen has interpreted the changes in production flows to indicate that "growth predicated on a global market orientation induces discontinuity in the urban hierarchy." n. 168 As Part III shows, this discontinuity may disproportionately harm racial minorities in American inner cities.

In sum, the economic base of city centers over the last few decades has shifted from manufacturing and associated management to producer services such as finance, telecommunications and lawyering. n. 169 These changes were not solely driven by technological innovations. Rather, the federal government took deliberate measures liberalizing trade, investment and finance. n. 170 These steps were taken in furtherance of a classic economic policy approach that predicted that liberalization would increase aggregate national *1486 wealth and therefore welfare. The theory behind this policy, however, does not adequately take into account the distribution of wealth. The theory therefore does not address the possibility that entrenched socioeconomic forces antagonizing "discrete and insular" groups -- such as racial minorities in the inner city -- might prevent those groups from benefiting proportionately in the gains of globalization. Rather, the theory assumes a relatively mobile population, and whatever the truth of the proposition generally, mobility does not characterize the bottom of the U.S. socioeconomic hierarchy, which is instead rigidly constructed. The costs of globalization may therefore concentrate at this rigidly constructed bottom.

Economists invariably leave it to the political process to address such distributive concerns; social justice demands that government do precisely that. This imperative is all the stronger given the government's role in constructing this hierarchy of race, income and geography to begin with. Part III examines the particular ramifications of contemporary economic trends for minority populations concentrated in the inner cities.

III. EFFECT OF GLOBALIZATION ON THE INNER CITY

Before continuing, it may be useful to provide some description of the racial minority groups that disproportionately inhabit the inner city. While the cultural, linguistic and historical heterogeneity of these groups is extensive, for purposes of the analysis of this Article, racial minority groups living in impoverished urban areas can be broken down into two categories: those who were born in the United States and those who were not. Both groups are racially diverse within themselves. Those not born here include immigrants from Africa, Asia, the Caribbean, Latin America and the Middle East. Those born here include African Americans, most of whom migrated from the rural South in the first half of the century; Mexican Americans that are descended from communities living in the South and West when those communities became part of the United States; and descendants of Latina/o, African, Arab, Asian, and Caribbean immigrants.

Of course, individuals within each of these racial categories exist at every income level and in widespread geographical ranges, and the extent to which individuals in these racial categories are poor *1487 varies depending on the particular category. n. 171 Along those lines, it is important to stress that this paper argues that globalization will have an adverse effect on populations characterized not only by racial minority status, but also by economic status and geographical location. n. 172

The trends of suburbanization and deindustrialization have been accompanied by the emergence of a "global city" whose specialty is the provision of "producer services" that coordinate a global production system, and whose links to the local economy are more attenuated than those of traditional manufacturing production had been. The transformation of the city from a manufacturing base to a globalized nexus of producer services has had several adverse consequences for the urban poor, who are disproportionately racial minorities. Among the potential ramifications of such a system is the exacerbation of a preexisting socioeconomic hierarchy that has concentrated poor racial minorities in depressed urban areas. This hierarchy manifests in the conditions affecting employment, housing and infrastructure in the inner city.

A.. Employment.

In the global city, with its focus on highly skilled producer services, one's ability to earn a "living wage" is increasingly tied to one's skill level. n. 173 Three trends arising out of the transformation *1488 of the city resulting from the globalization of the economy have reinforced impoverishment in many inner-city communities.

Decline of Manufacturing Employment. First, the decline of manufacturing employment has had a significant impact on the urban poor, and therefore on many racial minority groups. While some of this decline has resulted

from obsolescence due to technological advances, some of the decline is due to the relocation of manufacturing work. n. 174 The decline in manufacturing also means a decline in jobs that require relatively little previous training but offer a living wage. The increase in income inequality accompanying the shift to a service economy has been well documented. n. 175

Of the population under study, the decline in traditional manufacturing has primarily affected African Americans and Chicanas/os. n. 176 This is true even though manufacturing sectors in the United States have hardly acted as havens of racial equality. In the first half of the twentieth century, as these groups migrated to northern city centers, they met with hostility and exclusion from labor unions n. 177 reinforced in places by labor regulations. n. 178 By the *1489 1970s, these racial barriers to membership had largely dissolved. Even after unions largely relinquished such entry-level barriers, many continued to be criticized for the poor representation of racial minorities in their leadership ranks. n. 179 Although racial minorities have not been able to achieve completely egalitarian treatment from unions, by the 1970s they had largely succeeded in joining the union rank-and-file in traditional manufacturing sectors, thereby receiving the economic security provided by unions for their members.

This set of dynamics is supported, for example, by Clarence Lusane's study of the impact of NAFTA on minorities. The United States government has argued that NAFTA has been beneficial on the whole for the U.S. economy. n. 180 However, neither the benefits nor the losses are evenly spread, and Lusane's research suggests that NAFTA has so far had a disproportionately adverse effect on African Americans because of preexisting vulnerabilities in African American communities. Key among these effects has been the loss of low-skilled jobs. n. 181 NAFTA resulted in a net loss of manufacturing *1490 jobs, which were replaced by jobs in the service sector. Consequently, those who lost their jobs in manufacturing were less likely to find comparable new employment. n. 182 This situation was "compounded by the fact" that the replacement service-sector jobs "paid less and offered less benefits." n. 183

New industrial growth in which relatively "formal" work structures are maintained has been located in the outer ring of metropolitan areas and therefore away from concentrated minority populations, and in regions that tend to have less concentrated minority populations in the inner city. n. 184 Much new growth manufacturing, however, reflects the organizational trends transforming traditional manufacturing sectors, and tends to be lower-wage and lower-security. n. 185 This is consistent with the second trend, the "informalization" of employment.

"Information" of Employment. The second trend is the informalization or "downgrading" of urban manufacturing sectors. n. 186 This has occurred at the same time as the percentage of union organization has decreased. n. 187 Some argue this has increased the *1491 bargaining power of employers and helped to drive down wages and benefits. n. 188 The casualization

of work has enabled employers to hire more part-time and temporary work. Part-time or temporary work usually involves lower wages and fewer benefits. n. 189

An extreme example of this informalization process is the rise of "sweatshop" labor. Whereas the decline in traditional manufacturing most directly impacts racial minorities that were born here, the rise in casual manufacturing most directly impacts racial minorities who were not born here. This labor is provided primarily by immigrants who are also members of racial minority groups in the United States. n. 190

One particular type of sweatshop labor is industrial homework. A home worker works "in or from the home for an employer or contractor who supplies the work." n. 191 Common types of homework include the production of clothing and clothing accessories. n. 192 These industries are also among the most frequent violators of federal labor protections. n. 193 "[Away from the watchful eye of the public and the factory inspector, ... homework tended to be the least amenable to regulatory enforcement and the most susceptible to *1492 low wages, long hours, unhealthy conditions, and other exploitation. " n. 194 Industrial homework "partly involves the same industries that used to have largely organized plants and reasonably well-paid jobs." n. 195 The occupants of these positions are often poor, female, minority, and recent immigrants from Africa, Asia and Latin America. n. 196

In the early postwar era, the federal government placed a "virtual ban" on industrial homework, ostensibly due to its inability to enforce labor protections in such settings. n. 197

This ban was rescinded in 1989, reflecting the deregulatory policies of the Reagan Administration's Department of Labor. n. 198 Since then, homework and other types of sweatshop labor have become an increasing problem both within the United States and abroad. While the causes of this problem are complex and certainly include the influx of a workforce willing to work at lower wages, many commentators have expressed the concern that the possibility of relocation not just of workers, but also of products created by globalization allows for a "race to the bottom" in which manufacturers and other employers exercise the threat of relocation to gain significant concessions in the terms of employment. As the recent protests in Seattle during the Ministerial Conference of the World Trade Organization indicate, many argue that this race to the bottom is facilitated by the existence of an international legal structure in which the mandate of economic liberalization is not accompanied by a commitment to labor standards or other quality-of-life protections.

There are many reasons cited for why informalization of work relations in low-skill sectors has increased. First, relocation and decline of manufacturing has obviously played a role since many of the relocated jobs were at the core of the traditionally unionized workforce. Service-sector jobs are much less likely to be unionized. [*1493 n. 199 Many have pointed to the influx of immigrant populations as a second cause of unionization's decline. According to

this argument, newly arrived immigrants are willing to work for much less favorable terms than people born in the United States, so they encourage a "race to the bottom" in the manufacturing sectors.

Saskia Sassen makes a useful observation about globalization and immigration. "Linking the informalization and casualisation of work to growth trends takes the analysis beyond" the idea that immigrants cause informalization. Such a link "suggests, rather, that the basic traits of advanced capitalism may promote conditions for informalization. The presence of large immigrant communities then can be seen as mediating in the process of informalization rather than directly generating it: the demand side of the process of informalization is therewith brought to the fore." n. 200

A brighter account of the decline in "formal" work relations posits that the U.S. economy is adjusting appropriately to the new challenges of globalization, with its increased competition and volatility, by becoming more competitive and more flexible. If this is true, however, it does not change the fact that low-skill jobs are not as well compensated as they once were. Where discrete groups are concentrated in this low-skill work such a skewed impact is unjust.

Stratification of Workforce According to Skill Level. Many "symbolic analyst" jobs associated with service sectors such as investment banking and lawyering are highly compensated. Given that such services are increasingly exported, it is correct to say, as is often said by proponents of globalization, that new jobs associated with trade liberalization are on average higher paying than those they replaced. n. 201 However, the entry barriers to these high-paying jobs *1494 are significant, because they require relatively extensive postsecondary education and training.

The people that used to or would have worked in the manufacturing sector are not easily able to land these new high-paying jobs. Instead, many transfer to low-skill service jobs that pay less than manufacturing jobs requiring the same skill level. Thus, the transformation of highly developed economies into service economies has arguably been accompanied by a reorganization of the work force into a hierarchy in which there are many new high-paying service jobs, but also in which a greater proportion of the total jobs available are "low-wage" jobs than before. n. 202

These low-skill, low-paying service jobs come in several varieties. First, not all producer services jobs are highly compensated. n. 203 The vast armies of customer service and telemarketing representatives manning the contemporary service economy often earn very low wages. Second, producer services directly generate demand for support services such as cleaning and maintenance, delivery, office support (courier services and document production), and so on. n. 204 Third, producer services indirectly generate low-wage service jobs by producing a new high-income workforce that generates demand for residential and personal support services. n. 205 The concern about the impact of globalization is not primarily a concern about increased unemployment. To the

contrary, lower-skill service-sector jobs are abundant. However, such jobs in service sectors as compared to manufacturing are less stable, less likely to be full-time, and offer fewer benefits. n. 206 Thus, deindustrialization has occurred at the same time as "marked increases in wage inequality ... between the more skilled and less skilled." n. 207

***1495** The general instability resulting from globalization may also disproportionately harm racial minorities. A GAO study, for example, found that minority groups experience longer unemployment spells and the largest wage losses in their new jobs. n. 208 In addition to the "last hired, first fired" issue, the simple persistence of employment discrimination at the upper rungs of firms can make minorities relatively more vulnerable to them. n. 209

***1496 B.** Housing and Infrastructure.

The trends described above in employment both affect and are affected by other trends arising from suburbanization, deindustrialization and the emergence of the global city. With respect to housing, the integration of cities into global networks has helped to revitalize cities, but in a way that shuts out poorer urban communities. These communities benefit only tangentially in the high-skill, high-reward aspects of the new "global city." Rather, the global city created a highly compensated class of highly skilled workers together with the class of relatively low-skilled and low-compensated service- sector workers who support both their commercial and residential activity.

The new skilled class has contributed to the renovation of the city, but in ways that are sometimes harmful to poor minority urban communities. Urban gentrification and displacement is a central dynamic to the rise of the global city. n. 210 The increase in producer-services activity and the associated increased concentration of high-income workers in inner cities has helped to bring about a booming high-price real-estate market. This has led to bidding for space in previously "derelict" or abandoned locations that are centrally located, as well as redevelopment of centrally located properties into high- level office and housing markets. n. 211 Keith Aoki has observed that this rise in demand among high-income populations for central-city residences was also driven by a shift in tastes that led to a favorable reevaluation of the historical and aesthetic qualities of urban real estate. n. 212 Aoki has also demonstrated that gentrification and accompanying displacement was facilitated by a rise during the 1980s of a deregulatory approach among government policymakers. n. 213

***1497** Cities provide "large-scale, high-cost luxury office and residential complexes," so that "high-income residential and commercial gentrification" are "[distinct socio-spatial forms of the new global city." n. 214 In New York, for example, there has been a significant increase in high-paying service-sector jobs. But, as Saskia Sassen has observed, Manhattan "also contains areas that have experienced sharp declines in household incomes: northern

Manhattan, containing Harlem and East Harlem, has experienced growing unemployment, sharp increases in poverty, and sharp increases in crime and delinquency rates. There is a ring of poverty that runs through northern Manhattan, the South Bronx, and much of northern Brooklyn. " n. 215 In these areas, the "low-rent housing market suffered a massive decline in the 1980s that, along with the stagnation and decline in household incomes at the lower end, created a situation that led to severe overcrowding and homelessness." n. 216 Sharp inequalities in the distribution of household income in NYC reflect these developments. n. 217

Thus, rather than acting to revitalize the city in a relatively evenly-distributed fashion, n. 218 the rebirth of the city as a global command center operated by highly-skilled service-providers may have further penalized those subsisting at the bottom of a hierarchy defined by race, economic status and geography.

All of these statistics paint a grim portrait of globalization. It is important to explain exactly how this portrait should be understood. Leading institutional advocates of global economic liberalization, such as the International Monetary Fund ("IMF"), have argued that "deindustrialization clearly cannot be regarded as a symptom of the failure of a country's manufacturing sector, or for that matter, of the economy as a whole. On the contrary, deindustrialization is a natural feature of the process of economic development *1498 in advanced economies." n. 219 Moreover, the IMF asserts that the loss of low-skilled labor should not be of concern because "[low-wage imports are simply not that important for most advanced economies." n. 220 The implication following from this is that no tears should be shed over the loss of these low-skill jobs to other (poorer) countries.

This proposition is uncontroversial. Low-skill industries are not more inherently valuable than any other sort; nor did urban poor racial minority groups enjoy even remotely ideal conditions prior to globalization. The purpose of this article is to show how, because of existing structural inequalities, preexisting dynamics of socioeconomic hierarchy mean that the adverse impact of globalization-induced economic adjustment is born disproportionately by inner-city minority communities who have been crowded into this low skill work, and who may be crowded into an even less-rewarding replacement.

First, there is disproportionately large underemployment of urban minorities as a result of globalization, because of their disproportionate concentration in low-wage industries. Second, there is the relatively greater difficulty that inner-city minority communities have adjusting to globalization and ultimately benefiting from it. Both difficulties arise in part from the confluence of structural factors explained in Parts I and II. Relatively lower occupational skills mean relatively less ability to transition into higher-skill jobs replacing those lost to globalization. Barriers built on racial, economic and geographical divisions cause low skill levels and hinder minority communities from raising skill levels.

There were no "good old days" for these communities; however, the "good new days" that the current Gilded Age has brought to the highly skilled socioeconomic elite are not enjoyed, even proportionately, by those at the bottom of the socioeconomic hierarchy.

The IMF Globalization Survey concedes that "for those workers affected [by deindustrialization, namely, those at the lower end of the income distribution, the effects [of globalization may ... be significant." n. 221 In the United States, inner-city racial minorities are disproportionately concentrated at this lower end.

***1499** IV. CONCLUSIONS

The theory behind globalization is that everyone benefits from increased efficiency resulting from the removal of government constraints on the market. This theory, however, does not attempt to address the impact of these dynamics on existing inequalities within a society. It is possible that globalization will offer opportunities for some members of previously disadvantaged groups. n. 222 It is simultaneously possible that globalization will generally entrench existing structural inequalities, and that some of these inequalities will be racial in character. Such inequities may become particularly apparent when the economy enters its cyclical downturn. Consequently, although measures that promote globalization "are not racial in character or construction, that they have a racial dimension should not be ignored." n. 223 The need for serious empirical inquiry into this area remains critical, and this article offers only some preliminary, and therefore imperfect, observations.

Again, it is important to emphasize that this critique need not compel advocacy for economic protectionism. Let us assume that global economic integration in fact will deliver the gains promised by liberal economic theory. Even if this is true, then a just government must respond to the dilemma described in this Article by taking the difficult steps to eliminate the barriers that prevent minority communities from participating equitably in the gains of globalization. The IMF Survey suggested precisely this approach:

Rather than attempting to limit globalization, the appropriate policy response is instead to address the underlying structural rigidities that prevent labor markets from adjusting to technological change or external competition. n. 224

This passage is probably intended to refer to labor "rigidities" such as unionization. Both the text and the underlying logic, however, also encompass the socioeconomic rigidities of race, space and economic place that have pinned inner-city minorities to the bottom of the national socioeconomic hierarchy.

***1500** While this approach may seem sympathetic to classic economic liberalism in that it does not argue against economic liberalization, in fact it raises an important challenge to classic economic liberalism as practiced. A primary criticism of classic economic liberalism is that it assumes a "level playing

field," and thus allows and even justifies the persistence of structural inequalities. This Article advocates demanding that structural inequalities be removed. As the debate over affirmative action has shown, as contentious as affirmative action policies have been, they have ultimately proved more politically acceptable than the sorts of reforms that would change the deep-seated inequalities that create the need for affirmative action in the first place, such as entrenched social, economic and geographical segregation between racial groups. n. 225

Law and policy have played a role both in shaping these pre-existing inequalities, and in fostering globalization. Adverse effects of globalization on minority communities thus stem in part from conditions created by a complex web of law and policy at the federal, state and local levels. Law and policy makers at all levels bear a responsibility to rectify these conditions, for example, through concerted reforms in housing, education and lending. Without such reform, significant sectors of our society may be left behind in the rush to the end of the rainbow.

Empowerment Zone and Enterprise Cities Demonstration Program ("Enterprise Zones" Program). The Empowerment Zones Program is designed to revitalize inner-city economies by "providing tax incentives and social service funds within the zone to stimulate business creation and expansion. " n. 226 McFarlane concludes that the limited incentives offered by the program fail "to address the underlying structural reasons for the depressed economic and social conditions existing in the inner-city neighborhoods." n. 227 McFarlane cites both aspects of the law and policy creating preexisting conditions of vulnerability addressed in Part I, and aspects of the law and policy facilitating ***1501** globalization addressed in Part II, as sources of this underlying structural disparity.

The solutions to such deep-rooted structural problems, of course, are not likely to be popular causes among politicians. Advocates for the urban poor must insist, however, on a continuing focus on these difficulties and on real redress for them. Items on this agenda include imperatives that government resources be redistributed and legal processes reshaped to correct the disadvantages in capital formation, infrastructure, and education and other public services that currently operate to reinforce existing hierarchies.

NOTES

1. See *infra* Part II (defining globalization). See generally International Monetary Fund, *World Economic Outlook 1997: Globalization: Opportunities and Challenges* (1997) [hereinafter IMF Survey; United Nations Development Programme, 1999 Human Development Report: *Globalization with a Human Face*, available in <[http:// www.undp.org/hydr/report.html](http://www.undp.org/hydr/report.html)> [hereinafter Human

Development Report.

2. See **Chantal Thomas**, Fast-Track Trade Legislation: A Case Study of the Law and Politics of Globalization (unpublished manuscript, on file with author).

3. For discussions of the intersection of racial, geographic, and class segregation, see Keith Aoki, [Race, Space, and Place: The Relation Between Architectural Modernism, Post-modernism, Urban Planning, and Gentrification](#), 20 FORDHAM URB. L.J. 699 (1993), John O. Calmore, [Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"](#) 143 U. PA. L. REV. 1233 (1995), and Richard Thompson Ford, [The Boundaries of Race: Political Geography in Legal Analysis](#), 107 HARV. L. REV. 1841 (1994).

4. In its worse forms, such policy condones Social Darwinism, a theory whose purpose is to "justify social inequality," by explaining it as a product of "survival of the fittest" (a term coined by Social Darwinist Herbert Spencer). See SARAH BLAFFER HARDY, THE WOMAN THAT NEVER EVOLVED 12-13 (1981); see also RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (1992); Owen D. Jones, [Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention](#), 87 CAL. L. REV. 827 n. 233 (1999); Howard Schweber, [The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education](#), 17 LAW & HIST. REV. 421 (1999).

5. Most commentators agree that "globalization" was triggered in significant part by developments in transportation and communications technology that allowed both production and products to be dispersed over ever-wider areas. See *infra* notes 158-59. The cultural effects of this were memorably foreseen by Marshall McLuhan in his prediction of a "global village." See MARSHALL MCLUHAN, UNDERSTANDING MEDIA, THE EXTENSIONS OF MAN (1964).

6. For an account of the relationship between classical economics and evolutionary theory in the law, see Herbert Hovenkamp, [Evolutionary Models in Jurisprudence](#), 64 TEX. L. REV. 645 (1985). Hovenkamp explained:

The earliest Darwinians who called themselves "sociologists," particularly Herbert Spencer and William Graham Sumner, were thoroughgoing economic determinists. For this reason they believed that social science must merely describe the world, using Darwin's economic theory of natural selection to discover the natural rules of resource allocation in human society, but remaining powerless to change these fundamental laws. These evolutionary social scientists were called Social Darwinists. They influenced American jurisprudence greatly, particularly the constitutionalization of the unregulated market today known by the name of "substantive due process," or "liberty of contract."

Id. at 654 (emphasis added).

7. A Closer Look at Globalization, 144 CONG. REC. E1660-01, E1660 (daily ed. Sept. 9, 1998) (remarks of Rep. Lee H. Hamilton of Indiana).

8. This sort of discussion has been common among government decisionmakers faced with choices whether to facilitate globalization. See, e.g., Trade Barriers Would Hamper U.S. Competitiveness in Information Technology, 138 CONG. REC. E2473-01, E2473 (daily ed. Aug. 12, 1992) (remarks of Rep. William L. Dickinson of Alabama) ("While free market policies may cause some short-term pain -- a shakeout in some industries -- they ultimately promote higher living standards and global prosperity."); How Change Affects Government, 137 CONG. REC. E1742-02, E1743 (daily ed. May 14, 1991) (remarks of Rep. Newt Gingrich of Georgia) (commenting that "[advocates of free markets, limited government, low taxes, and deregulation [who are ideally positioned] to lead government reform of globalization). The latent contradiction between a view that naturalizes market activity yet understands law and policy as critical to fostering it is frequently overlooked.

9. See [Lochner v. New York, 198 U.S. 45, 75 \(1905\)](#) (Holmes J., dissenting). Holmes wrote, "[the 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." Id. As Hovenkamp remarked, Holmes's Lochner dissent: "[Standing alone, however, does not make a particularly convincing case that Holmes was not a Social Darwinist. He was a complex man, and it is certainly plausible that he believed in Social Darwinism, but believed even more in judicial restraint." Hovenkamp, *supra* note 6, at 654-63 (discussing Holmes's approach to jurisprudence).

10. See Brian Bix, [Positively Positivism, 85 VA. L. REV. 889, 893 \(1999\)](#) (reviewing ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998) (observing that legal realists were "inspired by the moral and legal skepticism of Oliver Wendell Holmes, Jr." and citing Holmes's Lochner dissent as one of his most influential writings for realists).

11. See *infra* Part II.

12. See *infra* Part I.

13. See *infra* Part III.

14. The focus of this Article is on federal law and policy for two reasons: first, because it is simply more accessible and manageable than a state or local survey, although the relationship between federal, state and local law and policy is discussed, and second, because it matches the focus on federal law and policy fostering globalization in Part II.

15. Elsewhere, I do take up more intensively the question of the desirability of globalization *per se*. See Thomas, *supra* note 2. The thesis of this Article builds on the premise that the gains from trade are not evenly distributed, which follows fairly straightforwardly from basic microeconomics. The debate over the extent to which such inequality is just, or the extent to which egalitarian economic outcomes are just, is eternal and intractable, and this Article does not attempt to resolve such questions. The argument is much more limited: that where certain groups are structurally positioned to consistently bear the adverse impact of liberalization, and where that position is a result of government law and policy,

justice requires the government to take steps to correct this structural disadvantage.

16. RAY SUAREZ, *THE OLD NEIGHBORHOOD: WHAT WE LOST IN THE GREAT SUBURBAN MIGRATION: 1966-1999*, at 2 (1999).

17. See U.S. Bureau of the Census, Current Population Reports, Series P25-311, P25-802, P25-1045, P25-1126, and PPL-91, available in <<http://www.census.gov/statab/freq /98s0002.txt>> (on file with author) (summarizing census information). For data on city centers, see SUAREZ, *supra* note 16, at 4-7. Suarez noted that New York's population declined by 11%, Chicago's by 17%, Baltimore's by 17%, Philadelphia's by 19%, Washington, D.C.'s by 20%, Cleveland's by 37%, Detroit's by 40%. See *id.*

18. See William W. Buzbee, [Urban Sprawl, Federalism, and the Problem of Institutional Complexity](#), 68 *FORDHAM L. REV.* 57, 68 (1999).

19. SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, AND TOKYO* 253 (1991).

20. See *id.* at 250.

21. The declines in the percentages of urban populations that were white in Chicago, Philadelphia, Los Angeles, Washington, Baltimore, Houston, San Diego, and San Jose from 1950 to 1990 were respectively 85% to 45%, 81% to 53%, 89% to 52%, 64% to 29%, 76% to 39%, 78% to 52%, 92% to 67% and 96% to 62%. See SUAREZ, *supra* note 16, at 10-11.

22. See, e.g., ROBERT FISHMAN, *BOURGEOIS UTOPIAS* (1987).

23. Aoki, *supra* note 3, at 707-11 (describing rise of pastoral aesthetic that implied that "the city is bad for you"); see also *id.* at 711-18 (describing nineteenth-century tenement conditions that gave rise to description of urban life as "drab, squalid and dreary").

24. See, e.g., G. SCOTT THOMAS, *THE UNITED STATES OF SUBURBIA* (1998).

25. This Article does not look at law explicitly establishing segregation, such as the "Jim Crow" legislation of the South. Rather, the Article focuses on law and policy regulating urban areas primarily in the northern and western United States. This focus is for two reasons. First, the Article looks at the effects of globalization on inner cities, and these effects are primarily in the traditional industrial centers. Second, the Article seeks to show how law and policy can entrench dynamics of socioeconomic subordination and vulnerability among urban minorities. For evidence of such entrenchment, one neednot look to the early and explicit permission and enforcement of segregation and discrimination against racial minorities. Rather, one need only look to the laws in place after racial minorities had been explicitly granted equal citizenship.

26. Julia P. Forrester, [Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing](#), 69 *TUL. L. REV.* 373, 374 & n. 1 (1994). For a wonderful discussion of the historical and aesthetic dimensions of this phenomenon, see Aoki, *supra* note 3.

27. See DANIEL Q. POSIN, *FEDERAL INCOME TAXATION OF INDIVIDUALS* 457 (3d ed. 1993). Posin earlier introduced the home mortgage interest deduction with this colloquy: "There is a major housing program going to be proposed by the President [Here's how it will work. It's going to be massive. It's going to come to about a total of \$89 billion a year. This is big time." Id. at 457.

28. Posin continued: "Here's some other facts about [the federal income tax deduction for home mortgage interest. Fifty-six percent of this, or \$50 billion, is going to go to the richest 20 percent of Americans. The poorest 20% will get \$15 billion. " Id. at 453.

29. Id. at 458 ("All of this can be summarized in one succinct piece of tax advice: If you are rich, buy a big house.").

30. In addition to lacking the income necessary to afford a down payment and mortgage, this initial difference can be exacerbated by information disparities and discrimination in lending. See *infra* Part I.B.

31. One might argue that suburbanization was a natural outcome of the increased demand for homes, because property in the city tended to be rental. Yet rental property can easily be converted into property to be owned, as was shown by the large-scale conversions of this kind in the 1980s in many cities. In the postwar period, however, much of the new demand was not for converted rentals but rather for new homes.

32. See Shelby Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 *FORDHAM URB. L.J.* 69, 84 (1998) ("Although not their stated intentions, various federal tax measures have operated since the mid-1940s to shape a particular housing pattern. ").

33. Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 *U. PA. L. REV.* 1285, 1309 (1995). The Home Owners Loan Corporation was created in 1933. See Home Owners' Loan Act of 1933, Pub. L. No. 73-43, ch. 64, 48 Stat. 128, 129-32, repealed by Housing Amendments of 1953, Pub. L. No. 83-94, ch. 21 (a), 67 Stat. 121, 126.

One of the most important contributions of the HOLC was the uniformity it promoted among financial institutions engaged in residential lending. In addition to introducing the fixed-rate, self-amortizing long-term mortgage loan, the HOLC also created uniform appraisal standards through the country Areas with even relatively small black populations were usually given the lowest rating"

Schill & Wachter, *supra*, at 1309.

34. See [12 U.S.C. § 1709\(a\) \(1994\)](#).

35. Schill & Wachter, *supra* note 33, at 1309. More specifically, a "lender who holds an FHA insured loan may assign the loan to FHA if the borrower defaults and may receive payment equal to the principal outstanding on the loan, plus unpaid interest." Brian Meltzer, *Institutional Financing: Home Loans in the 1980s*, 65 *CHI. BAR REC.* 84, 85 (1983).

36. See Meltzer, *supra* note 35, at 85.
37. Schill & Wachter, *supra* note 33, at 1309.
38. See *id.*
39. *Id.*; see also Kenneth T. Jackson, Race, Ethnicity and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration, 6 J. Urb. Hist. 419, 435 (1980) ("[Prospective buyers could avoid many of these [difficulties ... by locating in peripheral sections.]").
40. Schill & Wachter, *supra* note 33, at 1311.
41. See Roberta Achtenberg, [Shaping American Communities: Segregation, Housing and the Urban Poor](#), 143 U. PA. L. REV. 1191, 1193 (1995). Achtenberg was then Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development.
42. Ronald C. Peterson & Robert M. Kennan, Jr., The [Federal-Aid Highway Program](#), 2 ENVTL. L. REP. 50001 (1972).
43. See Michael E. Lewyn, The [Urban Crisis: Made in Washington](#), 4 J.L. & POL'Y 513, 540 (1996). The involvement of General Motors was not seen as a conflict of interest, given the conventional wisdom at the time that "What is good for General Motors is good for the country." See Linda A. Mabry, [Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality](#), 87 GEO. L.J. 563, 596 & n. 126 (1999) (discussing origins of this phrase).
44. See Buzbee, *supra* note 18, at 68; Lewyn, *supra* note 43, at 542.
45. See Lewyn, *supra* note 43, at 540.
46. Green, *supra* note 32, at 83.
47. See, e.g., Buzbee, *supra* note 18, at 6869; Green, *supra* note 32, at 84.
48. See Lewyn, *supra* note 43, at 542.
49. SASSEN, *supra* note 19, at 202.
50. Christian C. Day, [Resisting Serfdom: Making the Market Work in a Great Republic](#), 25 IND. L. REV. 799, 814 (1991).
51. See generally Schill & Wachter, *supra* note 33.
52. Housing Act of 1937, [42 U.S.C. § 1437](#) (1994). The Housing Act codified a 1935 federal court case requiring that federally funded housing be built in partnership with local government.
53. See [United States v. Certain Lands in City of Louisville, Jefferson County, Ky.](#), 78 F.2d 684, 686 (6th Cir. 1935) (holding that federal power of eminent domain cannot justify construction of low-income housing because such activity does not constitute sufficient "public use" of land).
54. See Florence Wagman Roisman, [Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty](#), 143 U. PA. L. REV. 1351, 1358 & n. 23 (1995).
55. See ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK (1974).
56. See Janet K. Levit, [Rewriting Beginnings: The Lessons of Gautreaux](#), 28

[J. MARSHALL L. REV. 57, 63 \(1994\).](#)

57. Housing Act of 1937, § 10(a), 50 Stat. 891-92 (1937) (current version at [42 U.S.C. § 1437 \(1994\)](#)).

58. Schill & Wachter, *supra* note 33, at 1292.

59. *Id.* at 1294.

60. *Id.* at 1314-16.

61. See David W. Price, Note, [Causation of Public Housing Segregation: HUD Authorization of Applicant Choice in Tenant Selection and Assignment Plans](#), 10 B.C. THIRD WORLD L.J. 121, 122 (1990).

62. See generally Levit, *supra* note 56; Alexander Polikoff, [Gautreaux And Institutional Litigation](#), 64 CHI.-KENT L. REV. 451 (1988).

63. This interpretation has been given to section 3608 of the Fair Housing Act, which requires HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title." Fair Housing Act of 1968, [42 U.S.C. § 3608 \(e\)\(5\) \(1994\)](#).

64. The Code of Federal Regulations provides that a HUD project must not be located in an area of: (1) minority concentration unless (i) sufficient, comparable opportunities exists for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot otherwise be feasibly met in that housing market area; or (2) a racially mixed area if the project will cause a significant increase in the proportion of minority to nonminority residents in the area.

[24 C.F.R. § 891.125\(b\) \(1999\)](#).

65. For example, *Shannon v. HUD*, held that HUD had violated [section 3608](#) when it decided to support a public housing project but did not consider that "the location of this type of project on the site chosen will have the effect of increasing the already high concentration of low income black residents." [436 F.2d 809, 812 \(3d Cir. 1970\)](#).

66. See, e.g., [Faymor Dev. Co. v. King](#), 446 U.S. 905 (1980).

67. See Sam Brownback, [Resolving HUD's Existing Problems Should Take Precedence over Implementing New Policies](#), 16 ST. LOUIS U. PUB. L. REV. 235, 238 (1997) ("[HUD housing projects invariably are difficult to manage and maintain, tend to segregate families by race, education and income, and isolate the poor in some of the worst neighborhoods in any city.]; Price, *supra* note 61, at 122-23 (charging that "little has changed" in public housing either in the level of segregation in public housing or in HUD's willingness to combat it, and quoting a HUD official's admission that HUD was "deeply involved in the creation of the ghetto system, and it has never committed itself to any remedial action").

68. Ford, *supra* note 3, at 1870.

69. Section 1 of the Fourteenth Amendment provides that "no State shall ... deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [U.S.](#)

[Const. amend. XIV, § 1](#). The Supreme Court struck down explicitly racial exclusionary zoning in [Buchanan v. Warley](#). See 245 U.S. 60, 74-82 (1917) (holding that Louisville, Kentucky municipal ordinance restricting property sales on basis of race within designated areas violated Fourteenth Amendment's protection of "property from invasion by states without due process of law"). The Court held that state enforcement of racially restrictive property covenants violated the Fourteenth Amendment in [Shelley v. Kraemer](#). See 334 U.S. 1 (1948).

70. In *Euclid v. Ambler Realty Co.*, the Supreme Court upheld a zoning ordinance that prohibited multi-family housing. See [272 U.S. 365 \(1926\)](#). In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Court held that a zoning ordinance prohibiting multifamily housing was not unconstitutional state action, because "official action will not be held unconstitutional [under the Fourteenth Amendment solely because it results in racially disproportionate impact" and "[proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." [429 U.S. 252, 264-65 \(1977\)](#). Richard Ford has argued that the intuitive validity of such zoning mechanisms stems from reifications of local government space that allow local governments to flout responsibility for their part in ensuring racial justice. See generally Ford, *supra* note 3.

71. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 17 n. 17 (1983) (citing [Aguins v. City of Tiberon](#), 447 U.S. 255 (1980)).

72. See *infra* notes 85-95.

73. See Stephen M. Dane, Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws, 26 MICH. L. REV. 527, 532 (1993) (arguing that "instead of addressing the mortgage-lending discrimination problem directly and comprehensively, Congress has taken a piecemeal and incomplete approach that generally has failed to bring the mortgage-lending industry into equal access compliance").

74. [Section 1](#) of the Thirteenth Amendment provides that: "Neither slavery nor involuntary servitude, except as a punishment for crime where of the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. " [U.S. Const. amend. XIII, § 1](#). Congress enacted the Civil Rights Act of 1866, to reinforce the Thirteenth Amendment. See [42 U.S.C. § 1982 \(1994\)](#) (providing that "[all citizens of the United States shall have the same right ... as is enjoyed by white citizens ... to inherit, purchase, lease, sell, hold, and convey real and personal property]").

75. See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 409, 413 (1968); [Newbern v. Lake Lorelei, Inc.](#), 308 F. Supp. 407 (S.D. Ohio 1968)..

76. See [Tillman v. Wheaton-Haven Recreation Ass'n, Inc.](#), 410 U.S. 431 (1973); *Sullivan*, 396 U.S. at 229; [Clark v. Universal Builders, Inc.](#), 501 F.2d 324 (7th Cir. 1974), cert. denied, 419 U.S. 1070 (1974).

77. See [Gladstone Realtors v. Village of Bellwood](#), 441 U.S. 91, 94 (1979).

78. Title VIII of the Civil Rights Act of 1968, is the most important provision, "prohibiting the refusal to sell or rent, or negotiate therefore, on the basis of race, color, religion, sex or national origin." [42 U.S.C. 3604\(a\) \(1994\)](#).

79. This prohibition affects explicit refusals. See [United States v. Hughes Mem'l Home](#), 396 F. Supp. 544, 547-48 (W.D. Va. 1975); [United States v. Real Estate Dev. Corp.](#), 347 F. Supp. 776, 779-80 (N.D. Miss. 1972). The prohibition also affects refusals through avoidance and delay. See [Trafficante v. Metropolitan Life Ins. Co.](#), 409 U.S. 205, 207-08 (1972); [United States v. Pelzer Realty Co., Inc.](#), 484 F.2d 438, 442, 446 (5th Cir. 1973), cert. denied, [416 U.S. 936 \(1974\)](#) (prohibiting "grudging" sales techniques "not consistent with common sense and ordinary business practices").

80. [United States v. Youritan Constr. Co.](#), 370 F. Supp. 643 (N.D. Cal. 1973), aff'd as modified, [509 F.2d 623 \(9th Cir. 1975\)](#). This includes a ban on "racial steering." See [Zuch v. Hussey](#), 394 F. Supp. 1028 (E.D. Mich. 1975); [Johnson v. Jerry Pals Real Estate](#), 485 F. Supp. 399 (E.D. Va. 1974); [United States v. Henshaw Bros., Inc.](#), 401 F. Supp. 399 (E.D. Va. 1974).

81. SCHWEMM, supra note 71, at 58-62, 404 (1983).

82. Price, supra note 61, at 122-23.

83. SCHWEMM, supra note 71, at 48 (citing [42 U.S.C. § § 3603\(b\)\(1\), 3603\(b\)\(2\), 3607 \(1994\)](#)). The Act applies to dwellings owned or operated by the Federal Government; provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government, and; insured, guaranteed, or otherwise secured by the credit of the Federal Government. See [42 U.S.C. § 3603\(a\)\(1\) \(1994\)](#).

84. Achtenberg, supra note 41, at 1194.

85. SCHWEMM, supra note 71, at 187. Section 3605 of Title VIII of the Civil Rights Act of 1968 prohibits discrimination by a financial institution on the basis of race, color, religion, sex or national origin. See [42 U.S.C. § 3605 \(1994\)](#); see also [Harper v. Union Savs. Ass'n](#), 429 F. Supp. 1254, 1257 (N.D. Ohio 1977) (prohibiting discrimination in form of mortgage foreclosure policies that are stricter for minority than white homeowners); [Laufman v. Oakley Bldg. & Loan Co.](#), 408 F. Supp. 489, 493 (S.D. Ohio 1976) (prohibiting racial discrimination in financial assistance for purchasing, constructing or maintaining dwelling, or in fixing terms or conditions of financial assistance). The Equal Credit Opportunity Act and the Home Mortgage Disclosure Act of 1975, reinforce this prohibition. See generally Home Mortgage Disclosure Act, [12 U.S.C. § § 2801-2811 \(1994\)](#); Equal Credit Opportunity Act, [15 U.S.C. § § 1691-1691e \(1994\)](#).

86. [12 U.S.C. § § 2901-2905 \(1994\)](#).

87. The CRA requires "each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions." [12 U.S.C. § 2901 \(b\) \(1994\)](#).

88. Schill & Wachter, *supra* note 33, at 1319, (citing [12 U.S.C. § § 2902-2903](#)).

89. See A. Brooke Overby, The [Community Reinvestment Act Reconsidered](#), [143 U. PA. L. REV. 1431, 1448-49 \(1995\)](#)..

90. See *id.*

91. See generally *id.* at 1458-1569.

92. See Glenn B. Canner, Home Mortgage Disclosure Act: Expanded Data on Residential Lending, 77 FED. RES. BULL. 859 (1991) (commenting that blacks and Latinas/os were rejected 33.9% and 21.4% for home buying loans, as opposed to 14.4% for whites); see also Alicia H. Munnell et al., Mortgage Lending in Boston: Interpreting HMDA Data (Federal Reserve Bank of Boston Working Paper No. 92-7, 1992) (noting that blacks and Hispanics are 56% more likely than whites to be rejected).

93. Following these studies, the federal government made several attempts to strengthen the CRA substantively and enforce it more vigorously. See Schill & Wachter, *supra* note 33, at 1320. In 1995 CRA regulations were approved that marked a turn away from "the efforts/process-based enforcement standard that had been in effect since 1978," and a turn towards "actual results, including loans, investments, and services to an institution's 'assessment area.'" Overby, *supra* note 89, at 1469. The objections surrounding the CRA, however, have not subsided. Many argue that apparent redlining includes lending decisions with discriminatory effect but based on "rational" factors, and that the CRA tries to solve "the problems of inadequate housing, urban decay, and violence that have become issues of national importance" by "compel[ling] suboptimal lending patterns" in a way which makes it "fundamentally flawed ... anachronistic and ultimately self-defeating." *Id.* at 1435-36.

94. See Anthony Taibi, [Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice](#), [107 HARV. L. REV. 1463, 1467-71 \(1994\)](#).

95. See *infra* Part IV. This argument is an oft recurring, if seldom- heeded, theme of critical theory. See generally Chantal Thomas, [Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development](#), [9 TRANSNAT'L L. & CONTEMP. PROBS. 1 \(1999\)](#) (observing postcolonial development theory and American critical race theory both sought to show how dominant legal systems perpetuate structural inequality between dominant and subordinate groups in system).

96. See Schill & Wachter, *supra* note 33, at 1310 n. 101 ("Redlining obtains its name from the practice of FHA underwriters' circling in red areas of the city that were bad credit risks.") (quoting NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 101 (1969)).

97. *Id.* at 1310 (quoting Gary Orfield, Federal Policy, Local Power and Metropolitan Segregation, 89 POL. SCI. Q. 777, 786 (1975) (quoting FHA Underwriting Manual)).

98. DENNIS R. JUDD, *THE POLITICS OF AMERICAN CITIES: PRIVATE POWER AND PUBLIC POLICY* 281 (1979) (quoting FHA Underwriting Manual).

99. See Schill & Wachter, *supra* note 33, at 1310; see also MARK I. GELFAND, *A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933- 1965*, at 217 (1975) (observing that "FHA virtually made [racially restrictive covenants mandatory]"); U.S. DEP'T OF HOUS. & URB. DEV., *EQUAL OPPORTUNITY IN HOUSING* § 2301, at 2320 (1973).

100. Schill & Wachter, *supra* note 33, at 1311.

101. See Exec. Order No. 11063, 27 Fed. Reg. 11,527 (1962) (amended by Exec. Order No. 12,259, 46 Fed. Reg. 1253 (1980)).

102. [42 U.S.C. § 2000d \(1994\)](#). The most famous fair-housing litigation arising from the 1964 Civil Rights Act was *Gautreaux v. Romney*, which held that racially segregated public housing maintained by the Chicago Housing Authority violated the Act. [448 F.2d 731 \(7th Cir. 1971\)](#).

103. See Roisman, *supra* note 54, at 1357 (citing [Gautreaux v. Romney, 448 F.2d 731, 739 \(7th Cir. 1971\)](#) (finding that HUD intentionally created racial segregation in Chicago public housing); see also [Young v. Pierce, 628 F. Supp. 1037, 1043-51 \(E.D. Tex. 1985\)](#) (describing activities of HUD related to creation and entrenchment of racial segregation).

104. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

105. See *infra* for a discussion of local government law and its role in creating this effect.

106. Ford, *supra* note 3.

107. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 131-32 (1985).

108. See [418 U.S. 717 \(1974\)](#); see also Ford, *supra* note 3, at 1875.

109. See [411 U.S. 1 \(1973\)](#); see also Ford, *supra* note 3, at 1876.

110. See Larry Tye, U.S. Sounds Retreat in School Integration: America's Schools in New Segregation, *BOSTON GLOBE*, Jan. 5, 1992, [available in 1992 WL 4158916](#).

111. Dash T. Douglas, [A House Divided: The Social and Economic Underdevelopment of America's Inner Cities, 10 U. FLA. J.L. & PUB. POL'Y 369, 384 \(1999\)](#) (citing MILTON S. EISENHOWER FOUNDATION, *THE MILLENNIUM BREACH* 10 (1998)).

112. For a discussion of inequitable school funding in New York City, see COMMUNITY SERVICE SOCIETY OF NEW YORK, *SEPARATE, UNEQUAL, AND INADEQUATE: EDUCATIONAL OPPORTUNITIES & OUTCOMES IN NEW YORK CITY PUBLIC SCHOOLS* (1995). For a discussion of affirmative action, see Kimberle Crenshaw, [Playing Race Cards: Constructing a Pro-Active Defense of Affirmative Action, 16 NAT'L BLACK](#)

[L.J. 196, 196-97 \(1999-2000\)](#). While the Supreme Court allowed race to be taken into consideration as one of many factors in determining admissions in post-secondary institutions, states such as California and Texas have disallowed any such considerations in admissions to their state university systems. Texas is a partial exception to this description in the sense that Texas has pursued relatively aggressive redistributive educational spending policies, has actively and explicitly focused on improving minority performance on standardized tests, and has established a policy under which state universities now admit all Texas high school graduates in the top 10% of their classes.

113. See Schill & Wachter, *supra* note 33, at 1311.

114. *Id.*

115. Section 3605 of Title VIII of the Civil Rights Act of 1968 prohibits a financial institution from denying financial assistance for purchasing, constructing or maintaining a dwelling, or in fixing the terms or conditions of the financial assistance, because of race, color, religion, sex or national origin. See [42 U.S.C. § 3605 \(1994\)](#). [Section 3605](#) also prohibits redlining, see [Laufman v. Oakley Building & Loan Co.](#), 408 F. Supp. 489 (S.D. Ohio 1976), which is "the practice of identifying certain neighbourhoods as unfit for normal housing loans on the basis of their racial makeup or some other prohibited ground." SCHWEMM, *supra* note 71, at 187. In addition, [section 3605](#) prohibits discrimination in the form of mortgage foreclosure policies more aggressive for minority than white homeowners. See [Harper v. Union Savs. Ass'n](#), 429 F. Supp. 1254, 1257-58 (N.D. Ohio 1977) (construing [section 3605](#)).

116. Schill & Wachter, *supra* note 33, at 1296-97 (citation omitted). "According to a recent report prepared for the national Commission on Severely Distressed Public Housing, the amount needed to modernize existing public housing ranges from \$14.5 billion to \$29.2 billion." *Id.*

117. See *infra* notes 217-26 for a discussion of gentrification.

118. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* 16 (1995).

119. See *infra* Parts II and III.

120. SASSEN, *supra* note 19, at 200.

121. See MASSEY & DENTON, *supra* note 104.

122. See IMF Survey, *supra* note 1, at 45 ("Globalization refers to the growing economic interdependence of countries worldwide through the increasing volume and variety of cross-border transactions in goods and services and of international capital flows, and also through the more rapid and widespread diffusion of technology.").

123. See *id.* ("Economic integration among nations is not a new phenomenon [However, the recent process of global integration is qualitatively different from that of the earlier period.").

124. These terms are used to categorize international transactions in a country's "balance of payments." The term "balance of payments" refers to a

"statement showing all of a nation's transactions with the rest of the world for a given period. It includes purchases and sales of goods and services, gifts, government transactions, and capital movements." PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *MACROECONOMICS* 420 (15th ed. 1995).

125. Human Development Report, *supra* note 1, at 25.

126. *Id.*

127. *Id.*

128. *Id.*

129. IMF Survey, *supra* note 1, at 60. This figure is for both "inward and outward" foreign direct investment. See *id.* at 60 tbl.14 n. 1. Compared to overall GDP, however, the value of foreign direct investment is still low. Since it began at 1% of gross domestic product, the final percentage was still a relatively low 3.3% of GDP. See *id.* at 60.

130. *Id.* at 60, tbl.13. "Gross domestic product can be defined as the money value of the goods and services produced by a given economy in a given period of time. GDP measures an economy's current account and excludes capital account flows, whose money value can and does exceed that of the current account." *Id.*

131. JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 6 (3d ed. 1995).

132. This figure represents exports and imports of goods and services, and earnings and payments on foreign investment. See 1999 Trade Policy Agenda and 1998 Annual Report of the President of the United States on the Trade Agreements Program, at 19 [hereinafter President's Trade Report].

133. *Id.* at 19 fig.1.

134. From 1980 to 1997, exports increased from 271.8 to 937.4 billion dollars, and imports increased from 290.7 billion dollars to 1,043.5 billion dollars. WORLD BANK, *WORLD DEVELOPMENT INDICATORS* 1999, at 250 (1999).

135. In 1998, exports in services were 259.9 versus 181.1 in imports, in billions of U.S. dollars. President's Trade Report, *supra* note 132, at 28.

136. SASSEN, *supra* note 19, at 90. Sassen has noted: "Central components of the producer services category are a range of industries with mixed business and consumer markets [such as insurance, banking, financial services, real estate, legal services, accounting, and professional associations." *Id.* More generally Sassen commented: "Producer services cover financial, legal and general management matters, innovation, development, design, administration, personnel, production technology, maintenance, transport, communications, wholesale distribution, advertising, cleaning services for firms, security and storage." *Id.*

137. See *id.*

138. See Lan Cao, *Money, Power, and Culture in the Global Economy: Towards a New Sensibility for International Economic Development* 15-27 (unpublished manuscript, on file with author).

139. See *id.* at 21 n. 80 (citing BENJAMIN R. BARBER, *JIHAD VS.*

MCWORLD 24 & n. 7 (1995)).

140. WILLIAM GREIDER, ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM 22 (1997).

141. See id.

142. Id. at 46. The reality of intrafirm trade contrasts markedly with the ideal that drives international trade liberalization -- that of a market in which "normal" trade is open and at arm's length. See David Kennedy, Receiving the International, 10 CONN. J. INT'L L. 10, 10-11 (1994) ("Broadly conceived, the international trade regime divides traders and trade relations into the normal and the deviant. Normal trade is open, structured solely by comparative costs and pursued by private actors without government intervention As it turns out, of course, the ... image of "normal" traders remains largely a fantasy."); cf. Daniel K. Tarullo, [Beyond Normalcy in the Regulation of International Trade](#), 100 HARV. L. REV. 546, 550 (1987) ("Implicitly or explicitly, [tradelaws] posit certain norms of economic behavior by government, both foreign and domestic. The usual, 'normal' condition is assumed to be nonintervention. ").

143. See, e.g., GREIDER, supra note 140 (discussing this view of globalization). In the first chapter, entitled "The Storm Upon Us," Greider described globalism with these words:

Imagine a wondrous new machine, strong and supple, a machine that reaps as it destroys Think of this awesome machine running over open terrain and ignoring familiar boundaries. It plows across fields and fencerows with fierce momentum that is exhilarating to behold and also frightening. As it goes, the machine throws off enormous mows of wealth and bounty while it leaves behind great furrows of wreckage.

Now imagine that there are skillful hands on board, but no one is at the wheel. In fact, this machine has no wheel or any internal governor to control the speed and direction. It is sustained by its own forward motion, guided mainly by its own appetites. And it is accelerating.

Id. at 11. Greider concluded: "To describe the power structure of the global system does not imply that anyone is in charge of the revolution. The revolution runs itself." Id. at 26.

144. IMF Survey, supra note 2, at 50.

145. These six negotiation rounds occurred in: Annecy, France, in 1948; Torquay, England in 1950; and thereafter in Geneva in 1956, 1960-61 (the "Dillon Round"), 1964-67 (the "Kennedy Round"), and 1973-79 (the "Tokyo Round"). See JACKSON, supra note 131, at 314. The ratio of duties collected to dutiable imports in the United States, for example, was 12.1 in 1961 and 5.1 in 1981, after the Tokyo Round. See id. at 6. For GATT members more generally, the end of the Kennedy round produced tariff reductions on 70% of total imports, with the majority of the reductions 50% or greater. See JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 228 (1969). The Tokyo Round effected a further reduction of about 35% in "the industrial tariffs of the major

industrial participants." JOHN. H. JACKSON ET AL., IMPLEMENTING THE TOKYO ROUND 13 (1984).

146. See North American Free Trade Agreement Implementation Act, [Pub. L. No. 103-182](#), 107 Stat. 2057 (1993) (codified at [19 U.S.C. § 3311 \(1994\)](#)) (implementing North American Free Trade Agreement, Dec. 8, 1992, [Can. -Mex. -U.S., 32 I.L.M. 289](#)).

147. See Uruguay Round Agreements Act, [Pub. L. 103-465](#), 108 Stat. 4809 (1994) (codified at [19 U.S.C. § 3501 \(1994\)](#)) (implementing Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr.15, 1994, [33 I.L.M. 1125 \(1994\)](#)).

148. See George F. Will, Free Trade, Faster Change, WASH. POST, Oct. 11, 1992, at C7 (commenting that "Ross Perot, the timidest Texan, quakes about the menace of Mexico, saying NAFTA would apply 'a giant sucking-sound vacuum on what used to be industrial America'").

149. These included the creation of American Depositary Receipts and Rule 144A, which encouraged foreign issuers to issue into the U.S. This helped stimulate a trend by which capital offerings would be made in at least two securities markets at once (so-called "global" offerings).

150. For example, the United States Bilateral Treaty ("BIT") Program played an important role in internationalizing investment. The BIT Program was "formally inaugurated" in 1977 with a treaty-negotiating initiative of the State Department. See Kenneth J. Vandeveld, U.S. Bilateral Investment Treaties: The Second Wave, 14 MICH. J. INT'L J. 621, 621 (1993).

[In a remarkably short period of time, BITs have become an important part of the foreign investment landscape In the 1990s, the pace of BIT signings increased dramatically and by mid 1996, over one thousand BITs had been signed, with almost every country on the globe a party to at least one such treaty.

Andre T. Guzman, [Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties](#), 38 VA. J. INT'L L. 639, 652 (1998).

151. See Letter from Chris Scott, Reader in Economics, London School of Economics, Apr. 25, 2000 (on file with author). That is, in any given market, there may be equilibria that have different distributional consequences, but that are equally "efficient" in the economic sense that "all of the probable trades have been made." HAL. R. VARIAN, INDUSTRIALIST MICROECONOMICS 17 (5th ed., 1999) (discerning Pareto optimality).

152. IMF Survey, *supra* note 1, at 47. The IMF Survey further reported that:

For the industrial countries as a whole, the share of manufacturing employment declined from about 28 percent in 1970 to about 18 percent in 1994 Deindustrialization began as early as the mid-1960s in the United States, and the trend there has been one of the most pronounced, with the share of manufacturing employment began declining steeply from about 28 percent in 1965 to 16 percent in 1994.

Id. at 47.

153. The increase in imports leading to the trade deficit has been especially strong in consumer goods but also increasingly capital goods. In 1998 capital goods were 216.8 and consumer goods were 271.9 in imports, as compared to 301.6 and 79.6 in exports. See President's Trade Report, *supra* note 132, at 22, 25.

154. The IMF Globalization Survey reported that "[the other side of [the decline of manufacturing has been a continuous increase in the share of employment in services." IMF Survey, *supra* note 1, at 48.

155. *Id.*

156. In *The Global City*, SASSEN observed that:

[Producer services have become central components in the work process of both goods- and service-producing firms The expansion in the use of such services as intermediate inputs is linked with the broader technical and spatial reorganization of the economy [Participation in a world market has created a need for a range of specialized services, and these have in turn facilitated the development of a world market. In brief what is characteristic in the contemporary phase is the ascendance of such services as intermediate inputs and the evolution of a market where they can be bought by foreign or domestic firms and governments.

SASSEN, *supra* note 19, at 124.

157. IMF Survey, *supra* note 1. The IMF Survey attributes deindustrialization both to a decline in expenditure in manufacturing and a relatively greater increase in productivity of manufacturing (meaning that technological advances have required less labor to produce the same amount of manufactures). See *id.* at 48-49.

158. See Clarence Lusane, [Persisting Disparities: Globalization and the Economic Status of African Americans](#), 42 *HOW. L.J.* 431, 437 (1999). This is also supported by Sassen's data for U.S. and N.Y.C. 1977-1985. Decline in manufacturing in city very steep as compared to rest of country (22% vs. 1%). "[The share of producer services jobs in New York, London and Tokyo is at least a third higher and often twice as large as the share of these industries in total national employment." SASSEN, *supra* note 19, at 131.

159. SASSEN, *supra* note 19, at 202 (stating that "growing international competition, inadequate investments for modernization of plants, leading to lower productivity, the development of technologies that made possible locating production and assembly facilities in low-wage countries or low-wage regions of the United States" all played a role here).

160. See *supra* Part II for definition.

161. See *supra* Part I.

162. For example, the telecommunication services often necessary to support "producer services" tend to be concentrated in urban areas. "Telecommunications facilities have not been widely dispersed; while the technology has made possible the geographic dispersal of many activities, the distinct conditions under which such facilities are available have promoted centralization of the most advanced users in the most advanced telecommunications centers." SASSEN, *supra* note 19,

at 109.

163. At the same time, national growth in producer services is outpacing city growth. Even though a few cities have become centers for concentrated provision of producer services, "[the evidence clearly shows that in all three countries the growth of producer services were higher at the national level than in those cities." *Id.* at 129.

164. See *id.* at 148-49.

165. *Id.* at 110.

166. *Id.* at 127.

167. *Id.* at 129.

168. *Id.* at 165.

169. See *id.* at 127. "The decline in manufacturing and the shift to service-dominated employment, the rapid growth of producer services, and the further service-intensification of the economy, are trends evident in ... cities." *Id.*

170. One might ask why the government is being portrayed as an autonomous force since this is a democracy. This raises the question of the extent to which government decision-makers are "captured" by particular interests -- in this case, interests favoring economic liberalization -- in such a way that they antagonize majority will. For a discussion of this question, see Thomas, *supra* note 2.

171. For a discussion of urban immigration see JOHN HIGHAM, *SEND THESE TO ME: IMMIGRANTS IN URBAN AMERICA* (1984) (1975), and JEFFREY G. REITZ, *WARMTH OF THE WELCOME: THE SOCIAL CAUSES OF ECONOMICS SUCCESS FOR IMMIGRANTS IN DIFFERENT NATIONS AND CITIES* (1998).

172. People of color that are middle class do not belong to this vulnerable population, and this Article does not necessarily predict that globalization will adversely impact them. Globalization may also benefit people of color that are on the poverty threshold. An expanding economy will provide new work opportunities even at the lowest skill levels, for example in the retail service industries, that will enable families previously living below the poverty threshold to rise above it. See, e.g., U.S. Census Bureau, *Number of African-Americans in Poverty Decline While Income Rises*, Press Release CB98- 176, Sept. 24, 1998; U.S. Census Bureau, *Poverty Level of Hispanic Population Drops, Income Improves*, Press Release CB98-178, Sept. 24, 1998. This Article addresses primarily the relative lack of mobility of those living and working just above the poverty threshold.

173. There is no readily accepted definition of the term "living wage" in the literature. See Peter B. Edelman, [Welfare Reform Symposium, 50 ADMIN. L. REV. 579, 586 \(1998\)](#). I use the term to mean the wage necessary to allow an individual and his or her dependents to live above the poverty line. The exact quantity of a living wage, therefore, depends on a number of different factors. Obviously, it depends on how one defines the poverty line. As the U.S. Census Bureau defined it in 1998, the poverty threshold for a one-person household was

\$8,316.00; \$10,634 for a two-person household; \$13,003 for a three-person household, and; \$16,660 for a four-person household. See U.S. Census Bureau, Current Population Reports, Series P60-207, Poverty in the United States: 1998, at A-4 tbl.A-2 (1999) [hereinafter Poverty Report. There has been some dispute, however, over the Bureau's methodology in measuring both income and need. See *id.* at xiv; U.S. Census Bureau, Current Population Reports, Series P60-205, Experimental Poverty Measures: 1990 to 1997 (1999). Because wage earners often have dependents, the definition of a living wage may also depend on one's conceptualization of the "normal" division of labor within the family. See Marion Crain, [Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech](#), 82 GEO. L.J. 1903, 1943 (1994) (arguing that some unions "adopted and marketed the family wage ideology, which defined women's role as homemakers and caretakers and men's role as waged workers, in support of its demand for a 'living wage' -- a male wage adequate to support non- working wives and daughters").

174. See *infra* note 207.

175. See *infra* notes 201-09.

176. See Lusane, *supra* note 158, at 438 ("For those African Americans who have less than a college education, the loss of manufacturing jobs seriously undermines their opportunities for employment."); see also LESTER HENRY, NAFTA AND GATT: WORLD TRADE POLICY IMPACTS ON AFRICAN AMERICANS 11 (1995) ("Plant closings [have been heaviest in the Northeast and in the old South, the two areas of the country where African Americans are most populous."); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996); John Bound & Harry Holzer, Industrial Shifts, Skills Levels, and the Labor Market for White and Black Men, REV. ECON. STAT., Aug. 1993, at 395 ("Up to half of the huge employment declines for less-educated blacks might be explained by industrial shifts away from manufacturing toward other sectors."). The term "Chicano" can be defined as a person of Mexican decent living in the United States. See Carlos Villareal, [Culture in Lawmaking: A Chicano Perspective](#), 24 U.C. DAVIS L. REV. 1193 & n. 2 (1991).

177. See JILL QUADAGNO, POLICY AND PREJUDICE THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994); David E. Bernstein, The [Law and Economics of Post-Civil War Restrictions on Interstate Migration by African- Americans](#), 76 TEX. L. REV. 781, 843 n. 393 (1998) ("Northern and Midwestern labor unions ... opposed African-American migration, sometimes violently.").

178. See David Bernstein, The [Shameful, Wasteful History of New York's Prevailing Wage Law](#), 7 GEO. MASON U. CIV. RTS. L.J. 1, 1-2 (1997) (arguing that both federal and state "prevailing wage" laws have discriminatory impacts on racial minorities and especially African Americans); Harry Hutchinson, [Toward a Critical Race Reformist Conception of Minimum Wage Regimes](#), 34 HARV. J.

[LEGIS. 93, 124 \(1997\)](#) (describing how "unions took advantage of the monopoly powers granted to them by the [National Industrial Relations Act ... to displace African American workers").

179. See Hutchinson, *supra* note 180, at 124-25.

180. See UNITED STATES TRADE REPRESENTATIVE, STUDY ON THE OPERATION AND EFFECT OF THE NAFTA ii-iii (1997). NAFTA is deemed to have created slightly more jobs than it has eliminated. See *id.* (asserting that NAFTA "has resulted in a modest increase in United States net exports, controlling for other factors" and that it "has boosted jobs associated with Mexico between roughly 90,000 and 160,000"); Reich Says NAFTA's Net Effect Will Be More Jobs for United States, *Int'l Trade Rep. (BNA)* (July 21, 1993). There are also reports that dispute the Trade Representative's findings. See, e.g., ROBERT E. SCOTT, NAFTA'S PAIN DEEPENS (Economic Policy Institute Paper, 1999).

181. See BARTHOLOMEW ARMAH, THE DEMOGRAPHICS OF TRADE-AFFECTED SERVICES AND MANUFACTURING WORKERS (1987-1990) ("Manufacturing industries that experienced a decline in positive net trade-related unemployment were more likely to employ black females and unskilled (i.e., laborers) and less educated (i.e., high school graduates) black and white workers than were other manufacturing industries."). This Article does not address the important issue of how NAFTA affects those living in the agreement's other member states, Mexico and Canada. For a discussion of Latina/o identity both within and outside the United States, see Elizabeth M. Iglesias, [Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates](#), 28 U. MIAMI INTER-AM. L. REV. 361-369-71 (1997), and David Viogt, [The Maquiladoras Problem in the Age of NAFTA: Where Will We Find Solutions?](#), 2 MINN. J. GLOBAL TRADE 323 (1993).

182. See Lusane, *supra* note 158, at 441 (citing Bureau of Labor statistics for proposition that "[of the jobs lost as a result of NAFTA, manufacturing workers were the largest share of displaced worker (27%) and the least likely to be re-employed.").

183. See *id.* at 445. "The service industry represented 112 percent of the net new jobs created since NAFTA. Those new service jobs paid, on average, only 77 percent of the manufacturing jobs that had been eliminated." *Id.*

184. See *id.* at 438; see also Henry, *supra* note 178, at 11 ("The pattern of firms, both foreign and domestic, when choosing sites for opening new plants, has been away from predominantly nonwhite areas The Japanese and other German firms have also shown a similar preference for plant location in suburban and sunbelt areas where few nonwhites reside."); ROBERT CHARLES SMITH, RACISM IN THE POST CIVIL RIGHTS ERA: NOW YOU SEE IT, NOW YOU DON'T 134 (1995) (noting that "[a study of the location decisions of Japanese firms in the United States and of American auto companies found a fairly consistent pattern of locations in rural and suburban areas about thirty miles from the nearest concentration of blacks, a distance thought to be about the limits of

worker commuter time"). Lusane raises the possibility that this is deliberate, but notes that "[even if premeditation is not present, the consequences of these site decisions exacerbate the job search crisis growing among the urban black poor." Lusane, *supra* note 158, at 438.

185. See SASSEN, *supra* note 19, at 218 ("[Major new industries, notably electronics, have a high proportion of low-wage jobs in production and assembly, while several of the older industries have undergone a social reorganization of the work process resulting in a growth of nonunion plants and a rapid increase in subcontracting.").

186. See *id.* "The historical forms assumed by [industrial expansion ... promoted the generalization of formal labor market relations [such as unionization and Fordism and acted against the casualisation of work Many of the patterns today work in the opposite direction, promoting small scales, less standardization, and an increasingly casualised employment relation. " *Id.* at 249.

187. See, e.g., Robert J. Lalonde & Bernard D. Meltzer, [Hard Times for Unions: Another Look at the Significance of Employer Illegalities](#), 58 U. CHI. L. REV. 953, 953 (1991) ("It is well known that the percentage of American workers in the private sector belonging to labor unions ... has declined sharply in the last four decades."); Paul C. Weiler, [Promises to Keep: Securing Workers' Rights to Self-organization Under the NLRA](#), 96 HARV. L. REV. 1769, 1771 (1983) ("No feature of contemporary labor-management relations in the United States is more significant than the diminishing reach of collective bargaining.").

188. See Charles B. Craver, [Mandatory Worker Participation Is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy](#), 66 GEO. WASH. L. REV. 135, 138 (1997) ("As union membership has declined ... competitive pressures have caused unionized firms to moderate wage increases and decrease fringe benefit protections."); Peter Kuhn & Arther Sweetman, Wage Loss Following Displacement: The Role of Union Coverage, 51 INDUS. & LAB. REL. REV. 384, 395-96 (1998) ("Long-tenured union workers who lose their union coverage experience, on average, a massive 30 log point decrease in wages, attributable purely to this change in union coverage and not to any other observable characteristic.").

189. See Mark Berger, The [Contingent Employee Benefits Problem](#), 32 IND. L. REV. 301, 304-05 & n. 10 (1999).

190. See Laura Ho et al., [\(Dis\)assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry](#), 31 HARV. C.R. C.L. L. REV. 383 (1996); Leo L. Lam, [Designer Duty: Extending Liability to Manufacturers for Violations of Labor Standards in Garment Industry Sweatshops](#), 141 U. PA. L. REV. 623 (1992).

191. Laura Helene Gonshorek, Note, [Crisis After Dole: The Plight of Modern Homeworkers](#), 8 HOFSTRA LAB. L.J. 1 n. 4 (1990).

192. See *id.* at 167 (listing items commonly produced by homemaker as "women's apparel, 'nonhazardous' jewelry, handkerchiefs, belts and buckles,

embroidery, gloves and mittens, and knitted outerwear.").

193. See, e.g., [ILGWU v. Donovan](#), 722 F.2d 795, 801 (D.C. Cir. 1983), cert. denied, 469 U.S. 820 (1984).

194. Bruce Goldstein et al., [Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment](#), 46 [UCLA L. REV.](#) 983, 1059 (1999) (quotation omitted).

195. SASSEN, supra note 19, at 281, 218

196. See Gonshorek, supra note 191, at 167.

197. See id. at 174.

198. [ILGWU v. Dole](#), 729 F. Supp. 877 (D.D.C. 1989) (upholding Department of Labor regulation rescinding ban on homework). For a discussion of the Dole decision and its relation to existing federal labor law on industrial homework, see Gonshorek, supra note 191.

199. See Glen Burkins, Union Membership Fell Further in 1997: Continued Decline Came Despite Huge Outlays Assigned to Recruiting, WALL ST. J., Mar. 18, 1998, at A2 (noting that one possible cause for declining union membership could be that "many of the jobs remain largely resistant to unionization -- for example, high technology and financial services").

200. SASSEN, supra note 19, at 282.

201. See, e.g., Presidential Proclamation No. 6690, [59 Fed. Reg. 26,407 \(1994\)](#) ("U.S. Exports Equal U.S. Jobs,' the theme of World Trade Week [1994, illustrates why the United States must make the push to increase the involvement of American business in international markets."). President Clinton further stated:

Exports have become a critical engine of our Nation's economic progress. In the past 5 years, exports of goods and services have been responsible for more than 40 percent of U.S. economic growth. Today one in every five manufacturing jobs is linked to exports. Exports of goods and services support some 10.5 million jobs. And exports lead to better paying jobs. American workers producing for export earn 17 percent more than the national average wage.

Id.

202. SASSEN, supra note 19, at 217.

203. See id. at 281.

204. See id.

205. See id.

206. Particularly, "in a range of office occupations, from secretaries, word processors, and file clerks to switchboard operators, average median weekly earnings were lower in the nonmanufacturing industries than in manufacturing." Id. at 225. Indeed, low-skill service jobs in manufacturing-sector firms are likely to be better compensated than the same jobs at service-sector firms.

207. IMF Survey, supra note 1, at 53. This is the case for the United States that has relatively flexible wages. See id. at 55. In countries with less flexible wages, the increases have been in "rises in unemployment among the less skilled." Id. at 56. It should be noted that the IMF Survey does not believe the bulk of this

inequality arises from increased international trade. The Survey concludes that "[r]ather than by competition from low-priced imports, the increase of wage inequality in the 1980s and 1990s appears to have been driven principally by advances in technology that favor skilled labor." *Id.* at 58. The IMF's reasoning for this conclusion, however, is in my view not entirely convincing. The primary support presented for this proposition is evidence that "prices of import-competing, low-skill-labor-intensive goods" have not fallen in real terms. The hypothesis, called the "Stolper-Samuelson Theorem," see Wolfgang F. Stolper & Paul A. Samuelson, *Protection and Real Wages*, 9 *REV. ECON. STUD.* 58 (1941), is that if low-skill labor in developing countries truly poses a threat to low-skill, but better compensated, labor in industrialized countries, then this threat would be evidenced in the following way: imports from developing countries produced with low-skill labor would be cheaper than the counterpart goods produced in industrialized countries; this would require domestic producers of such goods to lower their prices to stay competitive; this would reduce the profitability of such production; this would induce producers to shift out of low-skill production towards relatively more profitable "skill-intensive" goods. See IMF Survey, *supra* note 1, at 56. The Survey infers that the alleged threat does not exist from the fact that the prices of domestically produced low-skill goods have not declined. There are at least two possible critiques of this hypothesis. First, even if the basic mechanics of the theorem are correct, the cost-competitiveness of foreign goods might not necessarily lead to the lowering of prices, but might merely allow prices to remain constant over a longer period of time by allowing producers to avoid increasing prices to pay for wage increases, since such wage increases can be avoided. If this is true, stable rather than declining prices could coexist with and indeed would result from relocation of production specific to the advent of lower wages. Second, the hypothesis assumes competitive markets. Yet the IMF Survey admits, as has been conceded repeatedly elsewhere, that the "structure of foreign trade has increasingly become intra-industry and intrafirm." *Id.* at 46. If this is true, then both domestic and foreign goods in any given sector are likely to be produced by the same or affiliated companies. Consequently, in this less competitive environment, a cost differential in foreign labor would not necessarily be passed on to the consumer through lower prices, but rather would be absorbed by the company as greater profit. Given the ever-increasing centrality of "shareholder value" in the contemporary stock market, it seems entirely likely that companies would be induced to move production offshore precisely because of this low-cost differential, and thereby increase dividends on shareholder equity.

208. See Lusane, *supra* note 158, at 439 (citing a GAO study "which found that African Americans more than whites or Latinos "experience the longest spells of unemployment among displaced workers who eventually found jobs and showed the largest loss in wages in their new jobs"). While Lusane focused on African Americans, Latinas/os also suffer these effects disproportionately to whites.

209. Lusane cited a study by the San Jose Mercury that stated:

Blacks who were 17 percent of the executive branch workforce in 1992 were 39 percent of those dismissed. Whites made up 72 percent of the workforce and only 48 percent of those fired It's not that [blacks have less education, experience, and seniority. The difference has nothing to do with job performance Blacks are fired more often because of their skin color Rank didn't help. Black senior managers were out the door as often as black clerks. It gets worse. The deck is stacked against fired minority workers with legitimate grounds for reinstatement, the study shows. They win only one in every 100 appeals.

Id.

210. See generally Aoki, *supra* note 3, at 699.

211. See SASSEN, *supra* note 19, at 186.

212. See Aoki, *supra* note 3, at 796-97.

213. See SASSEN, *supra* note 19, at 186.

214. Id. at 251.

215. Id. at 261.

216. Id.

217. Id. at 264.

218. See id. Sassen wrote:

In its original and richest formulation, the postindustrial model posits a major transformation, one where the expansion of the highly educated work force and the centrality of knowledge industries will lead to an overall increase in the quality of life and a greater concern with social rather than narrowly economic objectives. Id. at 247.

219. IMF Survey, *supra* note 1, at 51.

220. Id. at 58.

221. Id.

222. The most recent U.S. Census contains some indications that some members of minority groups benefited proportionately slightly more from globalization. See *supra* note 172.

223. Lusane, *supra* note 158, at 439-40 (stating that "multinational trade and investment agreements perpetuate inequalities that already exist within national economies").

224. IMF Survey, *supra* note 1, at 59.

225. See Audrey G. McFarlane, Race, Space, and Place: The Geography of Economic Development, 36 SAN DIEGO L. REV. 304, 352 (1999).

226. IMF Survey, *supra* note 1, at 296.

227. McFarlane, *supra* note 225, at 352.

9. Mary Romero, *Historicizing and Symbolizing a Racial Ethnic Identity: Lessons for Coalition Building with a Social Justice Agenda*, 33 U.C. DAVIS L. REV. 1599 (2000)

In the late 1960s and 1970s the civil rights and antiwar movements splintered into an array of groups grounded in identity politics. A quarter of a century later, concern for inclusion, diversity, and difference continues to dominate progressive literature. Although groups centering on discrete identities struggled to find a rallying point from which to advocate social justice and coalition building, this has proven to be a difficult project. Self-criticism in the 1980s called attention to falsehoods lurking behind attempts to make universal claims about particular kinds of subordination. In the 1990s, these critiques have extended to problems of essentialism n 1 and antiessentialism. n. 2 Questions about *1600 the framing of racial and ethnic identity, n. 3 the history n. 4 and symbols n. 5 evokes, the incorporation of literature and the arts as antisubordination praxis, n. 6 and their basis for building coalitions (internationally and domestically) n. 7 were vigorously discussed and debated at LatCrit IV.

LatCrit IV raised number of challenging and provocative issues, particularly those arising from the apparently uneasy union between the theory and praxis of identity. As I reflected on the issues that arose in the symposium stressing commonalities and respect for difference in coalition building, I recalled a troubling incident that occurred recently where I teach at Arizona State University. Following the Supreme Court decision on the Boy Scout hiring practices that allowed the Boy Scouts to discriminate against gays, n. 8 the campus newspaper published a cartoon depicting a gay scout master handing a badge to a Boy Scout saying, "Ok Boyth, Who wants to earn their First AIDS merit badge?!" During this time, a graduate student in my seminar reported her research findings on student involvement. One of the students she interviewed used this incident as an example of the lack of university-wide support for gay activists. This interviewee remarked that a similar attack on the Chicano community would *1601 have generated hundreds of letters to the editor, and Movimiento Estudiantil Chicano de Aztlan ("MEChA") would have responded by rallying Chicano students and holding demonstrations. My student selected this interviewee for the study because he had helped to develop a public service component for a new Hispanic fraternity on campus. What I found revealing and

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alarming about the account was the way he constructed the issues around boundaries or turfs. First, the student did not comprehend how a cartoon attacking gays was "his" issue. He did not perceive that it had anything to do with the narrow range of topics and activities he had defined as "service." Second, he did not consider "activism" within the range of activities that his group participated in. Instead, he perceived Chicano and Latino issues to be narrowly constructed the mission statement of the student organization MEChA. Similarly, MEChA did not voice opposition to the cartoon because they defined political activism within a cultural nationalistic agenda, one that does not include gays or the general category of human rights.

I reflected on this story as I began this Afterword because it captures the tunnel vision inherent in constructing racialized ethnicities that ignore intersectionality and frequently narrow the terrain for coalition building, or make it impossible. The ways in which race-based movements and racialized communities construct their identities has enormous implications for setting social justice agendas and for coalition building. n. 9 Racialized ethnicities were forged out of centuries of colonialism, conquest, slavery, capitalism, racism, sexism, classism, and the politics of appropriation and co-optation. Consequently, all forms of resistance and struggle pose extremely complex questions. In order to resist effectively, we must constantly reconsider and reconstruct identity. n. 10 This Afterword reflects on a number of identity issues that emerged in LatCrit IV, paying particularly attention to three objectives: (1) the commitment to the production of both knowledge and community specifically as a means toward an end the *1602 attainment of social justice; (2) elucidating intra-and inter-group diversities across multiple identity axes, including those based on perspective and discipline, and; (3) ensuring that African American, Asian American, Native American, Feminist, Queer, and other OutCrit subjectivities are brought to bear on Latinas/os places and prospects under the Anglocentric and heteropatriarchal rule of the United States. n. 11

I hope to add to ongoing dialogues and critiques of problems in identity politics, particularly the distinctions between identity constructions based on a mythical past, imagined communities stemming from lived and shared experiences, claims of authenticity and cultural nationalism. I begin by discussing reflections on historicizing and symbolizing Latina/o identity in terms of agency in the struggle for social justice. Here, I want to engage questions of commonalities and differences involving both intra-and intergroup diversities. I note several essays that offer lessons for building coalitions that draw upon commonalities. Next, I consider writings that highlight cultural controversies that arise when we assume commonalities that do not lead to coalition building but rather splinter organizing efforts. I draw lessons on how to ground LatCrit in theory and material reality from historical and contemporary cases analyzed throughout the symposium. I end with a review of lessons learned by discussing the critical intersections and transformative potential that culture offers in the

struggles for social justice.

I. HISTORICIZING AND SYMBOLIZING LATINA/O IDENTITY: QUESTIONS OF COMMONALITIES AND DIFFERENCES

There is a disturbing parable that I first heard when I taught Chicana/o Studies, I had never heard it growing up: A young child asks a fisherman why he didn't put a lid on a basket of crabs. The fisherman says, "Because the basket contains Mexican crabs. As soon as one of them gets near the top the others drag him back down. They are so busy fighting among themselves that I don't have to worry about any of them reaching the top and getting out." This story has two meanings: the first is the familiar ***1603** ideology of capitalism: the only path to success is individual effort, and attempts at organizing only drag the hard worker back into the bucket. The second is a message of cultural- hatred -- this behavior is peculiar to Mexicans. The story frequently is told with a coda; pointing to another bucket with a lid, the fisherman completes the story by saying, "This basket has Jewish crabs. They help each other get to the top. I have to keep a lid on here because they will help each other get out of the basket." Each time I heard this story from a Chicana or Chicano undergraduate it was offered as an explanation for why collective action on campus or in the community failed. The ethnicity of the crabs changed in later tellings, but the parable always evokes the same two underlying assumptions: that organizing is counter-productive and that culture explains why some groups have difficulty establishing common ground and helping members get ahead. The "disfunction" of Mexican, black, or Indian crabs was explained by the essential qualities of culture and ancestry, as was the "function" of Jewish, Korean, or West Indian crabs.

I counter the myth by explaining that neither conflict nor organizational ability are essential cultural characteristics, and are no more inherent to Chicanas/os than any other group. I argue for cooperation and coalition building, for making common linkages, sharing values, and respecting differences. I argue for over-turning the basket. Although the social constructions of race in the U.S. present identity as fixed and stagnant, ideologies of race are anything but consistent. n. 12 Political strategies aimed at establishing interracial justice cannot assume that commonalities and differences articulated in multiple identities are devoid of racist ideology and history, and, therefore, necessarily constructive for coalition building. Interracial justice requires recognition of the fluidity of racism n. 13 and exposing the underlying assumptions in particular constructions of identity that create opportunities or establish barriers to coalition building. Constructing the ground between negotiated commonalities and respected differences is key to building the extremely delicate path toward

coalition and ***1604** antistatutory praxis. n. 14 In the following section, I begin to identify the lessons offered in LatCrit V concerning historicizing and symbolizing Latina/o identity and the limits or opportunities for progressive coalition building.

A.. Lessons for Building and Constructing Common Ground

A historical analysis of Filipinos in California suggests strategies for coalition building among subordinated groups. Professor **Leti Volpp**'s study of the neglected history of Filipinos and the pattern of antimiscegenation laws and enforcement raises questions about the different ways that race has been sexualized and gendered and the ways these characterizations govern marriage contracts, inheritance, and cultural/social legitimacy. n. 15 Volpp's questions about the implications of legal distinctions made within identity categories of "Asian American" and "Pacific Asian American" is particularly relevant to similar internal hierarchies within the identity category of Latina/o that need further consideration. n. 16 Linking examples of antimiscegenation laws and Filipinos to Proposition 187, Professor Victor Romero introduces the concept "minority on minority oppression" to explain inter- and intragroup action that "help perpetuate racial stereotypes that separate us rather than unify our communities." n. 17 He persuasively argues that responses to racism that fail to build bridges with other racially subordinated groups are likely to promote "minority on minority oppression." In addition, Romero illustrates how identity can be constructed and symbolized to include "perceived notions of commonality" that create opportunities for coalition building in everyday encounters -- even when they are based on stereotypes. n. 18 However, the limits of such a beginning are questionable and probably need to be qualified. It is necessary to move beyond stereotypes towards the development of concrete ***1605** commonalities in social, political and/or economic circumstances.

Bringing the lessons closer to home, three essays offer cautionary appraisals of "both the creation of scholarship through community and community through scholarship." n. 19 Professors Sumi K. Cho and Robert Westley suggest ways of facilitating coalitions among the generations of race critics and avoiding competing paradigms. They recount "an obscured history that was central to the development of Critical Race Theory ("CRT") "the history of student activism for diversity in higher education from the 1960s to the 1990s." n. 20 Documenting the history of law students at Boalt, Cho and Westley challenge the commonly held perception that CRT was born at Harvard, and point out that the movement has heterogeneous roots. Grounding critical theory in the historical context from which it emerged ties together CRT, LatCrit, APA Crit, Fem Critics, CLS, and NAIL. This grounding also constructs an egalitarian basis for developing and building coalitions to incorporate diverse communities in common struggles and acknowledges "symbiotic relationship between intellectual

activists and activist intellectuals." n. 21 In his panel presentation, Professor Devon Carbado added to growing commentaries on "the old and tired" critiques of the black/white paradigm. n. 22 He added a caution against continuing critiques that offer no strategic direction methods, or that fail identify the political misuses of the paradigm. He offers concrete suggestions to move dialogues on the various paradigms in directions that offer a basis for coalition building. The importance of community building among scholars of color is particularly salient to the experiences of young legal scholars whose "contributions to legal academia were disrespected, devalued and denigrated" by their home institutions. Professor Pamela Smith's essay provides a number of lessons for tenured and tenure track professors, stressing the need to make *1606 connections with professors of color across the disciplines, that experience silencing tactics and hostile academic environments, and to senior colleagues that can provide mentoring.

In the third essay, Professor **Tanya K. Hernandez** explores the socialist Cuban context of affirmative action to pose difficult questions concerning the case of Afro-Latinas/os that are frequently ignored in LatCrit critiques of the white/black binary. n. 23 This case study poses a distinction between color, class, and ethnicity that has largely been ignored in the analysis of racial and cultural discrimination. While social research has documented differences among Latinas/os based on color and class, n. 24 writings on intersectionality are primarily theoretical and narrative. n. 25 A related issue emerging from Hernandez's work is the question of the comfort zone among Latinas/os dissecting race: Are we more likely to engage in theoretical explorations of our mestizo roots rather than our multiracial roots? More specifically, have we ignored our African roots -- both the Moorish connections from Spain and African heritage from slavery? I will return to these issues of identity construction and the assumption of commonality and difference.

B. Lessons About Assuming Commonalities and Similarities

The most obvious incident of assumed and fictitious commonality was presented in the case study written by Dean Cameron. n. 26 He analyzes the fight over banning gas-powered leaf blowers, in which Hollywood celebrities often supported the ban under the guise of caring for safer environment and the health and spirituality of the Latino gardeners. Defining the ban as benign guidance was not an attempt to build a coalition but to appropriate the voice of the workers. It served to keep Latino gardeners invisible as workers. The social and class differences between the *1607 gardeners and Hollywood celebrities was exacerbated by these attempts to couch their relationship as that of allies rather than of adversaries; no attempt was made to find a common ground to define the issue.

Salient issues that distinguish racialized communities in the U.S. are highlighted in Professor Eric Yamamoto's article. n. 27 He demonstrates how

questions of identity situate groups' political status, historical consciousness, self-determination, human rights and colonialism. n. 28 These specific questions of identity are closely related to the underlying the conflicts described in Professor Hernandez's essay. n. 29 Each of these works calls into question the legitimacy of certain kinds of historicizing and symbolizing, as well as underscoring the limitations to coalition building that stem from identity construction. While these essays are primarily aimed at inter- and intra-groups within the U.S., I suggest that they raise serious implications for international coalition building as well.

In her comments on the Native Cultures, Comparative Values and Critical Intersections Panel, Professor Tsosie challenged constructions of Chicana/o identity that claim "indigenous" status and rejects similar claims to ancestral land implied in the concepts of Aztlan and la frontera. While I largely agree with her critique, I do think it is important to note that there are numerous constructions of Chicana/o and Mexican American identity. And while some of these identities are grounded in indigenous ancestry, they do not claim the same political status as Native Americans or Native Hawaiians.

On the one hand, I appreciate Professor Tsosie's comments because they address the underlying problem with the movimiento indigenista and the growing cultural nationalism in our communities and universities today. On the other hand, her critique has the unfortunate consequence of erasing the basis for one hundred and fifty years of land and water rights struggles in Southern *1608 Colorado and Northern New Mexico. n. 30 Before addressing the specific identity constructions of the movimiento indigenista, I think it is critical to recall that the construction of racial, ethnic and national identity is inexorably tied to myth-making and is highly selective, n. 31 particularly when the identity is a gloss of two to five hundred years of conquest, occupation, the destruction and creation of nation states, transitions from feudalism to capitalism, and shifting boundaries of citizenship status. n. 32

Given the acceptance of the term Chicano and the concept of Aztlan among academicians and writers, the Chicano Movement was extremely successful in unifying a population that had not previously owned its history or culture. n. 33 While Chicanos are unlikely to distinguish themselves as mestizo or non- mestizo, they do make regional classifications such as Tejanos, n. 34 Californios, n. 35 and manitos, n. 36 and they differentiate between Mexicano and Chicano, immigrant and nonimmigrant. n. 37 We also make generational distinctions. [*1609 n. 38 Comparisons between rural and urban experience are extremely significant to families who migrated from the countryside of Texas, New Mexico, and California to find employment in Chicago, Detroit, Denver, and Los Angeles. n. 39 Prior to the commercial homogenization of culture, regional distinctions were observed in linguistic differences n. 40 and a host of cultural practices including food, music, n. 41 traditional medicine, n. 42 santos, shrines, and other religious customs. n. 43

I draw attention to these distinctions, not merely to celebrate

diversity and acknowledge difference, but to focus on the importance of historical events n. 44 in shaping social processes and creating and maintaining unique or similar cultures. There is an extensive literature of historical and sociological studies that documents significant regional differences generated by the various religious, government, n. 45 and labor n. 46 practices used "to win the *1610 West." Each of these institutions contributed to shaping the process of "becoming Mexican American," "becoming Chicano," "becoming Latino," and "becoming Hispanic." n. 47 These concrete historical, social and cultural processes went beyond individual choice to construct specific but fluid group identities created from group experiences and struggle. The construction of identity involved imagining community and establishing the basis for collective action. Today's (so-called postmodern) identity construction based on personal choice or idiosyncrasy is quite different from one based on a concrete, lived experience. Furthermore, the ways in which identity is historicized and symbolized creates boundaries that do not necessarily promote coalition building in antisubordination struggles within the inter- or intra-group. n. 48

One of the first references to identity politics that I can recall reading was by Carey McWilliams. Writing in the 1940s, he critiqued the identity politics of the elite in Los Angeles in a chapter entitled, "The Fantasy Heritage." n. 49 At the time Mexicans were excluded from "restaurants, dance halls, swimming pools, and theaters." But, claiming to be direct descendants of "Spanish grandes and caballeros," and building a "Spain-away-from-Spain," they referred to "a quarter acre and twenty chickens" as a rancho. McWilliams followed with a racial description of Los Angeles' first settlers:

Pablo Rodriguez, Jose Variegas, Jose Moreno, Felix Villavicencio, Jose de Lara, Antonio Mesa, Basilio Rosas, Alejandro Rosas, Antonio Navarro, and Manuel Camero. All "Spanish" *1611 names, all good "Spanish" except "Pablo Rodriguez" who was an Indian; Jose Variegas, first alcalde of the pueblo, also an Indian; Jose Moreno, a mulatto; Felix Villavicencio, a Spaniard married to an Indian; Jose de Lara, also married to an Indian; Antonio Mesa, who was a Negro; Basilio Rosas, an Indian married to a mulatto; Alejandro Rosas, an Indian married to an Indian; Antonio Navarro, a mestizo with a mulatto wife; and Manuel Camero, a mulatto. The twelfth settler is merely listed as "a Chino" and was probably of Chinese descent. n. 50

What is most telling is that such references to "Spanish" in our fin de siecle imagination translates into White. This translation is distorted given that Spain's history includes eight hundred years of Moorish domination prior to the colonization of Mexico and the expulsion of Jews in 1492. Clearly, myth making is not the exclusive property of any one group. n. 51 Early writings of the Chicano Movement claimed Chicanos as the direct descendants of Aztecs and the Southwest as Aztlan, thereby establishing essentialist notions of culture and the nature of mestizos n. 52 that were later popularized in poetry, art, literature, and dance. n. 53 In the late *1612 1970s and 1980s, Chicana/o writings began to

critique aspects of "Aztlán" ideology and challenge certain assumptions, particularly those depicting gender and sexuality. For instance, Mexican n. 54 and Chicana n. 55 feminists revisited the portrayal of Malintzin Tenepal or Dona Marina as "La Malinche," the Mexican Eve. n. 56 In a mytho-symbolic language, they argued that Tenepal could not be traitor of the Mexican people because Mexico was not a nation state at the time and Aztecs had subordinated surrounding tribes. n. 57 Revisionists argued that Malintzin Tenepal was a heroine that united the tribes in their quest to overthrow the tyranny of the Aztec empire. The most popularized Chicana writings strived to replace the macho representations of Yo Soy Joaquin or Chicano Manifesto with feminist versions of spirituality drawn from Meso-America, that (1) replaced the male deities Quetzalcoatl or Huxilopochtli, with the female deities, Tonatzin and Coatlicue, n. 58 and (2) feminized indigenous identities claiming that "la Raza Comica comes of the union of the Indian mother and the European father." n. 59 This genre did not directly challenge Chicanismo but merely packaged cultural nationalism in a feminist voice. The symbolizing used to construct indigenous and mestiza/o identity as the true identity of Chicanas/os in the U.S. had several political *1613 consequences that limited its usefulness and hobbled its ability for coalition building that: (1) it lacks historical specificity, n. 60 (2) it equates biology [the hybrid represented in the concept of mestizo to a common culture, history and ancestry, (3) it erases 500 hundred years of material reality; n. 61 (4) it ignores the central importance of social class, n. 62 (5) it creates dualistic thinking about racial justice, n. 63 and (6) it centers spirituality while marginalizing concrete historical and sociological analysis. n. 64

*1614 A contemporary version of the "the fantasy heritage" may well include many aspects of cultural nationalism, particularly the movimiento indigenista. n. 65 Primarily structured around dance troupes known as Danzantes, the movement claims a Mexica nation and proclaims cultural nationalism -- frequently expressed in sexist, homophobic, anti-Semitic, racist, and militarist ideology. Ignoring Mexico's complex ethnic, race and class history, as well as the existing indigenous communities still struggling to survive, they claim a distinctive indigenous identity based on a MesoAmerica heritage and culture as members of a Mexica nation. n. 66 In spite of the obvious contradiction, indigenous and mestizo identity is being claimed as a collective spiritual link. Such an ideology requires a highly selective and distorted vision of Mexico's past. n. 67 In the romantic imagination, indigenous and mestizo identity becomes highly symbolic and ritualized, ungrounded in the lived experience, cultural competence or struggle that unifies specific communities. n. 68 Nonetheless, Mexistas burn sage, built sweat lodges, and claim a position at international conferences on indigenous rights and struggles. n. 69 This produces, not coalition, but increased tension and strains surrounding their claims of an identity as "a people/a tribe." In his critique of Anzaldua's identity construction of the new mestiza, Benjamin Alire Saenz captured the embedded contradictions in

appropriation of indigenous identity:

In wanting to distance herself from dominant European discourses, which she views as dualistic, oppressive, and racist, Anzaldua gestures toward mythologies and cultures that I cannot believe are truly her own. Acknowledgment of mixed ancestry is not in itself problematic; it is far better to acknowledge the competing cultures we literally inherit than to base our identities on ridiculous (and dangerous) notions of "purity" and "pedigree" such as those that gave rise to Nazi Germany and the current wars of ethnic cleansing in Eastern Europe By calling herself a mestiza, she takes herself out of a European mindset. She refuses to refer to herself as "Hispanic"; to do so would be to embrace an identity that admits no competing discourses, that admits only a European history and erases any indigenous consciousness. Her impulse is to defy that her "Indianness" has been destroyed. But her "Indianness" has been destroyed -- just as mine has. I do not find it productive to build a politics and an identity centered on "loss." n. 70

Characterized as a form of oppositional culture or culture of resistance in the face of internal colonialism and institutional racism, the romanticism of pre-Columbian traditional ways, coupled with the appropriation of living indigenous cultures, is inconsistent with the decolonization process that Franz Fanon n. 71 and Paulo Freire n. 72 described. Embracing an oppositional culture that substitutes adherence to perceived tradition for assimilationist ideology hampers the progress toward decolonization because it discourages dialectic consciousness-raising or liberating techniques involving self-criticism.

A serious confrontation with our mestizo heritage is a complex project; one that needs to include accepting historical responsibility and recognizing privileges gained by neither being fullbloods *1616 nor assimilating into Spanish/Mexican culture. n. 73 An argument that claims (or mandates) mestizo and indigenous identity as a political identity, but remains centered on pre-Columbian mythology assumes commonalities with indigenous people that is not based on our material existence or historical and current struggles in the U.S. While I recognize that the spirituality gained through the mythology of pre-Columbian gods and goddesses may be inspirational to some individuals, the imagined community is thoroughly exclusionary. This type of identity construction has already proven to be an obstacle to coalition building within and outside Chicana/o and Latina/o communities.

The problematic politics of an indigenous identity that places tradition above concerns for social justice is an issue that can be shared with Native Americans. Like the manitos that claim the Colorado's San Luis Valley, Mora Country, Tierra Amarilla and other land grant areas of New Mexico as their homeland, n. 74 and have been forced off their land in search of jobs, many Native Americans were dispossessed of their land and tribal position through various means. Too often the litmus test of "tradition" and "authenticity" is used to deny membership to mixed-bloods, detribalized or nonreservation Indians. n.

75 Denying the urban Indian experience, their struggles, and cultural production advances the assimilationist project that began under Richard Pratt at the Carlisle Indian school. n. 76 No community confronted by the racist colonial past of U.S. policies can wrap themselves in traditionalism and be assured of developing and maintaining an antisubordination***1617** agenda. Nor will such a policy result from the refusal to engage in self- critique or address issues of essentialism.

The salience of particular kinds of historicizing and symbolizing also appear in the essays that revisit the controversies over religion and coalition theory and praxis. n. 77 Professor Luna's n. 78 analysis of the establishment and enforcement of Spanish law by clergy of the Catholic Church in the California missions alerts us to the need to recognize the historical and religious linkages of canon law, statutes, and doctrine to the subordination of Indians and mestizos. Grounding her discussion in a historical context, she avoids the tendency to make the essentialist arguments that appear in more general abstract discussions. n. 79 At the same time, universalizing the Catholic experience among Latinas/os on the basis of theology is inaccurate because each cultural group had a unique history to the Church. The uniqueness is characterized by the incorporation of specific cultural rituals and icons (including saints and distinctive versions of Mary). n. 80

Similarly, the Catholic Church's selective appropriation of indigenous culture provided parishioners with a variety of cultural flavors. n. 81 Cultural variation within Catholicism is not limited to music, language, rituals, or icons but also includes of other ideologies (feminism, nationalism, humanism) n. 82 and a wide range of beliefs and behaviors. The task, to ascertain how religious praxis may "promote or obstruct the liberation struggles and antisubordination imperatives that have coalesced in and around the LatCrit movement," n. 83 is most clearly illuminated in Luna's analysis of ***1618** specific struggles of resistance within the Church rather than centering the discussion on theology or the mythology of saints and icons.

C. Historicizing and Symbolizing Material Realities

As the articles in the symposium show, connecting LatCrit theory and praxis to the concrete political struggles of Latina/o communities and other subordinated groups outside the academy, n. 84 rather than to mythology and theology, promises to bring focus and clarity to the movement. Reclaiming our intellectual history is best achieved by grounding our project in the resistance and struggle of activists. n. 85 Professor Gil Gott's essay provides an excellent example of locating the roots of the intellectual and political project of critical race theory in the work of "activists such as Ida B. Wells, DuBois, Paul Robeson, Mary McLeod Bethune, Arturo Schomburg, Addie Hunton and Alphaeus Hunton, Jr." n. 86 Drawing from this rich history of political thought and praxis, we can see how to bridge difference and build coalitions as suggested in Professor Gott's call for a critical race globalism. n. 87 Recovering our intellectual and political

history has been a major project since the fragmenting identity politics of the 1970s and continues today. n. 88 Shifting our search for roots from the feet of MesoAmerican or Catholic deities to human social activists such as Sara Estela Ramirez, n. 89 Ricardo Flores Magon, n. 90 Juan Jose *1619 Herrera, n. 91 Lucia Gonzalez Parsons, n. 92 Teresa Urrea, n. 93 Emma Tenayca, n. 94 and Ernesto Galarza n. 95 has the potential to set us firmly on the path towards antistubordination theory and praxis.

The value of historical specificity n. 96 or employing "a kind of political impact determination" n. 97 in the investigation of LatCrit theory cannot be overstated. Several of the essays provide evidence of the strength of grounded analysis. A fine example of historical specificity in race identity is found in Professor Ediberto Roman essay. By analyzing the race debate surrounding the Spanish American War and occupation of territories in the Caribbean and the Pacific, Roman demonstrates that the debate is not merely legislative history but has become "part of the United States Supreme Court jurisprudence." Roman thus demonstrates how "race has always been a real but unspoken factor in international policy." n. 98 Professor **Donna Coker's** n. 99 assessment of the actual material resources available in intervention programs takes into consideration conditions that determine different outcomes for Latinas and other poor women of color. Rather than falling back on models of cultural determinism that characterize Latinas as submissive, suffering and fatalistic, n. 100 Coker emphasized the intersectionality of multiple identity axes and highlighted structural barriers to obtaining services, such as bilingual services, citizenship, unemployment, and police community relations. William Tamayo, Regional Attorney for the Equal Employment Opportunity *1620 Commission ("EEOC"), draws upon past experience with political asylum applicants and battered immigrant women in "challenging the cultural limits and cultural-based assumption of the staff" in order to investigate the rape and sexual abuse of non-English speaking Latina immigrant farm workers. n. 101 Analyzing the recent antibilingual education initiatives in California, Professors George Martinez and Kevin Johnson demonstrate concrete ways that persons of Mexican ancestry have been discriminated against in each initiative and argue for using "discrimination by proxy" as a doctrinal tool to strengthen antidiscrimination laws. This is a very important type of analysis that addresses the more subtle and covert forms of racism that are replacing familiar but the previously unmasked forms.

II. CRITICAL INTERSECTIONS THROUGH CULTURE

The urgency of Professor Eric Yamamoto's thesis that "cultural performance" is a viable means to influence the cultural frameworks of decisionmakers, became apparent n. 102 after reading Professor Larry Cata Backer's findings on the limited penetration that outsider scholarship has made in the courts. n. 103 Using citations in the opinions of courts to measure the degree

of acceptance of the legal writings by women and scholars of color, Backer concludes by noting that most successes have been experienced in "the political and cultural life of the states." n. 104 Yamamoto's powerful account of "a multifaceted hula dance program performed by a multiracial group of law students and faculty during the Jurist-in-Residence program two years ago" shows how cultural performance has the potential to penetrate the individual framework of supreme court justices. Yamamoto imagines the influence that this cultural performance may have in (re)presenting the history of indigenous Hawaiians to members of the Supreme Court who might not otherwise understand their political status in *Rice v. Cayetano*. Yamamoto challenges legal advocates to go beyond the work of crafting doctrinal arguments by including strategies for cultural transformation. There are brilliant examples from the *1621 community to draw from, including: CHRLA's use of novelas to organize domestic workers, n. 105 Nuyorican Poets, n. 106 Luis Alfaro, n. 107 Marisela Norte, n. 108 Culture Clash, *El Vez*, n. 109 Coco Fusco, n. 110 Guillermo Gomez Pena, n. 111 and many others. The overwhelming enthusiasm in the U.S. over the revival of Cuban music presented in the film and CD of The Buena Vista Club will no doubt play an important role in shaping the American public's cultural framework for expanding diplomatic channels in Cuba.

Critical intersections between the arts and legal commentary are further illuminated in Professor Pedro A. Malavet's essay. Drawing on his extensive experience as the editor of several books on storytelling, he extends "insightful and powerful social, political and legal commentaries" n. 112 to other art forms of the narrative. Citing examples of popular culture, including such forms as Afro-Cuban Jazz, Salsa, poetry, and dance, he points to the political significance and the potential for re-thinking, refiguring and reproducing narratives of nation, citizenship, class, race, gender and sexuality. Discussing Jamaican popular music as antisubordination praxis, Nicholas A. Guinia's reviews ways that Reggae functions as both a "tool for resisting oppression" and a "vehicle for communicating and promoting values, ideas and beliefs." n. 113 In much the same way, Professor Lillian Manzor analyzed Camelita Tropicana, a Cuban-American lesbian art performer, to call attention to the power of narratives and story telling in subverting*1622 essentialist constructs of race, gender and sexuality. n. 114 The intersections between LatCrit and narrative story telling found in the arts suggest innovative ways for outsider scholarship to penetrate the cultural frameworks of decision makers and the political process.

Future LatCrit sessions on popular culture might incorporate inquiries into the ways that the production and consumption of Latina/o popular culture in the U.S. is being transformed by the transnational flows of capital and people. We might take a look at the implications for coalition building with other subordinated groups, what role Latina/o popular culture has in influencing global conversations about contradictions produced by transnational capital, and how popular culture facilitates conversations with other racialized and minoritized

people. The growth of "world music," the easy availability of video technology, and the spread of cultural forms through the Internet, make the issue of popular culture a particularly promising area for critical theory.

CONCLUSION: A CAUTIONARY TALE

When I began my academic career twenty years ago, I was inspired by the transformative potential and political activism shaping Chicana/o Studies. As I look back, I can see many important intellectual and political contributions that my generation has made. However, I am also aware of our shortcomings and the pitfalls we tumbled into. There were originally two linked goals: 1) creation of a political vision linking intellectual production to community activism; 2) the elimination of oppression. However, as faculty and students undertook the process of institutional building, their political strategies of control and autonomy within academia shifted towards efforts to acquire resources and stability within the institution. Establishing journals, building an academic association, and developing curricula lead to the development of characteristics similar to traditional disciplines. Gradually the critical edge and link to community struggle lessened as scholarship and student activity became focused on identity issues and not antiracism praxis. The cultural nationalism that dominates current political discussion and debate within Chicana/o Studies, was largely fueled by an emphasis on arts and ***1623** humanities that was not grounded in a social justice agenda but served narrowly construed identity politics. n. 115 Even as early as the late 70s, the move towards "doing culture" as a priority of identity politics was apparent. Gomez-Quinones remarked that:

Without class identification and political participation this is at best neutral. At worst, it becomes deceptive, diversionary, and conservative, thus supportive of the status quo. Cultural activity, quo culture, even in groups ostensibly allied to the political movement, retains this conservative character. n. 116

Building on cultural or racial identity rather than specific antiracism theories and praxis has resulted in the establishment of interdisciplinary programs that provide Latina/o faculty and students with an academic home but frequently bear more similarities to the larger institution than differences. For instance, on my campus, Chicano/a Studies continues to accept funding from Motorola in the face of strong evidence of the company's continued pollution in communities heavily populated by Chicanas/os. Moreover they accepted a substantial grant from Wells Fargo -- the bank that assisted Oregon Steel in surviving a strike at their Colorado Fuel and Iron Company in Pueblo. The CF&I strike consisted largely of Chicano workers. With a growing number of students majoring in business, efforts are underway to develop an undergraduate bidisciplinary program with the Business School. Needless to say,

this program does not emphasize *1624 the concerns of workers but rather of employers and corporate interests.

Replicating traditional disciplines also involved institutionalizing norms and values. Arrogance and self-importance crept into daily interaction between faculty. Hypercriticism and personal grievances repackaged as "political" limited intellectual discourse and community participation in the National Association for Chicana and Chicano Studies. Academic cliques emerged around the practice of selective citation, and perceived stars became legitimated through this institutional practice. Meanwhile as jargon intensified and relevance dissipated the applicability of their writings to community struggle waned. In our enthusiasm to produce interdisciplinary knowledge in LatCrit, I hope that the errors made by ethnic and cultural studies will not be uncritically embraced or reproduced.

Identity politics and resurgent nationalism have made coalition building in our demographically changing communities difficult and have made it impossible, in many instances, to undertake common projects with our neighbors in the black, Asian, Native American, and poor white communities. All too often we see ourselves involved in a zero sum game where black political gains are seen as Latina/o losses. This ideology hinders our ability to address the pressing substantive issues of race, gender and class oppression -- locally, nationally, and internationally. Nationalism has slowed our progress in addressing issues of gender and sexuality. Relying on exhausted tropes of ethnic specificity, ethnic solidarity and other essentialized notions of community, we find ourselves with an identity stripped of the national and international struggles for human rights and alone in the fight against racism and class oppression.

Advancing LatCrit's "commitment to the production of both knowledge and community specifically as a means to social justice" involves transforming the crab parable from cultural determinism to a message that organizing is both productive and essential in antiracism struggle. The LatCrit project has the potential to rebuild misdirected and fragmented ethnic studies discourses. LatCrit discourse has already influenced interdisciplinary writings and revived the link between scholarship and community struggle. The LatCrit web page, LatCrit Primer, and the LatCrit-Student Outreach Listserv will further strengthen *1625 links towards antiracism struggle. All of these efforts will hopefully transform future responses of student activists on campuses and in the community to identify with the larger category of human rights rather than fragmenting along lines of race, ethnicity, sexuality, and other dissected identities.

NOTES

1. See Angela Harris, [Race and Essentialism in Feminist Legal Theory](#), 42

[STAN. L. REV. 581 \(1990\).](#)

2. See Sumi K. Cho & Robert Westley, [Critical Race Coalitions: Key Movements that Performed the Theory](#), 33 U.C. DAVIS L. REV. 1377 (2000).

3. See **Tanya K. Hernandez**, [An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context](#), 33 U.C. DAVIS L. REV. 1135 (2000); Berta Esperanza Hernandez-Truyol, [LatIndia II -- Latinas/os Natives, and Mestizajes -- A LatCrit Navigation of Nuevos Mundos, Nuevas Fronteras, and Neuvas Teorias](#), 33 U.C. DAVIS L. REV. 851 (2000).

4. See Cho & Westley, *supra* note 2; Gil Gott, [Critical Race Globalism?: Global Economy and the Intersections of Race, Nation, and Class](#), 33 U.C. DAVIS L. REV. 1503 (2000); Eric K. Yamamoto, [Practically Reframing Rights: Culture, Performance, and Judging](#), 33 U.C. DAVIS L. REV. 875 (2000).

5. See Cho & Westley, *supra* note 2; Gott, *supra* note 4; **Guadalupe T. Luna**, [Gold, Souls and Wandering Clerics: California Missions, Native Californians, and LatCrit Theory](#), 33 U.C. DAVIS L. REV. 921 (2000); Laura M. Padilla, [Latinas and Religion: Subordination or State of Grace?](#), 33 U.C. DAVIS L. REV. 973 (2000).

6. See Nicholas A. Gunia, [Half the Story Has Never Been Told: Popular Jamaican Music as Antisubordination Praxis](#), 33 U.C. DAVIS L. REV. 1333 (2000); Pedro A. Malavet, [Literature and Arts as Antisubordination Praxis LatCrit Theory and Cultural Production: The Confessions of An Accidental Crit](#), 33 U.C. DAVIS L. REV. 1293 (2000).

7. See, Gott, *supra* note 4; Pamela J. Smith, [The Tyrannies of Silence of the Untenured Professors of Law](#), 33 U.C. DAVIS L. REV. 1105 (2000); William R. Tamayo, [The Role of the EEOC in Protecting the Civil Rights of Farm Workers](#), 33 U.C. DAVIS L. REV. 1075 (2000); **Leti Volpp**, [American Mestizo: Filipinos and Antimiscegenation Laws in California](#), 33 U.C. DAVIS L. REV. 795 (2000).

8. See [Curran v. Mount Diablo Council of Boy Scouts of America](#), 17 Cal. 4th 670, 72 Cal. Rptr.2d 410 (1998) (permitting Boy Scouts to discriminate in hiring on basis of sexual preference).

9. See George A. Martinez, [African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition](#), 19 CHICANO-LATINO L. REV. 213 (1998) (discussing importance for Latinas/os to reject legal designation of white in order to dismantle racial subordination and step toward building coalition with African Americans).

10. These issues are explored in depth in videos by Marlon Riggs. See *BLACK IS, BLACK AIN'T: A PERSONAL JOURNEY THROUGH BLACK IDENTITY* (California Newsreel 1995); *TONGUES UNITED* (Frameline 1989).

11. Francisco Valdes, Afterword -- [Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience -- RaceCrits, QueerCrits, LatCrits](#), 53 U. MIAMI L. REV. 1265 (1999).

12. See Volpp, *supra* note 7. Defining racial identity for Filipinos is addressed in the question of whether to classify as Latinas/os or Asians. The "either/or"

nature of the question reflects mainstream society's demand that we all pick and in some cases be assigned a single identity, when in fact many of us have more than one.

13. See ROBERT C. SMITH, *RACISM IN THE POST-CIVIL RIGHTS ERA, NOW YOU SEE IT, NOW YOU DON'T* (1995).

14. See JODI DEAN, *SOLIDARITY OF STRANGERS, FEMINISM AFTER IDENTITY POLITICS* (1996) (proposing theory of participatory democracy that respects difference and moves beyond limitations posed by identity politics).

15. See Volpp, *supra* note 7; see also TOMAS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* (1994) (discussing role of intermarriage in establishing upper class relationships between Mexican elite in California and Anglo Americans).

16. See Volpp, *supra* note 7.

17. See **Victor C. Romero**, "[Aren't You Latino?': Building Bridges upon Common Misperceptions](#)," 33 U.C. DAVIS L. REV. 837 (2000).

18. See *id.*

19. See Valdes, *supra* note 11.

20. See Cho & Westley, *supra* note 2.

21. *Id.*

22. See Anthony Paul Farley, [All Flesh Shall See It Together](#), 19 CHICANO-LATINO L. REV. 163, 172-74 (1998) (critiquing Gloria Sandrino-Glasser's criticism of black/white paradigm because paradigm makes Latinas/os that are multi-racial invisible). In addition, Farley makes a very important point about the criticism that ignores the extensive writings by blacks that have been inclusive of Latinos, Asians, and Native Americans -- including Frederick Douglass, W.E.B. DuBois, Booker T. Washington, Paul Robeson, and James Baldwin. See *id.*

23. See Hernandez, *supra* note 3.

24. See SUZANNE OBOLER, *ETHNIC LABELS, LATINO LIVES: IDENTITY AND THE POLITICS OF (RE) PRESENTATION IN THE UNITED STATES* (1995); ALEJANDRO PORTES & ALEX STEPICK, *CITY ON THE EDGE: THE TRANSFORMATION OF MIAMI* (1993); CLARA E. RODRIQUEZ, *PUERTO RICANS, BORN IN THE U.S.A.* (1989).

25. See **KEVIN R. JOHNSON**, *HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN'S SEARCH FOR IDENTITY* (1999).

26. See Christopher David Ruiz Cameron, [The Rakes of Wrath: Urban Agricultural Workers and the Struggle Against Los Angeles' Ban on Gas-Powered Leaf Blowers](#), 33 U.C. DAVIS L. REV. 1087 (2000).

27. See Yamamoto, *supra* note 4. Specifically he discusses: "(a) political status contrasted with racial status (in applying equal protection doctrine); (b) historical acuity versus historical myopia in mulitracial settings; (c) legal norms of self-determination vis-a-vis equality; (d) international human rights rather than domestic civil rights, and; (e) colonialism and conquest vis sovereignty and liberation. "

28. See *id.*

29. See Hernandez-Truyol, *supra* note 3.

30. Since 1848, Chicanas/os have engaged in political and legal struggles to keep their homeland and have never claimed their homeland as descents of Aztecs or the Mexica nation. Instead, they claim an identity based on a history of two or three hundred years, tracing their ancestry to communal land grants, and to the surrounding Pueblos and/or Spanish colonization. Unless engaged in university campus politics, they are unlikely to refer to the land as Aztlan but as land designated by Spanish and Mexican land grants, such as Tierra Amarillo. See PATRICIA BELL BLAWIS, *TIJERINA AND THE LAND GRANTS, MEXICAN AMERICANS IN STRUGGLE FOR THEIR HERITAGE* (1971).

31. See Luz Guerra, [LatCrit la Des-Colonizacion Nuestra: Taking Colon Out, 19 CHICANOLATINO L. REV. 351 \(1998\).](#)

32. See GLORIA ANZALDUA, *BORDERLANDS: LA FRONTERA: THE NEW MESTIZA* (1987).

33. However, there is an overabundance of university examples, particularly among college students in MEChA, that are used in writings claiming an Aztec identity. Consequently, we do not have strong indicators measuring the level of acceptance of ethnic terms and movement symbols that are embraced by the larger Mexican and Mexican American population throughout the U.S.

34. See generally DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986* (1987).

35. See generally GILBERT G. GONZALEZ, *LABOR AND COMMUNITY: MEXICAN CITRUS WORKER VILLAGES IN A SOUTHERN CALIFORNIA COUNTY, 1900-1950* (1994); MARTHA MENCHACA, *THE MEXICAN OUTSIDERS: A COMMUNITY HISTORY OF MARGINALIZATION AND DISCRIMINATION IN CALIFORNIA* (1995).

36. See generally NANCIE L. GONZALEZ, *THE SPANISH-AMERICANS OF NEW MEXICO, A HERITAGE OF PRIDE* (1976).

37. See DAVID GUTIERREZ, *WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY* (1995) (providing overview of history of tensions and cooperation between Mexican Americans and Mexican immigrants in California). Gutierrez provides numerous examples in which Mexican Americans perceived and treated immigrants as not part of their community, and other examples of how Mexican Americans defined their social and political issues as one community. See *id.*; see also **Kevin R. Johnson**, [Immigration and Latino Identity, 19 CHICANO-LATINO L. REV. 197 \(1998\)](#) (identifying difficulty that legal definitions "citizen" and "alien" create for coalitions in Los Angeles).

38. See Leo Chavez, Introduction to *SHADOWED LIVES: UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY* xii (1998) (identifying himself as thirteenth generation Chicano).

39. Although early writings by anthropologists characterized Mexican

Americans as a rural people, some of the oldest urban centers in the Southwest were founded by Mexicans. In other words, the urban experience of El Paso and Los Angeles is just as authentic and Yakama Valley in Washington.

40. See ROSAURA SANCHEZ, *CHICANO DISCOURSE SOCIO-HISTORIC PERSPECTIVES* (1983) (discussing Spanish language varieties).

41. See MANUEL H. PENA, *THE TEXAS-MEXICAN CONJUNTO, HISTORY OF A WORKING- CLASS MUSIC* (1985) (discussing development of class-base and regionally specific type of music).

42. See FRAN LEEPER BUSS, *LA PARTERA: STORY OF A MIDWIFE* (1980) (telling life story of Jesusita Aragon, midwife from San Miguel County in northern New Mexico). Buss's book contains descriptions of specific maternal health practices, herbs, and beliefs specific to this region and borrowed from training received in Mexico. See *id.*

43. See generally ANA MARIA DIAZ-STEVENSON & ANTHONY M. STEVENSON-ARROYO, *RECOGNIZING THE LATINO RESURGENCE IN U.S. RELIGION, THE EMMAUS PARADIGM* (1998) (discussing traditions); NORMA JEAN WILLIAMS, *THE MEXICAN AMERICAN FAMILY: TRADITION AND CHANGE* (1990) (reporting on study conducted on changing traditions within Mexican American families in Texas from one generation to next).

44. These include distinct settlement histories and government policies. See generally RODOLFO ACUNA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (1988).

45. See *id.* (contrasting states in Southwest after Mexican American War, presented in terms of length of time each experienced before annexation and different role each region played in the U.S. economy and capitalist development); CAREY MCWILLIAMS, *NORTH FROM MEXICO* (1961).

46. See generally MARIO BARRERA, *RACE AND CLASS IN THE SOUTHWEST; A THEORY OF RACIAL INEQUALITY* (1979) (discussing labor history of Mexican Americans from Mexican American War to 1970s that built on colonial labor system model); CAMILLE GUERIN-GONZALES, *MEXICAN WORKERS & AMERICAN DREAMS: IMMIGRATION, REPATRIATION AND CALIFORNIA FARM LABOR, 1900-1936* (1994); DEVRA WEBER, *DARK SWEAT, WHITE GOLD, CALIFORNIA FARM WORKERS, COTTON, AND THE NEW DEAL* (1994); EMILIO ZAMORA, *THE WORLD OF THE MEXICAN WORKER IN TEXAS* (1993).

47. See GUTIERREZ, *supra* note 37 (discussing political struggles and historical incidents in which Mexican Americans identified with Mexican immigrants); FELIX M. PADILLA, *LATINO ETHNIC CONSCIOUSNESS: THE CASE OF MEXICAN AMERICANS AND PUERTO RICANS IN CHICAGO* (1985) (exploring ethnic identity and identifying uses and practices of panethnicity); GEORGE J. SANCHEZ, *BECOMING MEXICAN AMERICAN, ETHNICITY, CULTURE AND IDENTITY IN CHICANO LOS ANGELES,*

1900- 1945 (1993) (analyzing formal federal and state programs of acculturation aimed at Mexican immigrants and ways that Mexican culture was reconstructed through family networks, religious practices, musical entertainment, work experiences, and consumption patterns).

48. See Hernandez, *supra* note 3 (discussing implications of Afro-Cubans theorizing Latinos as race or as ethnicity and ways that Latinas/os with connections to African ancestry may be excluded from coalition building).

49. MCWILLIAMS, *supra* note 45, at 43.

50. *Id.* at 44.

51. Of course, the power to write history and establish policy based on one's myth depends on the group's political and economic power. In addition, the less threatening the revisions are, the more likely they will be accepted. I would argue that the incorporation of spiritual and mythical writings into the curriculum is much less threatening than social science research that examines structural inequalities and the impact on the Latina/o community or historical research on labor struggles and organizing.

52. See generally ARMANDO B. RENDON, *CHICANO MANIFESTO* (1971) (referring to "People of Aztlan").

We are the people of Aztlan, true descendants of the Fifth Sun, el Quinto Sol.

In the early morning light of a day thousands of years old now, my forebears set out from Aztlan, a region of deserts, mountains, rivers, and forests, to seek a new home. Where they came from originally is hidden in the sands and riverbeds and only hinted at by the case of eye and skin which we, their sons, now bear.

Id. at 7.

53. See RODOLFO GONZALES, *I AM JOAQUIN* 16 (1967).

I am Cuauhtemoc,
proud and noble,
leader of men,
king of an empire
civilized beyond the dreams
Of the gachupin Cortes, who also is the blood,
The image of myself.
I am the Maya prince.
I am Nexahualcoyotl,
great leader of the Chichimecas.
I am the sword and flame of Cortes
The despot.
And
I am the eagle and serpent of
the Aztec civilization.

Id.

54. JUAN ARMANDA ALEGRIA, *PSICOLOGIA DE LAS MEXICANAS* (2d ed. 1995).

55. See generally SANDRA MESSINGER CYRESS, *LA MALINCHE IN MEXICAN LITERATURE FROM HISTORY TO MYTH* (1991); Adelaida R. Del Castillo, *Malintzin Tenepal: A Preliminary Look into a New Perspective*, in *ESSAYS ON LA MUJER* (Rosaura Sanchez & Rosa Martinez Cruz eds., 1977).

56. See OCTAVIO PAZ, *THE LABYRINTH OF SOLITUDE, LIFE AND THOUGHT IN MEXICO*, (Lysander Kemp trans., 1961).

57. See ALFREDO MIRANDE & EVANGELINA ENRIQUEZ, *LA CHICANA: THE MEXICAN- AMERICAN WOMAN* 31 (1979).

58. See GLORIA ANZALDUA, *BORDERLANDS: LA FRONTERA: THE NEW MESTIZA* (1987). (concluding with belief that la diosa, Aztec goddess figure, will "life us," presumably our salvation from capitalism, heterosexism, sexism and racism).

59. Guerra, *supra* note 31, at 357; see also ANZALDUA, *supra* note 58; CHERRIE MORAGA, *LOVING IN THE WAR YEARS: LO QUE NUNCA PASO POR SUS LABIOS* (1983).

60. See *BORDER THEORY: THE LIMITS OF CULTURAL POLITICS* (Scott Michaelsen & David E. Johnson eds., 1997) [hereinafter *BORDER THEORY* (critiquing Gloria Anzaldua and other writers using border, borderlands and border crossing metaphor in developing theories, and pointing to contradictions embedded in the various applications); Paula M. L. Moya, *Chicana Feminism and Postmodernist Theory*, in *SIGNS* (forthcoming) (arguing that: "If we choose the realist approach, we will work to ground the complex and variable experiences of the women who take on the identity 'Chicana' within the concrete historical and material conditions which they inhabit.") Moya continued: Rather than a figure for contradiction or oppositionality, the identity 'Chicana' would be a part of a believable and progressive social theory. I would like to suggest that it is only when we have a realist account of Chicana identity, one that refers outward to the world we live in, will we be able to understand what social and political possibilities are open to use, as Chicanas, for the purpose of working to build a better society than the one we currently live in.

Id.

61. The emphasis on a genealogical construction of race in defining mestizo in Chicano literature is based on U.S. racial formation rather than the one developed in most Latin American contexts where constructions were influenced by culture, class, and other social factors. See Clara Rodriguez & Hector Cordero-Guzman, *Placing Race in Context*, 15 *RACIAL & ETHNIC STUD.* 523 (1992). In addition, race is often viewed as an "individual marker" in the Caribbean and Latin America, while in the U.S. race is always assumed as a group marker that determines your reference group. See Lawrence Wright, *One Drop of Blood*, *NEW YORKER*, July 25, 1994, at 46-55.

62. Migration of European men outnumbered the migration of European women and families. This sex ratio may have attributed to the kinds of relations between the races and the conceptions of race that developed in Latin American.

The offspring between Indian and black women that served as mates for European men were in some cases recognized as members of the criollo class and inherited all the privileges attached to this racial class. See Elinor C. Burkett, In Dubious Sisterhood: Class and Sex in Spanish Colonial South America, 4 *LATIN AM. PERSP.* 18, 18-26 (1977).

63. See Benjamin Alire Saenz, In the Borderlands of Chicano Identity, in *BORDER THEORY*, supra note 60, at 86. Saenz noted: "Anzaldua, unfortunately, falls into the dualistic thinking she so eloquently critiques. To categorize the world into 'European' and 'indigenous' and try to bridge those two worlds under mestizaje is to fall squarely into 'dualistic' thinking that does not do justice to the complex society in which we live." *Id.*

64. *Id.* "The material conditions that give rise to the Aztec's religion no longer exist. Anzaldua's language, her grammar, her talk are ultimately completely mortgaged to a nostalgia" *Id.* at 86-87.

65. See Hector Carreon, A Cancer in Chicano Studies ... Immediate Surgery Required (visited Apr. 18, 2000) <<http://www.serve.com/Impacto/cancer.html>> (on file with author). "Our community is predominately Catholic and as Christians we believe that 'homosexuality' is an abnormality and should not be promoted in our tax supported institutions of higher learning." *Id.* More recently, anti- Semitic e-mails have been in abundance over the removal of Los Angeles schools Superintendent Ruben Zacarias. See March B. Haefele, Dialogue of Slurs, Ethnic Insults have no Place in School District's Power Struggle., *L.A. WEEKLY*, Nov. 1999 <<http://www.laweekly.com/ink/99/50/city-haefele.shtml>> (on file with author).

66. There is no acknowledgment of Mexico's history of slavery or the complex hierarchy arising from intermarriage between Spaniards born in Spain to those born in Mexico, between Spaniards and Indians, Spaniards and mestizos, Spaniards and mutalos, Indians and mutalos.

67. *Indigenista* is based on a cultural deterministic model much like the one proposed by cultural anthropologists, Florence Kluckhohn and Fred L. Strodbeck, conducting research in a New Mexican village in 1950s. See FLORENCE ROCKWOOD KLUCKHOHN, *VARIATIONS IN VALUE ORIENTATIONS* (1961). Although their study consisted of less than fifty individuals, their research findings were applied to Mexican Americans throughout the U.S. The history of Mexico is multicultural and the simplistic claims of indigenous or mestizo roots erases the incredible diversity of the country and denies the existence of a meaningful culture undergoing the daily transformations to meet the material demands of daily life.

68. See Saenz, supra note 63, at 85.

69. The movement has only superficially links to American Indians or indigenous communities in Mexico.

70. Saenz, supra note 63, at 85-86.

71. FRANTZ FANON, *THE WRETCHED OF THE EARTH* (1963).

72. See PAULO FREIRE, CULTURAL ACTION FOR FREEDOM (1973); PAULO FREIRE, EDUCATION FOR CRITICAL CONSCIOUSNESS (1973); PAULO FREIRE, PEDAGOGY OF THE OPPRESSED (1970).

73. The controversy over the commemoration of the Spanish conquest in New Mexico highlights the different legacies left from conquest for Don Juan de Onate and soldiers' descendants and the residents of Acoma Pueblo. Commemorations symbolize an attempt by his descendants and other Spanish- Mexican people to reclaim New Mexico away from the growing number of Anglo influences throughout the state; whereas Onate remains the murder of Indians. See New Mexico Monument Conjures Bitter Legacy, PHILADELPHIA INQUIRER, Apr. 17, 1999, at A1; Bridges Needed to Unite Cultures, DENV. POST, Apr. 4, 1999, at G2; Conquistador Statue Stirs Hispanic Pride and Indian Rage, N.Y. TIMES, Feb. 9, 1998, at A10.

74. James Brooke, Hot Issue in Northern New Mexico: Fine Print of an 1848 Treaty, N.Y. TIMES, Feb 19, 1999, at A10 (addressing significance of Treaty of Guadalupe Hidalgo for communities in Northern New Mexico and loss of communal land grants).

75. See Joanne Marie Barker, Indian [TM USA: Citizenship Rights, Blood Tales, and the Indian Arts and Crafts Act of 1990, in WE DECIDE! NATIVE IDENTITY (Irene Vernon ed., forthcoming).

76. See RICHARD HENRY PRATT, BATTLEFIELD AND CLASSROOM: FOUR DECADES WITH THE AMERICAN INDIAN, 1867-1904 (1964); see also WILLIAM HEUMAN, THE INDIANS OF CARLISLE (1965).

77. Elizabeth M. Iglesias & Francisco Valdes, Afterword -- [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).

78. See Luna, *supra* note 5.

79. See Padilla, *supra* note 5 (portraying Chicanas and Latinas as having specific cultural tendencies "to accept their fate of suffering with dignity").

80. See Terry Rey, "The [Virgin's Slip Is Full of Fireflies](#)": The Multiform Struggle over the Virgin Mary's Legitimierende Macht in Latin America and Its U.S. Diasporic Communities, 33 U.C. DAVIS L. REV. 955 (2000).

81. See *id.* After the Mexican American War, the archdiocese changed hands and Archbishop Lamy assumed the post. The conflict between the Archbishop and local priests who allowed parishioners to continue their indigenous practice is documented as part of the history of New Mexico. See generally RAY JOHN DE ARAGON, PADRE MARTINEZ AND BISHOP LAMY (1978).

82. See Rey, *supra* note 80.

83. Iglesias & Valdes, *supra* note 77, at 509. The case of the Mothers of East L.A. is an example of how a group of Latina activists experienced tension within one Catholic parish; they sought affiliation with another parish and developed a nonprofit community-based component direct by their concerns. See Mary Pardo,

Working-Class Mexican American women and "Voluntarism": "We Have to Do It!", in *WOMEN AND WORK: EXPLORING RACE, ETHNICITY, AND CLASS* 204 (1997).

84. Iglesias & Valdes, *supra* note 77, at 582.

85. See Cho & Westley, *supra* note 2.

86. See Gott, *supra* note 4.

87. See, Timothy A. Canova, [Global Finance and the International Monetary Fund's Neoliberal Agenda: The Threat to the Employment, Ethnic Identity, and Cultural Pluralism of Latina/o Communities](#), 33 *U.C. DAVIS L. REV.* 1547 (2000) (suggesting areas of application that LatCrit theory may have to the international economic system).

88. For example, Recovering the U.S. Hispanic Literary Heritage is a national project to search for literary expressions created by Latino in the U.S. from colonial to contemporary times. The project is housed at the University of Houston, and works and collections have been published by the Arte Publico Press.

89. See Emilio Zamora, Sara Estela Ramirez: Una Rosa Roja En El Movimiento, in *MEXICAN WOMEN IN THE UNITED STATES STRUGGLES PAST AND PRESENT* (Magdalena Mora & Adelaida R. Del Catillo eds., 1980).

90. See WARD ALBRO, *ALWAYS A REBEL: RICARDO FLORES MAGON AND THE MEXICAN REVOLUTION* (1992); COLIN MACLACHLAN, *ANARCHISM AND THE MEXICAN REVOLUTION: THE POLITICAL TRIALS OF RICARDO FLORES MAGON IN THE UNITED STATES* (1991).

91. See ROBERT J. ROSENBAUM, *MEXICANO RESISTANCE IN THE SOUTHWEST: "THE SACRED RIGHT OF SELF-PRESERVATION"* (1981); Mary Romero, *Class Struggle and Resistance Against the Transformation of Land Ownership and Usage in Northern New Mexico: The Case of Las Gorras Blancas* (unpublished manuscript, on file with author).

92. See CAROLYN ASHBAUGH, *LUCY PARSONS: AMERICAN REVOLUTIONARY* (1976).

93. See *NOTABLE HISPANIC AMERICAN WOMEN* 405-06 (Diane Telgen & Jim Kamp eds., 1993).

94. *Id.* at 398; MATT S. MEIER, *MEXICAN AMERICAN BIOGRAPHIES; A HISTORICAL DICTIONARY 1836-1987*, at 218 (1988).

95. See ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY; AN ACCOUNT OF THE MANAGED MIGRATION OF MEXICAN FARM WORKERS IN CALIFORNIA, 1942-1960* (1964); ERNESTO GALARZA, *SPIDERS IN THE HOUSE AND WORKERS IN THE FIELD*. (1970); ERNESTO GALARZA, *TRAGEDY AT CHUALAR: EL CRUCERO DE LAS TREINTA Y DOS CRUCES* (1977).

96. Iglesias & Valdes, *supra* note 77.

97. See, Sumi K. Cho, *Essential Politics*, 2 *HARV. LATINO L. REV.* 433,

434 (1997).

98. See Ediberto Roman, [A Race Approach to International Law \(RAIL\): Is There a Need for Yet Another Critique of International Law?](#), 33 U.C. DAVIS L. REV. 1519 (2000)..

99. See **Donna Coker**, [Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color](#), 33 U.C. DAVIS L. REV. 1009 (2000).

100. MIRANDE & ENRIQUEZ, *supra* note 57.

101. See Tamayo, *supra* note 7.

102. See Yamamoto, *supra* note 4.

103. See Larry Cata Backer, [Measuring the Penetration of Outsider Scholarship in the Courts: Indifference, Hostility, Engagement](#), 33 U.C. DAVIS L. REV. 1173 (2000).

104. *Id.*

105. See PIERRETTE HONDAGNEU-SOTELO, WHY ADVOCACY RESEARCH? REFLECTIONS ON RESEARCH AND ACTIVISM WITH IMMIGRANT WOMEN, THE AMERICAN SOCIOLOGIST (1994).

106. See, e.g., Aloud! Voices of the Nuyorican Poet's Cafe, Henry Holt and the Online Bookstore (visited Apr. 5, 2000) <<http://www.obs-us.com/obs/English/books/holt/books/aloud/index.htm>> (on file with author).

107. See LUIS ALFARO, DOWN TOWN, NEW ALLIANCE RECORDS (1993); Michelle Habell Pallan, Family and Sexuality in Recent Chicano Performance: Luis Alfaro's Memory Plays, OLLANTAY THEATER J. 33, 33-42 (1996).

108. Marisela Norte is the author of a CD entitled Norte Wood. See MARISELA NORTE, NORTE WORD (New Alliance Records 1991). She has written essays and short stories too. See, e.g., Marisela Norte, And the Wind cries Mari, in ALCHEMY 14- 16 (1992); Marisela Norte, Dolores Fuertes: A Short Story, in ALCHEMY, *supra*, at 32-33; Marisela Norte, El Club Sufrimiento 2000, 9 HIGH PERFORMANCE 56 (1986).

109. See Michelle Habell Pallan, El Vez is 'Taking Care of Business': The Inter/National Appeal of Chicana/o Popular Music, 13 CULTURAL STUD. 195, 195- 210 (1999).

110. See COCO FUSCO, BROKEN ENGLISH SPOKEN HERE: NOTES ON CULTURAL FUSION IN THE AMERICAS (1995).

111. See GUILLERMO GOMEZ-PENA, WARRIOR FOR GRINGOSTROIKA: ESSAYS, PERFORMANCE TEXTS, AND POETRY (1993).

112. See Malavet, *supra* note 6.

113. See Gunia, *supra* note 6.

114. See Malavet, *supra* note 6.

115. The argument against cultural nationalism and identity issues that I make here is not exclusive to Chicano and Chicana Studies or Latina/o Studies for that matter, but dominates the current debates over the direction of ethnic studies. This

controversy was featured in a recent New York Times, featuring two spokes men representing differing perspectives: Manning Marable and Henry Louis Gates. See A Debate on Activism in Black Studies, N.Y. TIMES, Apr. 4, 1998, at A13, A15. The titles of their individual essays clearly state their position. Manning Marable's essay was entitled A Plea That Scholars Act Upon, Not Just Interpret, Events and Henry Louis Gates' essay was entitled A Call to Protect Academic Integrity From Politics. Gates calls for "the distinction between scholarship that is political and politicized scholarship" whereas Marable makes the distinction between the "intellectual tradition that has generally been 'descriptive,' 'corrective' and 'prescriptive'" and the one he advocates which would continue to link scholarship with the goal of improving the lives of black people. While Manning Marable and Henry Louis Gates are nationally recognized scholars, they are certainly not the first or only ethnic studies scholars and educators to engage in this debate. See JUAN GOMEZ- QUINONES, ON CULTURE (1977); THE STATE OF ASIAN AMERICA: ACTIVISM AND RESISTANCE IN THE 1990S (Karin Aguilar ed., 1994).

116. GOMEZ-QUINONES, *supra* note 115, at 43.

Chapter III: Michigan LatCrit Symposium

1. Elizabeth M. Iglesias & Francisco Valdes, *Expanding Directions, Exploding Parameters: Culture and Nation in LatCrit Coalitional Imagination*, 5 MICH. J. RACE & L. 787 (2000)

We have to believe in the power of imagination because it is all we have, and ours is stronger than theirs. [n.1](#)

The real war is between our imagination and theirs, what we can see and what they are blinded to. Do not despair. None of them can see far enough, and so long as we do not let them violate our imagination we will survive. [n.2](#)

In *Imagining Argentina*, Carlos Rueda's wife, Cecilia, is disappeared during Argentina's dirty war. [n.3](#) Carlos' story is of dreams and the awesome power of the human imagination to sustain life and reclaim the living through the simple will to believe. [n.4](#) Cecilia's is a story of the courage and integrity that still drive enough among us to speak truth to power despite its well-known risks and predictable consequences. [n.5](#) Although Carlos and Cecilia are fictional characters, their story marks a vivid *788 and appropriate point of departure for this volume of LatCrit scholarship. This is because, in the last five years, the LatCrit movement has emerged as the collective project of a diverse group of individuals who are determined to consolidate an ethical community of scholars and activists committed to combating injustice in and through the critical analysis and effective transformation of legal discourse, legal institutions, and the elitist culture of the American legal academy. [n.6](#) Like Cecilia's fate, the future of the LatCrit project depends on the power of the human will to imagine, to believe, and to manifest meaningful alternatives to realities conjured and coercively imposed by those who benefit from current structures of domination and subordination. As evidenced by the contributions to this Symposium, these structures exist both within the legal academy and throughout the broader fields of social, cultural, economic, and political contestation in which law routinely intervenes. [n.7](#) Like Carlos, this community of scholars and activists survives on

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the strength of its power to imagine and its courage to affirm ways of being and doing that effectively challenge the repressive practices, discourses, and ideologies through which totalitarian realities are constructed both within and beyond the legal academy.

In this vein, the articles and commentaries in this Symposium are excellent points of departure for reflecting upon the advances thus far achieved in the evolution of this still very young community of scholars. The articles and commentaries that follow this brief Introduction comprise the second “free-standing” law review Symposium on LatCrit theory organized specifically in response to *789 student interests and initiatives. [n.8](#) The timing is fitting, for this Symposium also coincides with the fifth anniversary of LatCrit theory’s emergence in the American legal academy. Since then, five annual conferences and four additional colloquia have produced, in total, nine published symposia in both mainstream and “of color” law journals. [n.9](#) This record reflects and affirms LatCrit theory’s original commitment to collaboration with student law review editors, especially those of color, in the production of this new critical legal discourse on Latinas/os, policy, and society. [n.10](#) This textual record—including this very Symposium—also attests to LatCrit theory’s expanding directions and exploding parameters. Indeed, this Symposium effectively celebrates and continues the LatCrit experiment that, in 1995, was, like Carlos’ dreams, little more than a will to imagine and believe.

In the five years since, LatCrit theorists have conducted several interventions in critical legal scholarship, antiracist discourse, and public policy debates guided by early commitments to *790 antistatist theory, antiesentialist community, and coalitional praxis. First, reflecting the imperatives of demography, LatCrit theorists have centered “Latinas/os” in outsider jurisprudence and legal discourse. [n.11](#) In doing so, we also have centered Latinas/os’ multiple diversities precisely in order to excavate the valences and explore the significance of intra-Latina/o “difference” in the development of critical analysis, social activism, public policy, and legal reform. [n.12](#) This antiesentialist approach to “Latina/o” critical legal studies has helped to expand antiracist discourse and politics within the legal academy and also has challenged some basic mis/understandings of Latina/o lives and communities.

For example, by foregrounding intra-Latina/o diversities, LatCrit has challenged a core misrepresentation of Latinas/os. This misrepresentation is summed up in the dominant presumption that Latinas/os are all, or would like to be, “Hispanic”—Spain’s progeny, with Eurocentric and White-identified affinities. [n.13](#) In fact, as LatCrit theorists have shown time and again, Latinas/os come in many racial and ethnic varieties—including a high degree of cross-mixture. [n.14](#) Latinas/os are indigenous, Asian, Black, and mixed, as well as Hispanic. Like other populations, Latinas/os are multicultural, multiethnic, and multiracial. And, in this vein, *791 Latinas/os—again like other groups—are diverse along many axes of identity, including gender, sexual orientation, religion, and socioeconomic class. By foregrounding these multiple internal diversities,

LatCrit theory has striven to ensure that public debates about, and legal responses to, social issues deemed especially germane to “Latina/o” populations will be guided in part by the needs that arise from multiple intragroup differences. [n.15](#) We similarly have sought to situate LatCrit analysis of the Latina/o condition in intergroup social frameworks and cross-group historical contexts that take into account both the present and the past in the delineation of LatCrit priorities and projects. [n.16](#) This intergroup framing expands the circle of perspectives brought to bear on the Latina/o condition and deepens the substance of LatCrit discourse. The diversity of position and perspective enabled by this intergroup discourse ensures a broadly inclusive multilateral dialogue that listens both to Latina/o experiences and to others as well. In this way, LatCrit theory is informed by diverse “outside” viewpoints—in addition to diverse “internal” viewpoints. This openness to both “internal” and “external” critique ***792** helps to ensure a critical (as well as self- critical) approach to Latina/o interests and issues. [n.17](#) In this way, LatCrit scholars learn from—and teach each other—about the similarities and differences that construct domination and subordination across multiple vectors of experience and identity, both within and beyond Latina/o contexts. [n.18](#) Along the way, this cross-group process promotes the formation of a progressive, diverse, and inter-disciplinary community of scholars and activists united across differences of position and perspective by a common commitment to antiessentialist, antisubordination theory, community, and praxis. [n.19](#) Indeed, the creation of a diverse and antiessentialist community of critical scholars and activists, grounded in antisubordination principles and praxis, has been a key aspiration of the LatCrit project from its inception. [n.20](#) This kind of scholarly community serves not only as an incubator of intellectual exchange and insight, but also creates a network of critical colleagues and mentors to nurture new scholars ***793** and their efforts. In crucial moments of struggle, this type of scholarly community also can (and should) serve as a bulwark against the oppressive social and/or institutional practices through which too many minority scholars have been “disappeared” from the American legal academy. [n.21](#)

Moreover, the insights and practices developed through this collective process of mutual engagement are not limited in application to the legal academy. On the contrary, the creation of an antiessentialist and antisubordination discourse and community among diverse scholars and activists may serve as a magnet or model for similar coalitional communities on a larger societal level. [n.22](#) Over time, this cross-group process of exchange and convocation may help to foster the discursive conditions and sociopolitical consciousness necessary for a broader coalitional solidarity among outgroups in the United States and beyond. In short, this community-building dimension of LatCrit theory fully reflects the substantive vision of, and commitment to, antiessentialism and antisubordination in both theory and praxis—through the conceptual advances our discourse enables, as well as through the new practices of mutual recognition, engagement, and respect that our collaborative efforts inspire and manifest. [n.23](#)

Thus, in and through LatCrit theory we have sought to center, at once, in

legal discourse (a) Latinas/os qua Latinas/os, (b) our multiple internal diversities, and (c) the schematics and dynamics of cross-group relations and inter-group coalitions. In keeping with LatCrit community-building aspirations, these efforts have entailed a conscious and conscientious dedication to community-building ideals and practices in both individual and structural terms. This fragile experiment has yielded promising advances to date.

***794** Through LatCrit exchanges, for example, we have transcended the “White-Over-Black” binary of “domestic” race relations. [n.24](#) We have also challenged the dichotomy between “domestic” and “international” that historically has bounded legal discourses and that too-often still separates antiracism undertakings that should instead intersect. [n.25](#) In doing so, LatCrit theorists have disrupted traditional paradigms that have constricted antiracist work specifically and that, more generally, have inhibited intersectional antiracism alliances. Through these exchanges, LatCrit and allied scholars have broadened, deepened, and textured the antiracism gains and antiracist insights of “outsider” jurisprudence.

To transcend traditional paradigms of analysis and engagement, we also have learned to “rotate the center” of critical analysis and ***795** collective action. [n.26](#) In practice, this effort has entailed both individual and group embrace of coalitional methods in critical and self-critical ways that continually (re)ground both theory and praxis in the objectives of intra- and inter-group justice. These practices include programmatic initiatives that periodically shift the substantive focus of critical and self-critical inquiry among and between various groups or identities, as well as individual research projects that explicitly center marginal identities within outsider groupings. [n.27](#)

This practice of “rotating centers” was first initiated in a self-conscious and programmatic manner at LatCrit III through the organization of a plenary focus-group discussion titled From Critical Race Theory to LatCrit to BlackCrit? Exploring Critical Race Theory Beyond and Within the Black/White Paradigm. [n.28](#) The purpose of this focus group was specifically and self-consciously designed to center in LatCrit theory the problem of Black subordination, and to explore the antiracist insights to be gained by shifting the focus of LatCrit analysis from Hispanic Latinas/os to Black Latinas/os and their intersectional commonalities with other Black identity groups. The proceedings at LatCrit IV carried this important discussion forward through a plenary panel on The Meanings and Particularities of Blackness in Latina/o Identity and LatCrit Theory, even as the decision to organize a plenary on Mestizaje, Identity and the Power of Law in Historical Context encouraged yet another rotation designed to center mestiza/o identity in LatCrit discourse. [n.29](#) Most recently, at LatCrit V, conference organizers sought yet again to give substantive meaning and practical content to the antiracist commitments of LatCrit ***796** theory by “rotating the center” of analysis in two ways: first, to focus on the problem of class subordination within and between different minority groups and, second, by organizing a plenary focus-group discussion titled Rotating Centers: Confronting

Latina/o Homophobia—A Moderated Focus-Group Discussion, which was designed specifically to address the problem of homophobic oppression within Latina/o and other minority communities. [n.30](#)

This collective experience in the practice of “rotating centers” powerfully has demonstrated the learning achieved through programmatic initiatives designed to manifest in concrete ways the commitment to antiessentialism and inclusion that animates the LatCrit project. It has also borne witness to the value of continuity and to the importance of fostering a collective commitment to sustained engagement in constructing a genuine “community” of scholars within the legal academy. [n.31](#) By rotating centers, we have ameliorated the tendency to imagine the world mostly through the prisms of our own contingent experiences and the experiences and perspectives of others who are “like us.” In so doing, we have begun to give substantive content and practical meaning to our commitments both to antiessentialist analysis and to antistatist solidarity—commitments that conceptually define the otherwise fluid, shifting, and intersectional parameters of the LatCrit “community.”

Now—five years later—this record of collective achievement confirms LatCrits’ early convictions and commitments. These convictions and commitments are reflected in both sets of texts presented in this Symposium. Each “set” is comprised of an article and two commentaries, with a foreword and afterword bookending the Symposium as a whole. In the opening article, Professor Margaret Montoya conducts a detailed, cross-cultural accounting of silence and its sociopolitical uses and misuses. She is particularly interested in challenging the way dominant representations of the meaning of silence, particularly the silence of individuals belonging to subordinated groups, serve to reinscribe relations of domination and exclusion and to marginalize alternative cultural understandings. [n.32](#) In their commentaries, Professors Steven Bender ***797** and Dorothy Roberts effectively link Professor Montoya’s analysis to their own experiences teaching law in order to reveal substantial obstacles currently confronting the task of preparing law students to practice law for social and racial justice. [n.33](#) In the second “set” of essays, Professor Gema Perez-Sanchez unfolds an inter-disciplinary analysis of Spain’s sex/gender national anxieties and their homophobic lawmaking potency, situating this analysis in a rich and multidimensional exploration of the relationship between homophobic ideology, totalitarian practices, and the struggle for a more substantive vision of democracy. [n.34](#) The commentary by Professor Peter Kwan raises probing questions, urging further interdisciplinary exploration of the intersections between fascism, homophobia, and the transformative potential of Queer identity, [n.35](#) while the commentary by Professors Ratna Kapur and Tayyab Mahmud extends the discussion, incisively interrogating the relationship of (hetero)sexuality to the project of “nation-building” and the structures of totalitarian power (and resistance to it) both within and beyond the state apparatus. [n.36](#)

The rich diversity of methodology, terrain, positionality, and perspective reflected in these articles and commentaries is salutary, revealing important, and

otherwise invisible, connections between the antiessentialist, antisubordination objectives underlying LatCrit theory and social justice agendas, on the one hand, and antitotalitarian struggles, on the other. They inspire demands for more and better of the same. [n.37](#) This Symposium, as well as these times, challenges us to expand our practices of “multidimensionality” and to interrogate continuously the meaning, and expand the substantive parameters, of the commitment to antisubordination that animates LatCrit theory, community, and praxis. In the next two Parts, we briefly take up these two pressing imperatives and reflect on the contributions of the Symposium articles and commentaries to the further evolution of LatCrit discourse and analysis.

***798** I. Multidimensional Analysis: Grounding LatCrit Theory, Community, and Praxis

The LatCrit imperative of multidimensional analysis and action is presaged by early outsider insights, such as intersectionality and multiplicity, because these twin concepts demand more than single-axis, or unidimensional, analysis of sociolegal conditions. [n.38](#) Multidimensionality, then, proceeds from multiplicity and intersectionality, making it akin to a form of “multiintersectionality.” [n.39](#) However, multidimensionality denotes more a qualitative shift in analytical consciousness and discursive climate than a quantitative increase in the recognition of identities and their intersections. This is simply to say that “multidimensionality” cannot be reduced to a mere recitation of the multiple diversities that constitute (and oftentimes disrupt) racial or ethnic categories, such as “African American,” “Asian American,” “Native American,” or “Latina/o.”

On the contrary, “multidimensionality,” as we use the term here, calls for a profound and far-reaching recognition that the particularities of religion, geography, ability, class, sexuality, and other identity fault lines run through, and help to configure and to interconnect, all “racial” or “ethnic” communities. [n.40](#) Thus, ***799** multidimensionality is a necessary analytical and political response to the fact that every “identity” group is a virtual construction that organizes communities around imagined commonalities, even as it suppresses precisely those “differences” that might otherwise reorganize the social, political, and legal fields by reconstituting the structure of group identification and alliance. Multidimensionality, as critical method and political commitment, requires a flexible yet multifaceted approach to critical sociolegal analysis that can operate on several levels at once, depending on context and circumstance. These levels include both intra- and inter- group diversities based on multiple identity sources, such as race, ethnicity, gender, class, sexual orientation, and ability. As we use the term here, multidimensionality may be viewed as a template of critical analysis that is adjustable and transportable across varied legal regimes and social fields. [n.41](#)

In addition to describing a mode of analysis, multidimensionality

describes an analytical mindset that precedes and informs the framing and contents of an analysis. This mindset is a keen but critical appreciation—at the very threshold of any antisubordination project—of the fact that no structure of subordination “ever stands alone.” [n.42](#) At this juncture, this bedrock condition cannot be doubted; not only is it amply demonstrated in this Symposium, but it has also been noted both during and since the formative moments of outsider jurisprudence. [n.43](#) A threshold appreciation for ***800** this bedrock fact therefore can benefit both the conception and execution of all antisubordination projects. [n.44](#) Multidimensionality signifies both an expansive analytical approach to issues of subordination as well as an antecedent understanding of the interconnected structuring of sociolegal biases that necessitate this expansive approach. [n.45](#) Yet, multidimensionality as LatCrit method must also have a substantive purpose. Through our sustained and collective engagement in each others’ differences of perspective and position, this purpose has emerged, in ever clearer and increasingly self-conscious ways, as a commitment to anti-subordination in any and every context. [n.46](#)

Multidimensionality, then, describes a method of critical analysis that seeks both to interrogate the diversity and particularity of specific contexts and to situate those findings within a critical deconstruction of the larger structures of subordination that oppress ***801** and surround diverse outgroups. LatCrit and allied scholars increasingly must deploy multidimensional analysis not only to root out the particularities of subordination in any given context, but also to chart their interconnection with other particularities in other contexts and, ultimately, to design our antisubordination interventions more efficaciously. [n.47](#) Our challenge increasingly is to discern patterns from particularities and design synergistic interventions through our mutual engagement in the particularities of each others’ realities and perspectives. This we do by locating each particular analysis of social power/lessness and legal position in a more inclusive and comprehensive understanding of the overall organization of privilege and prejudice, which will in turn enable us to recognize and therefore to dismantle interlocking structures of subordination in law and society through our multidimensional analyses and coalitional solidarity.

The articles and commentaries in this Symposium clearly illustrate the practice and value of multidimensional analysis. A key benefit of their analyses is that they offer new, and otherwise inaccessible, insights into the way relations of power/lessness are configured across different sociolegal fields, thus revealing new perspectives on the commonalities and interconnections linking the subordination of different groups in different contexts through ostensibly different mechanisms of coercion, control, and erasure. The two lead articles in this Symposium are a case in point. A unidimensional reading might easily miss the unique opportunity these two articles offer for exploring important, and otherwise invisible, connections between the antiessentialist, antisubordination objectives underlying LatCrit theory and social justice agendas, on the one hand, and antitotalitarian struggles on the other. This is because, in a superficial and

unidimensional reading, these articles seem to have nothing to do with each other. A brief review illustrates the point.

Professor Montoya's project is to provide a comprehensive exploration of "the interplay between the subordinating aspects of *802 being silenced and the liberatory aspects of silence, its expressive and performative aspects that are part of our linguistic and racial repertoires." [n.48](#) In exploring silence, Professor Montoya traces its modes and manifestations across the fields of cultural, classroom, and legal discourse. In each instance, her analysis advances a rich and complex argument that simultaneously seeks to reveal the cultural and racial biases embedded in, and reproduced by, the manner in which silence is interpreted, represented, and performed in the discourses that dominate these three fields, even as she articulates alternative ways of understanding and performing silence and seeks to excavate the transformative potential embedded in these understandings and performances. Her argument is that subordinated groups are oftentimes forced into silence by dominant discursive practices ("centripetal forces") that "crowd" us out or erase our realities, and that the possibilities of using silence in transformative ways to disrupt and resist ("centrifugal forces") are foreclosed by the fact that dominant interests routinely misinterpret the meaning of our silence.

There is no doubt that this is a complex and difficult argument to make. It requires us to imagine what the silence of the marginalized and subordinated might mean culturally, politically, and interpersonally if our self-understandings were culturally dominant. Silence is at times a self-experienced instance of resistance and withdrawal, oftentimes in disgust and disdain for the processes, practices, persons, and/or institutions that trigger our silence. Being the object of disgust and disdain is hardly a mark of distinction or dominance, and yet there remains a profound disjuncture between this way of understanding the meaning of one's own silence and the performative impact of such silence on the structures of power/lessness that organize the social spaces and institutions we inhabit. This disjuncture is precisely the space in which our silence is misinterpreted as submission, rather than disdain. It is this disjuncture that raises doubts about the transformative potential of "holding silence" in this culture.

Professor Montoya is well aware of this problem and the issues it raises. [n.49](#) The profound importance of these issues is in turn reflected in Professor Roberts' thoughtful commentary. According to *803 Professor Roberts, Professor Montoya's argument presents a significant challenge for resistance scholarship and praxis. This challenge results from the fact that "[the distinction between what is compelled and what is defiance is not always apparent." [n.50](#) In this vein Professor Roberts asks whether we really can "tell the difference between silence that is coerced by repression and silence that is an act of resistance? Does outsiders' silence in response to dominant speech challenge the status quo or simply acquiesce in it?" [n.51](#) These questions, and the fact that both Professors Montoya and Roberts locate their analysis of silence and resistance in the law school context, prompt further reflections on the way silence is institutionally and

discursively organized, as well as on its implications for the future of diversity in the American legal academy. Minority (as well as non-minority) law professors and students who are committed to fostering diversity and inclusion in the legal profession are quite familiar with the ways in which resistance to exclusionary admissions, appointments, and promotion practices is silenced. Oftentimes this silence is organized around discourses of “collegiality,” which cast resistance as “uncollegial,” or through discourses of “academic freedom.” These discursive practices enable impunity by silencing internal criticism and deflecting external accountability from the frequently racist and sexist decision-making processes through which social elites reproduce their political, institutional, and cultural dominance.

A unidimensional analysis of the Montoya-Roberts “debate” would easily conclude that while silence in this context may be internally experienced as an expression of disgust, rather than submission, in this context it nevertheless operates to acquiesce in injustice. But Professor Montoya’s analysis is not unidimensional. As we read her text, she does not ultimately disagree with Professor Roberts, for she readily acknowledges and insightfully explores the uses and abuses of silence in performing acquiescence to injustice. [n.52](#) For this reason, her multidimensional analysis forces one to struggle for a broader understanding of the way subordination is configured and transformed. This is because Professor Montoya is not simply writing about resistance and the role of silence in *804 performing it (or not); she is in fact performing resistance precisely by presenting an alternative account of the meanings of silence from the perspective of subordinated cultures. Her resistance is against the broader structure of power that not only silences the marginalized and subordinated individual, but also destroys the cultural understandings and suppresses the self-understandings through which these individuals oftentimes do, in fact, perform their resistance through silence. This exchange thus reveals the totalitarian dimensions of domination, which not only structure relations of power/lessness, but construct the “meanings” that define reality. In this totalitarian reality, the marginalized and subordinated have no choice but to assimilate to precisely those practices and methods of “resistance” through which “change” can be effectively achieved. They must “play the game to win,” even if playing the game requires them to abandon the meanings and understandings that define their cultural difference.

This is, indeed, a very hard argument to make, for it forces us to recognize the awesome dimensions of power that oftentimes may coerce us to relinquish difference in the very act of defending it. And yet Professor Montoya does resist—in and through the meanings she excavates and offers us here. In doing so, she significantly expands our understanding of the meaning of culture and counsels us to bear in mind that efforts to preserve cultural diversity, unlike other forms of political struggle, require forms of resistance that can counteract the cultural destruction that our participation in “effective” political struggle may produce, both internally in our souls and externally in the cultures whose

extinction we seek to combat. She also leaves us to ponder whether and how we decide whether there are some games that simply are not worth winning.

Professor Bender's commentary takes up and effectively expands upon a different dimension of Professor Montoya's multidimensional analysis. Professor Montoya's analysis of silence aims to show "how silence and silencing are used to draw and maintain the borders of racialized power." [n.53](#) One important dimension of her project traces the way legal discourse silences issues of race in the articulation of legal doctrine and the adjudication of legal disputes. Her analysis crosses numerous doctrinal domains, revealing the relationship between racial subordination and the interpretations of silence that inform legal analysis, as well as exploring the silence of law regarding matters of ***805** race. Focusing, for example, on the doctrinal structure of American property law regimes, she makes a compelling argument that the silence of law on matters of race obscures the relationship between property, power, and White supremacy. [n.54](#)

Professor Bender takes up this dimension of Professor Montoya's analysis and substantially expands it by reflecting on his own experiences teaching a course titled Chicano/as and the Law in an Ethnic Studies program. [n.55](#) In his commentary, Professor Bender effectively displays how the complex dynamics critiqued by Professor Montoya play out in the context of higher education; he shows the applicability of Professor Montoya's analysis to our profession. After further mapping the erasure of Latinas/os across multiple fields of law, Professor Bender reflects, as a teacher, on the demoralizing and demobilizing impact that a deeper understanding of the way American law erases Latina/o experiences, interests, and realities too often has on the idealistic young students who take his class in the eager expectation of one day practicing law for social justice. Professor Bender thus raises profound questions about the role of legal education in preparing agents of progressive transformation. [n.56](#)

Of course, as earlier indicated, this brief review of some of the insights offered and debates triggered by Professor Montoya's article and responding commentaries might prompt one to ask what any of them has to do with Spanish literature and legal history, Franco's fascism or Queer theory—the topics taken up in this Symposium by Professor Perez-Sanchez's article and the responsive commentaries. Approached through a unidimensional lens, the answer might well be nothing. Indeed, one might fairly ask what the evolution of LatCrit discourse, understood specifically as a project to develop antiessentialist, antisubordination critical theory and political community among diverse groups of scholars and activists, has to gain from any engagement with Spain. Certainly, one ready answer is that the historical and continuing impact of Spanish colonialism and contemporary projects, as well as the ***806** terms and conditions under which Spanish supremacy gave way to the rise of the United States as a global and imperial power, have had profound and lasting effects on the configuration of Latina/o identities and social realities, both within the United States and throughout this hemisphere. [n.57](#) And yet, in the context of this Symposium, the real payoffs of this engagement stem in large part from the fact that Professor

Perez-Sanchez articulates her intervention, like Professor Montoya, through a multidimensional analysis.

Locating her argument in and around a critical analysis of the way homosexuality was codified in Spain, before, during, and after the Franco dictatorship, Professor Perez-Sanchez interrogates both the nature of power and the possibilities of resistance, as well as the role of literary production in the struggle for progressive social transformation. In their fascinating commentary, Professors Kapur and Mahmud take up the issues she raises and substantially expand the analytical scope of LatCrit scholarship by retracing the contributions of Gramsci, Althusser, and Foucault, even as the authors challenge the ability of these theories to adequately engage the realities of power/lessness in the uncivil societies organized around colonial and non-capitalist state formations. [n.58](#) In doing so, they open a whole range of questions that are ripe for LatCrit engagement, to the extent that “the international move” in LatCrit theory seeks proactively to engage “the struggles and suffering of our Third World ‘others’” [n.59](#) in ways that foster the kind of commitment ***807** to intergroup justice and solidarity that can shatter the essentialist constructions of difference through which antiracist, antiimperialist antisubordination alliances, and coalitions too-often have been fragmented. [n.60](#) To advance the antisubordination objectives of the LatCrit project, this engagement must, as Professors Kapur and Mahmud appropriately suggest, “seek theoretical guidance from Europe’s Others.” [n.61](#) To advance LatCrit’s antiessentialist commitments to intra- and intergroup justice, this engagement must help us articulate theories that more effectively can reveal the common contexts of struggle [n.62](#) that the colonial experience has structured across regions as diverse as Asia, Africa, and Latin America. From both perspectives, Professors Kapur and Mahmud’s commentary offers important insights and maps new trajectories of inquiry as LatCrit theory seeks to reveal interlocking sites of contestation for the struggle against subordination in all its configurations.

Their commentary is particularly on point insofar as they reveal that Spain, for all of its colonial history and modern pretensions, internally has been structured for much of its history around a non-capitalist, illiberal state formation. [n.63](#) Indeed, this observation provides a welcome backdrop for reflecting yet again on the LatCrit imperative of multidimensional analysis, as well as on the particular contribution Professor Perez-Sanchez makes to this project. By focusing LatCrit attention on the criminalization of homosexuality within Spain, Professor Perez-Sanchez shatters ***808** otherwise dominant, and profoundly essentialized, images that cast Spain as a unitary “nation-state.” She also marks important points of antisubordination commonality linking all people oppressed by homophobic ideologies and regimes across the essentialist lines of national boundaries and, further, links the particular antisubordination imperatives of Queer liberation to the seemingly more universal project of fostering democracy and preserving democratic transitions. [n.64](#)

In this way Professor Perez-Sanchez reminds us that, like the United

States and, indeed, like any nation-state, “Spain” is an imagined construction superimposed upon a people marked by distinctions of class, gender, race, ethnicity, language, sexual orientation, and national origin, among other classifications. Though Spanish colonial histories wreaked havoc at the time and today constitute an important backdrop for the continued reproduction of intergroup injustices and inequalities throughout the Americas, the antiessentialist, antisubordination imperatives of the LatCrit project call for multidimensional analyses that can help us find and align with those at “the bottom” of any sociolegal context, including in colonial centers such as Spain. [n.65](#) By unpacking and de-essentializing our constructions of “Spain,” we not only discover others whose struggles for justice we share and should rightfully embrace, but we also expand the scope of our “coalitional imagination” in ways that can have a profound and material impact precisely because of the cross-national alliances this heightened consciousness of commonality may activate.

In this vein, LatCrit scholars might benefit greatly from a deeper understanding of the “coalitional imagination” and the “multidimensional analysis” that prompted approximately 3000 Americans, some ninety of whom were African-Americans, to risk and in many instances lose their lives fighting Franco’s fascist troops in *809 the Spanish Civil War. [n.66](#) They were known as the “Abraham Lincoln Brigade.” [n.67](#) From 1936 to 1939, these brave men and women flouted the myopia of United States law and policy and crossed the Atlantic Ocean to stake their lives in support of a democratically- elected government whose ultimate overthrow paved the way for Franco’s dictatorship and emboldened Hitler’s aggression. [n.68](#) For the African- Americans who fought in this war, the interlocking connections between fascism and racism were abundantly evident. Rejecting the essentialism of a unidimensional race-nationalism, they understood the struggle against Mussolini’s invasion of Ethiopia and Franco’s assault on Spanish democracy to be part of the same battle. [n.69](#) Indeed, while their struggles against Jim Crow racism in the United States inspired solidarity with the Ethiopian cause, their decision to take up arms against the fascist assault on Spanish democracy reflected a commitment to eradicating all forms of subordination, particularly the material dispossession of the poor. [n.70](#) In the words of one African- American veteran of the Spanish Civil War,

I had been more than ready to go to Ethiopia, but that was different. Ethiopia, a Black nation, was part of me. I was just beginning to learn about the reality of Spain and Europe, but I knew what was at stake. There the poor, the peasants, the workers and the unions, the socialists and the communists, together had won an election against the big landowners, the monarchy and the right-wingers in the military. It was the kind *810 of victory that would have brought Black people to the top levels of government if such an election had been won in the USA. A Black man would be Governor of Mississippi. The new government in Spain was dividing its wealth with the peasants. Unions were organizing in each factory and social services were being introduced. Spain was the perfect example for the world I dreamed of. [n.71](#)

These brief remarks can hardly scratch the surface of the many lessons to be learned from the history of African-Americans in the Abraham Lincoln Brigade and the political understandings that informed their personal sacrifices on behalf of Spanish democracy. Nevertheless, these remarks do underscore the insights LatCrit scholars can gain, and the solidarities we can foster, by applying multidimensional antisubordination analysis in every context we examine.

Though not every project need operate on all possible levels of multidimensional analysis at once, LatCrit scholars can and should remain at all times conscious and attuned to the multiple dimensions of the issues and interests we take up. By making multidimensionality a conscious process in the framing and execution of our critical interventions, the limitations of our projects can be self-critically reviewed, and these limitations can be explicitly acknowledged and explained in relationship to the project's antiessentialist, antisubordination objectives. In the same way, scholars can begin more consciously and expressly to delineate the connection between the issues we address in our critical interventions and the larger patterns of power and privilege that confront social justice efforts. Over time, multidimensional thinking can foster a culture of scholarly self-awareness that may facilitate the commencement of a more collaborative and interwoven anti-subordination discourse in the legal academy. Over time, the net result may be an enhanced collective awareness of the multidimensional issues that inhere in every community, discourse, and project. This awareness in turn should motivate more effective coalitional antisubordination initiatives.

***811 II. AntiSubordination Purpose: AntiEssentialism in LatCrit Theory, Community, and Praxis**

To be socially grounded, as well as socially relevant, LatCrit (and other outsider discourses) must account for the multiple diversities within as well as across traditionally subordinated non-White groups. Beyond doubt, multidimensionality is one means of ensuring LatCrit theory's vitality as one method of social justice resistance to the sociolegal ecology of supremacy and subordination. However, in continuing and celebrating the commitment to multidimensional projects, LatCrit theorists concomitantly must devise the means of embracing multiple sources of "difference" in self-critical and empowering ways—in ways that at once recognize differences rooted in past, present, or prospective conditions and harness that recognition to aid material antisubordination transformation. Sources of intra- and intergroup difference must be more than mapped and named for the sake of antiessentialism; difference must be put to work for social justice through critical legal theory anchored to an antisubordination purpose. In our view, an ever-present and always-pressing challenge for LatCrit and allied "OutCrits" is the joinder of outsiders' postmodern discourse to a political agenda of substantive social justice. To meet this challenge, LatCrit and allied scholars must find a balance between the insights of

antiessentialism and the exigencies of social transformation.

One challenge in the effort to strike such a balance flows from the regressive co-optation of outgroup antiessentialism. [n.72](#) A danger already noted is the potential for—or actuality of—majoritarian forces friendly with White and other forms of privilege to turn the complexities and uncertainties adduced through outgroup antiessentialism against LatCrit and RaceCrit theorists and our communities, and also to the detriment of antistatization goals. [n.73](#) Examples range from backlash academic discourse that ***812** decries critical analysis as “political correctness” to judicial proclamations that squash affirmative action programs on the ground, effectively, that they essentialize race. These and similar examples contort antiessentialism in similar ways: if “race” and “identity” are socially constructed—if all is multiplicitous, intersectional and diverse—then structural antidiscrimination remedies are over-determined. This perversion of critical antiessentialism—indeed, the general sociopolitical climate of these times—call for LatCrit and other antistatization scholars to distinguish between variants of “essentialism”—distinctions fully congruent with LatCrit social justice principles and objectives.

In the public discourse of cultural warfare, social backlash, and legal retrenchment, majoritarian reclamation of in-group “rights” to economic preeminence and social primacy has been successfully pursued through a deadly form of identity politics that might be described as majoritarian, or in-group, essentialism. In fact, the “culture wars” declared and waged during the past decade against the nation’s most vulnerable communities by majoritarian backlash politicians and their (un)witting footsoldiers have been based on naked vows to “take back” the country in the essentialized name of traditional, dominant forces. [n.74](#) This war has been pursued from coast to coast, against racial as well as other “minority” communities, through the use of varied lawmaking devices ranging from “popular” referenda to judicial rollbacks. In each instance, majoritarian forces peddled essentialized appeals to homogenize majoritarian self-interest and congeal majoritarian resentment of outgroup communities that purportedly deprived majority-identified groups of their right to the best social status and goods. In each instance, an essentialized sense of majority identification underpinned the success of backlash lawmaking. [n.75](#) All this while the reactionary “political correctness” social police hiss down progressive cries—or whispers—in the name of antiessentialist indignation and righteousness. This Orwellian status quo thus enables majoritarian identity politics, effectively practiced through majoritarian essentialism, to reassert in-group privilege even while stigmatizing outgroup “essentialism” as a form of resistance to in-group backlash.

***813** The consequence is that “identity” has remained intact as a basis for enjoying the privileges of domination while becoming a taboo for rallying resistance to subordination. This hypocritical approach to “identity politics” undercuts the search for intergroup commonalities specifically as a platform for social justice solidarity among outgroups, while at the same time valorizing

essentialist affinity among majority-identified in-groups. If permitted, this hypocritical double standard could exploit for subordinationist purposes LatCrits' antiessentialism. [n.76](#) The contemporary Orwellian status quo makes it imperative for LatCrits regularly to revisit and refine the role of outgroup antiessentialism in antisubordination discourse and praxis. In particular, this duplicitous status quo makes it incumbent on LatCrit, RaceCrit, and allied OutCrit scholars to clarify with more precision the forms of antiessentialism that are conducive to antisubordination praxis and transformative theorizing.

To begin with, LatCrit theory cannot revert to any form of pre-intersectional quasi-essentialism that veils outgroup diversities and their sociolegal significance in the conception of, and quest for, equality and equity. [n.77](#) But the practice of antiessentialism could benefit in particular moments by strategic activations of quasi-essentialism among outgroups to harness the power of identity and experience on behalf of the antisubordination struggle. By "strategic quasi-essentialism" we thus mean a method of legal scholarship and praxis that recognizes the coexistence—and politicized juxtapositions—of essentialism and multidimensionality in public affairs, and which strives toward critical coalitions that accommodate the complexities of diversity and imperatives of solidarity among "minority" outgroups living under a majoritarian unjust order. [n.78](#) The sort of outgroup quasi-essentialism that we embrace here is strategic because it admits no romance with essentialized presumptions of homogeneity or commitment to social justice transformation based on identity, instead using commonalities of identity only as a point of departure for coalescing new and ***814** traditional outgroup antisubordination efforts in strategic moments and substantive ways. This limited practice of essentialism is qualified as "quasi" because it resists the "essentialism" it practices, and it practices this "essentialism" only strategically. As part of a discourse and vision anchored to antisubordination purpose, strategic quasi-essentialism becomes another tool or technique that may assist at some points in LatCrit theorizing, community-building, and even coalitional praxis.

To be sure, strategic quasi-essentialism is no panacea to the troubles wrought by backlash and other such ills. Like "interest convergence" politics, strategic quasi-essentialism is a temporary and self-limiting enterprise. It is, in fact, no more than a short-term catalyst for the mobilization of communities under siege. Like all other tools of outsider scholars and activists, strategic quasi-essentialism is merely one among many means toward social justice struggle and transformation. As always, to sustain outgroup antisubordination resistance in the longer run, a mutual and common commitment to an expansively egalitarian transformation of law and society—rather than "mere" coincidence of biosocial identity—must be shared and upheld. [n.79](#)

This longer-term reality is what requires outsider scholars to articulate a vision of post-subordination society. [n.80](#) While history and experience inform contemporary socioeconomic realities, the differences of the past and present are the context within which we imagine, theorize, and act. While strategic quasi-

essentialism may serve momentary antsubordination purposes, a mutual commitment to a common vision of an expansively egalitarian future—and an ongoing commitment to its material attainment—are the only glue for long-term antiessentialist community-building and sustained antsubordination activism.

Happily, this Symposium manifests a resolutely antsubordination stance. Professor Montoya's thorough critique of silence and its (mis)uses and (mis)interpretations exudes a sharp antsubordination purpose. Professor Roberts' commentary explicitly explores the complicated dynamics of silence to help advance its antsubordination deployment in and through "resistance scholarship"—such as LatCrit theory—while Professor Bender's commentary turns to language law and policy to display and confront the "deteriorating *815 conditions for progressive lawyering" [n.81](#) and to attract the attention of progressive Latina/o students toward an education and, perhaps, a career in social justice lawyering. Similarly, Professor Perez-Sanchez centers the socially and statutorily denigrated "homosexual" in her analysis to expose and tranquilize Hispanic traditions of homophobia and to promote sex/gender egalitarianism more generally. In their two commentaries, Professors Kapur and Mahmud, as well as Professor Kwan, push for thoroughly cross-cultural and transnational frameworks of critical analysis and social activism to help bring into view the interconnectedness of systems of subordination. Individually and as a Symposium, these texts aptly demonstrate the substantive value and multifaceted functions of LatCrit theory as antsubordination scholarship. [n.82](#)

Individually and as a Symposium, these texts likewise demonstrate the crucial joinder of antiessentialism and antsubordination in LatCrit theory. In each instance, the Symposium texts represent clear efforts to intervene on behalf of the subordinated, the devalued, the marginalized among us. But, while so doing, each Symposium author also (de)centers essentialized categories of law, society, and dominant cultural understandings. In each instance, the Symposium texts effectively practice antiessentialism to promote antsubordination. Uniformly, the Symposium authors put under LatCrit pressure the normalized categories and accompanying (mis)conceptions to which humans become acculturated—and subservient—through coercively Euroheteropatriarchal ideologies, hierarchies, and systems. [n.83](#)

These articles and commentaries thereby point to the substantive anchor for LatCrit antiessentialism. This Symposium makes plain that critical analysis and praxis, while requiring multidimensional frameworks, need also be grounded in antsubordination purpose at all times and in all contexts. Antsubordination principles and analysis, applied in critical and self-critical ways, provide the substantive limits for and directions *816 of antiessentialism in LatCrit theory, community, and praxis. Thus, antiessentialism is no end unto itself; its utility is defined in relation to a contextual antsubordination purpose. In LatCrit theory, community, and praxis, antsubordination ideally always contextualizes and informs antiessentialism.

In closing, this Introduction celebrates the continuation and advancement,

via this Symposium, of the LatCrit project as we enter the second half of our first decade. As this Symposium well illustrates, this LatCrit project, while a young and fragile experiment, continues to grow—to broaden and deepen, as a discourse, community, and praxis. This growth continues to evince a strong embrace and earnest practice of antisubordination and antiessentialism through multidimensional analysis and critique. For this vitality and grounding, we salute—and congratulate—the authors and editors who bring us this enriching collection of new LatCrit texts.

NOTES:

1. Lawrence Thornton, *Imagining Argentina* 65 (1987).
2. *Id.* at 99.
3. See generally *id.*
4. See *id.*
5. See *id.*
6. See Elvia R. Arriola, Foreword: [March!, 19 *Chicano-Latino L. Rev.* 1, 11-12 \(1998\)](#) (discussing the importance of ethical community building for the LatCrit project); Elizabeth M. Iglesias, Foreword: [International Law, Human Rights, and LatCrit Theory, 28 *U. Miami Inter-Am. L. Rev.* 177, 178 \(1996- 97\)](#) (emphasizing LatCrit theory as the work-product of a diverse group of scholars); Francisco Valdes, [Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities, 9 *La Raza L.J.* 1, 24-30 \(1996\)](#) (grounding the LatCrit project in a broad and comprehensive vision of the way LatCrit might articulate and manifest new possibilities for intergroup solidarity and mutual understanding in and through the production of critical legal scholarship).
7. See, e.g., Margaret E. Montoya, [Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse, 5 *Mich. J. Race & L.* 847 \(2000\), 33 *U. Mich. J.L. Reform* 263 \(2000\)](#) (classroom silences); Steven W. Bender, [Silencing Culture and Culturing Silence: A Comparative Experience of Centrifugal Forces in the Ethnic Studies Curriculum, 5 *Mich. J. Race & L.* 913 \(2000\), 33 *U. Mich. J.L. Reform* 329 \(2000\)](#) (silence as metaphor for absence of Latinas/os in network of legal rights); Dorothy E. Roberts, [The Paradox of Silence: Some Questions About Silence as Resistance, 5 *Mich. J. Race & L.* 927 \(2000\), 33 *U. Mich. J.L. Reform* 343 \(2000\)](#) (classroom silence).
8. This Symposium project originated through the initiatives of law students at the University of Michigan Law School. It is the second Symposium organized specifically in response to law student requests for assistance in organizing a LatCrit Symposium. For proceedings of the first such Symposium organized in response to interest expressed by law students at the University of California at Boalt, see Symposium, *LatCrit Theory, Latinas/os and the Law*, 10 *La Raza L.J.* 1 (1998), 85 *Cal. L. Rev.* 1087 (1997).

9. Although LatCrit legal theory is a relatively recent intervention in the evolution of American critical legal scholarship, LatCrit scholarship has developed at an unprecedented pace during the last five years. See Symposium, LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship, 2 Harv. Latino L. Rev. 1 (1997) (LatCrit I); Symposium, Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory, 19 Chicano-Latino L. Rev. 1 (1998) (LatCrit II); Symposium, Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory, 53 U. Miami L. Rev. 575 (1999) (LatCrit III). In addition to the published proceedings of LatCrit I, II, and III, LatCrit scholars also have produced a first-ever symposium exploring key issues in international law and international human rights from a critical race perspective. See Symposium, International Law, Human Rights and LatCrit Theory, 28 U. Miami Inter-Am. L. Rev. 177 (1997). For proceedings of the gathering of Latina/o law professors that gave birth to the LatCrit project, see Colloquium, Representing Latina/o Communities: Critical Race Theory and Practice, 9 La Raza L.J. 1 (1996). For a particularly insightful overview of the purposes and commitments of the LatCrit movement, see Francisco Valdes, Foreword: Under Construction—LatCrit Consciousness, Community, and Theory, 10 La Raza L.J. 1, 7-10 (1998), 85 Cal. L. Rev. 1087, 1093-96 (1997). For proceedings of the LatCrit IV conference see Symposium, Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections, 33 U.C. Davis L. Rev. (forthcoming 2000). For proceedings of the LatCrit V conference see Symposium, Class in LatCrit: Theory and Praxis in a World Economic Inequality, 78 Denv. U. L. Rev. (forthcoming).

10. See Elizabeth M. Iglesias, Foreword: Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community, 53 U. Miami L. Rev. 575, 656 (1999) (grounding support for minority-run law reviews in the imperatives of an antielitist ethic and politics); Valdes, supra note 6, at 11-12 (grounding the publication of LatCrit scholarship in self-conscious project to foster success of both minority law reviews and scholars).

11. See generally Valdes, supra note 6 (noting that LatCrit theory seeks to center Latinas/os qua Latinas/os); Francisco Valdes, Foreword: Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment, 2 Harv. Latino L. Rev. 1 (1997) (same).

12. See, e.g., Elizabeth M. Iglesias, Out of the Shadow: Marking Intersections In and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory, 40 B.C. L. Rev. 349, 355, 19 B.C. Third World L. J. 349, 355 (1998) (noting LatCrit Theory's initial emphasis on mapping "intra-Latina/o divisions, stratifications and antagonisms" and explaining the objectives of this analysis as an effort to dismantle rather than suppress or ignore structures of subordination organized around these differences for the sake of some false commonality); Kevin R. Johnson, Some Thoughts on the Future of Latino Legal Scholarship, 2 Harv. Latino L. Rev. 101, 129 (1997) (exploring diversities within and between Latina/o communities and reflecting on the challenges posed for the project of promoting pan-ethnic solidarity).

13. Kevin Johnson, [“Melting Pot” or “Ring of Fire”?: Assimilation and the Mexican-American Experience](#), 10 *La Raza L. J.* 173, 186-87 (1997), 85 *Cal. L. Rev.* 1259, 1272-73 (recounting how the claim to a Spanish identity is oftentimes used to organize Mexican-American assimilation into a racist Anglo culture through the denial of indigenous racial mixtures); Francisco Valdes, *PostColonial Encounters in the PostPinochet Era: A LatCrit Perspective on Spain, Latinas/os and “Hispanismo” in the Development of International Human Rights*, 9 *U. Miami Int’l & Comp. L. Rev.* (forthcoming 2001) (deconstructing the White supremacist ideology of “Hispanismo”).

14. See Berta Esperanza Hernandez-Truyol, *Building Bridges: Latinas and Latinos at the Crossroads*, in *The Latino/a Condition: A Critical Reader* 24, 30 (Richard Delgado & Jean Stefancic eds., 1998); Valdes, *supra* note 9, at 1106 (noting that Latina/o communities are characterized by a high degree of mestizaje, or racial intermixture and internal diversity).

15. Recognition of intra-group diversities has broad implications for public policy and legal discourse, and LatCrit scholars have been at the forefront in exploring these implications. See, e.g., Elizabeth M. Iglesias, [Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates](#), 28 *U. Miami Inter-Am. L. Rev.* 361 (1996-97) (assessing current debates over whether, and how, to link human rights enforcement to international economic law, given the complex ways in which Latinas/os are divided by cultural differences and nationalist ideologies as well as by race, class, and gender hierarchies); Elizabeth M. Iglesias & Francisco Valdes, *Afterword: 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, 574-82 (1998) (arguing that LatCrit antipoverty agendas must take into account the particularities of class-based subordination that affect different Latina/o communities in varied ways by developing comparative analyses of the way Latina/o poverty has been configured historically around different legal events and regimes and structurally around the particularities of uneven development and economic restructuring in different geographical areas within and beyond the territorial United States).

16. See, e.g., Iglesias, *supra* note 12, at 350-51 (articulating a “common context of struggle” for Latinas/os and Asian Pacific Americans around three points of reference: (1) the centrality of international relations, (2) the uses and misuses of national security ideology, and (3) the structure of the (inter)national political economy on the (re)production of inter- and intra-group subordination among Latinas/os and APAs); Guadalupe T. Luna, *On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sandford*, 53 *U. Miami L. Rev.* 691 (1999) (exploring points of commonality and difference in the historical dispossession of Blacks and Chicanos effected through the articulation of Anglo-American property law regimes, in order to articulate a common context of struggle); George A. Martinez, [African- Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition](#), 19 *Chicano-Latino L. Rev.* 213, 214 (1998) (urging Latinas/os and African Americans to explore commonalities); Eric K. Yamamoto, *Conflict and Complicity: Justice Among Communities of Color*, 2 *Harv. Latino L. Rev.* 495, 500-01 (1997) (urging more expansive inter-racial alliances based on mutual and reciprocal commitments to intergroup justice).

[17.](#) See Iglesias, *supra* note 10, at 619-20 (reflecting on the difference between “internal” and “external” criticisms and the imperative of remaining critically and self-critically engaged in, and open to, both).

[18.](#) See *id.* at 626 (noting that the struggle against White supremacy must be conceived as a common collective project that advances only when difference is embraced as the medium through which “we teach each other about the similarities and differences in the way white supremacy operates in our various communities”) (emphasis omitted).

[19.](#) It bears noting that LatCrit theory is a crossroads for many different critical discourses and perspectives precisely because the evolution of LatCrit theory has been substantially enriched by the active and continuous participation of a highly diverse and extraordinarily talented assortment of Asian and Pacific American critical legal scholars, RaceCrits, QueerCrits, FemCrits, and other OutCrit scholars. See, e.g., Keith Aoki, *Language is a Virus*, 53 U. Miami L. Rev. 969 (1999) (noting extent of Asian and Pacific American participation in LatCrit conferences and community); Barbara J. Cox, *Coalescing Communities, Discourses and Practices: Synergies in the Anti- Subordination Project*, 2 Harv. Latino L. Rev. 473 (1997) (reflecting on relevance of LatCrit project to White lesbians); Jerome McCristal Culp, Jr., *Latinos, Blacks, Others and the New Legal Narrative*, 2 Harv. Latino L. Rev. 479 (1997) (reflecting on relevance of LatCrit project to African Americans); Stephanie M. Wildman, *Reflections on Whiteness and Latina/o Critical Theory*, 2 Harv. Latino L. Rev. 307 (1997) (reflecting on significance of LatCrit project from a White critical feminist perspective). These scholars have performed the unprecedented act of solidarity by investing their intellectual capital and professional resources in the creation and continued evolution of a discourse, whose purpose has been to combat the relative invisibility of Latinas/os in the production of critical legal discourse, even as they also remain deeply involved in developing other strains of critical theory. For one genealogical narrative of the relationship between LatCrit theory and the historical evolution of critical legal discourses in the American legal academy, see Elizabeth M. Iglesias, *LatCrit Theory: Notes Towards a Transatlantic Dialogue*, 9 U. Miami Int’l & Comp. L. Rev. (forthcoming 2001) (locating LatCrit theory in and against seven strains of critical legal discourse including Critical Legal Studies, Critical Race Theory, Feminist Legal Theory, Critical Race Feminism, Asian Pacific American Critical Legal Scholarship, Chicana/o Studies, and Queer Legal Theory).

[20.](#) See, e.g., Arriola, *supra* note 6; Yamamoto, *supra* note 16.

[22.](#) See Iglesias, *supra* note 10, at 580 (noting that “[it is precisely because LatCrit theory has taken up the challenge of producing knowledge and performing community for the purpose of manifesting and advancing an anti- essentialist commitment to anti-subordination politics that the LatCrit community stands as microcosm of the many challenges facing the global community....”).

[23.](#) See *id.* at 679-82 (linking the LatCrit community-building project to the imperative of institutionalizing solidarity and practicing mutual recognition).

24. See Iglesias & Valdes, *supra* note 15, at 562-74 (urging LatCrit scholars to remain cognizant of and vigilant in rejecting the Black/White paradigm, we uncritically equate Black and White positions within a paradigm that emerged from the very real and continued oppression of Whites over Blacks, as well as by non-Blacks who have sought their own liberation in the delusions of a White identity); Iglesias, *supra* note 10, at 623-24 (explaining how LatCrit theory seeks to expand critical analysis of “white supremacy progressively beyond the Black/White binary of race, even as we acknowledge the particular and virulent forms of anti-Black racism that are institutionalized and expressed in virtually every society across the globe, including Latina/o communities”); Athena D. Mutua, [Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm](#), 53 U. Miami L. Rev. 1177, 1187-90 (1999) (expressing concern that the critique of the Black/White paradigm tends to minimize the particularly virulent forms of racial oppression endured by Blacks); Stephanie L. Phillips, [The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History](#), 53 U. Miami L. Rev. 1247, 1253-54 (1999) (providing an account of tensions generated by the critique of the Black/White paradigm in the context of Critical Race Theory workshop); Francisco Valdes, [Afterword: Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits](#), 53 U. Miami L. Rev. 1265 (1999) (urging similar recognition of the particularities of Black subordination and their relevance to the LatCrit project).

25. See Berta Esperanza Hernandez-Truyol, [Building Bridges: Bringing International Human Rights Home](#), 9 La Raza L.J. 69 (1996) (exploring the limitations of the domestic civil rights paradigm); Iglesias, *supra* note 6, at 180-84 (noting the centrality of international law and relations in the configuration of Latina/o identities and realities of subordination, and emphasizing the need to center the relationship (and disjunctures) between domestic and international legal regimes in the articulation of antirsubordination legal theory); Iglesias, *supra* note 12, at 358-63 (centering “the international” in critical analysis of White supremacy and exploring the cross-group commonalities of subordination revealed through this analytical shift in perspective); Iglesias, *supra* note 10, at 596-600 (exploring how the common context of struggle linking Haitian and Cuban refugees is revealed only when critical analysis shifts its attention from the domestic field to the legal structures of international relations and U.S. foreign policy); Celina Romany, [Claiming a Global Identity: Latino/a Critical Scholarship and International Human Rights](#), 28 U. Miami Inter-Am. L. Rev. 215 (1996-97) (urging LatCrits to embrace a global identity); Natsu Taylor Saito, [Beyond Civil Rights: Considering “Third Generation” International Human Rights Law in the United States](#), 28 U. Miami L. Rev. 387 (1996-97) (exploring limitations of domestic civil rights paradigm).

26. Iglesias, *supra* note 10, at 622-28 (explaining the normative and epistemological imperatives underlying the practice of “rotating centers” at LatCrit conferences).

27. See, e.g., Luz Guerra, [LatCrit y la Des-Colonizacion Nuestra: Taking Colon Out](#), 19 [Chicano-Latino L. Rev.](#) 351 (1998) (centering the otherwise marginal realities of indigenous peoples); Berta Hernandez-Truyol, [Latina Multidimensionality and LatCrit Possibilities: Culture, Gender and Sex](#), 53 [U. Miami L. Rev.](#) 811 (1999) (centering the otherwise marginalized experiences of Latina lesbians); Dorothy E. Roberts, [BlackCrit Theory and the Problem of Essentialism](#), 53 [U. Miami L. Rev.](#) 855 (1999) (centering the otherwise marginal intersectionalities of Black identities in LatCrit theory); Siegfried Wiessner, [!Esa India! LatCrit Theory and the Place of Indigenous Peoples Within Latina/o Communities](#), 53 [U. Miami L. Rev.](#) 831 (1999) (centering the otherwise marginal realities of indigenous peoples).

28. For a description of the substantive themes of the focus group, see LatCrit Archives: LatCrit III, Miami Florida, May 7-10, 1998 (visited November 28, 2000) <<http://nersp.nerdc.ufl.edu/~malavet/latcrit/archives/lciii.htm>>. For essays inspired by and reflecting on these themes, see generally Iglesias, *supra* note 10; Mutua, *supra* note 24; Phillips, *supra* note 24; Roberts, *supra* note 27; Valdes, *supra* note 24.

29. For a description of the substantive themes of the plenaries at LatCrit IV, see LatCrit IV: Substantive Program Outline (visited November 28, 2000) <<http://nersp.nerdc.ufl.edu/~malavet/latcrit/lcivdocs/lcivsubs.htm>>.

30. For a description of the substantive themes of the plenaries at LatCrit V, see Fifth Annual LatCrit Conference: Substantive Program (visited November 28, 2000) <<http://nersp.nerdc.ufl.edu/~malavet/latcrit/lcvdocs/substantiveprogram.htm>>.

31. See Iglesias, *supra* note 12, at 352-53 (linking the construction of “dynamic and authentic community” both to the articulation of inter-group commonalities as well as to the respectful embrace of inter-group differences).

32. See generally Montoya, *supra* note 7.

33. See Bender, *supra* note 7; Roberts, *supra* note 7.

34. See Gema Perez-Sanchez, [Franco’s Spain, Queer Nation?](#), 5 [Mich. J. Race & L.](#) 943 (2000), 33 [U. Mich. J.L. Reform](#) 359 (2000).

35. See Peter Kwan, [Querying a Queer Spain Under Franco](#), 5 [Mich. J. Race & L.](#) 989 (2000), 33 [U. Mich. J.L. Reform](#) 405 (2000).

36. See Ratna Kapur & Tayyab Mahmud, [Hegemony, Coercion and Their Teeth-Gritting Harmony: A Commentary on Power, Culture, and Sexuality in Franco’s Spain](#), 5 [Mich. J. Race & L.](#) 995 (2000), 33 [U. Mich. J.L. Reform](#) 411 (2000).

37. See, e.g., Kwan, *supra* note 35, at 5 [Mich. J. Race & L.](#) at 989, 33 [U. Mich. J.L. Reform](#) at 405 (calling for “more articles in the legal journals such as Professor Gema Perez-Sanchez’s”).

38. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 [U. Chi. Legal F.](#) 139 (1989); Angela Harris, [Race and Essentialism in Feminist Legal Theory](#), 42 [Stan. L. Rev.](#) 581 (1990) (arguing that gender essentialism in feminist legal theory silences, among others, the voices of Black women); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 [Women’s Rts. L. Rep.](#) 7 (1989).

39. Outsider, or “OutCrit,” scholars have been developing post- intersectional concepts designed, in effect, to advance a kind of “multiintersectional” form of discourse and politics through outsider jurisprudence. See, e.g., e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 U. Conn. L. Rev. 441 (1998) (on wholism); Berta Hernandez-Truyol, [Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement](#), 25 Colum. Hum. Rts. L. Rev. 369 (1991) (on multidimensionality); Darren Lenard Hutchinson, [Out Yet Unseen: A Radical Critique of Gay and Lesbian Legal Theory and Political Discourse](#), 29 Conn. L. Rev. 561 (1997) (on multidimensionality); Peter Kwan, [Jeffrey Dahmer and the Cosynthesis of Categories](#), 48 Hastings L.J. 1257 (1997) (on cosynthesis); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter- Connectivities*, 5 So. Cal. Rev. L. & Women’s Stud. 25 (1995) (on interconnectivity).

40. See, e.g., Iglesias, *supra* note 10, at 628-29 (noting that all ethnic and racial groups include “members whose multiple and intersectional identities link each group to every other group” and reflecting on the implication of this insight for combating arguments that antiessentialist theory promotes “Balkanization”); Francisco Valdes, [Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory and Politics of “Sexual Orientation,”](#) 48 Hastings L.J. 1293 (1997) (discussing the ethical and political implications of interconnectivity in the articulation of “Queer” legal theory).

41. See infranotes 57-65 and accompanying text (transposing multidimensional analysis to engage the question of the significance of “Spain” in LatCrit theory).

42. Mari J. Matsuda, [Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition](#), 43 Stan. L. Rev. 1183, 1189 (1991).

[43.](#) For example, this recognition of interlocking structures of subordination and their implications for identity politics was clearly incipient in early Critical Race Feminist theory in which the political identity of “women of color” was revealed to be a conceptual and political battleground for multiple and competing liberation projects aimed at combating race, class, and gender subordination. Women of color were oftentimes forced by group politics, institutional structures, and legal doctrines to identify either as minorities, workers, or women to the detriment of more fluid, comprehensive, and intersectional alliances across the civil rights, labor rights, and women’s rights movements. See, e.g., Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 *Signs* 42 (1988). This was accomplished by sanctioning their alliances with groups, which the dominant constructions of identity and allegiance within these respective movements cast as “others.” Indeed, efforts to acknowledge “women of color” as a distinct identity within each of these movements was resisted on the grounds that a “quantitative” proliferation of recognized identities would fracture the political alliances and group solidarity needed to achieve progressive transformation along a single privileged axis of identity. Oftentimes, this translated into a suppression and marginalization of difference for the benefit of internally dominant interests. See, e.g., Elizabeth M. Iglesias, [Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!, 28 Harv. C.R.-C.L. L. Rev. 395 \(1993\)](#) (revealing this dynamic in the context of majoritarian labor unions). However, critical race feminists responded by asserting a “qualitatively” different approach to analyzing structures and practices of subordination. That approach was multidimensional analysis centered on combating subordination organized around all three categories of identity at once, by focusing on the subordination of women of color “at the intersection” of race-, class-, and sex-based discrimination. See, e.g., Crenshaw, *supra* note 38; Harris, *supra* note 38. Only this kind of multidimensional commitment to combat all forms of subordination could effectively foster the liberation aspirations of women located at the intersection of these different forms of subordination. For an early exploration of the implications of this analysis for the construction of antiessentialist institutions, see Iglesias, *supra* note 43 (focusing on the institutional structures of subordination and marginalization produced through the interpretative deployment of essentialist legal categories). LatCrit theory has since carried this analysis forward in profound and far-reaching ways, precisely by recognizing the way essentialist identity configurations suppress our collective recognition of (1) the intra-group differences within Latina/o communities, (2) the inter-group commonalities between Latinas/os and other non-Latina/o outgroups, and (3) the resulting imperative of “antibusordination” as the only normatively and epistemologically defensible guidepost for negotiating our way through this maze of competing possibilities of alliance and identity in ways that foster genuine substantive inter- and intra-group justice for all. For further thoughts on this important insight into the political and epistemological implications stemming from the multidimensionality and interconnectivity that informs every identity group including Latinas/os, see Iglesias, *supra* note 10, at 625-29.

[44.](#) See *id.*, at 625, 626 (explaining how the objectives and insights underlying the practice of “rotating centers” make it an imperative in the configuration of any antibusordination project, whether within or beyond the institutional and programmatic parameters of the LatCrit project).

[45.](#) See *supra* notes 39-43 and sources cited therein.

Appendices

[46.](#) See Iglesias & Valdes, *supra* note 15, at 516 (exploring the practical implications of this antisubordination imperative through an account linking multidimensional analysis to the practice of “looking to the bottom” in a way that strives relentlessly “to ascertain how power structures relations of privilege and subordination within any given context so that the most vulnerable and marginal within that particular context are never left behind by our critical analysis and political interventions.” This imperative by implication demands a fluidity of perspective and analysis that is—necessarily and in all instances—multidimensional).

[47.](#) See, e.g., Iglesias, *supra* note 10, at 596-600 (describing this process as the search for “common contexts” in the struggle for justice, and illustrating its efficacy through an analysis of the common contexts of struggle shared by Haitian and Cuban refugees otherwise divided by the domestic racism reflected in their differential treatment); Iglesias, *supra* note 12, at 351 n.8 (centering international relations, national security ideology, and (inter)national political economy as common contexts of struggle for activating coalitional projects and alliances between Asian Pacific Americans, Latinas/os and Blacks); Luna, *supra* note 16, at 692-97, 711-16 (centering the historical evolution of Anglo-American property law as a common context of struggle against the material dispossession of Blacks and Chicanos with important implications for current-day struggles).

[48.](#) Montoya, *supra* note 7, at 5 Mich. J. Race & L. at 850, 33 U. Mich. J.L. Reform at 266.

[49.](#) See *id.* at 5 Mich. J. Race & L. at 863, 33 U. Mich. J.L. Reform at 279 (noting that the meaning of oppositional silence is oftentimes submerged by the hegemony of dominant (mis)interpretations).

[50.](#) Roberts, *supra* note 7, at 5 Mich. J. Race & L. at 930, 33 U. Mich. J.L. Reform at 346.

[51.](#) *Id.* at 5 Mich. J. Race & L. at 931, 33 U. Mich. J.L. Reform at 347.

[52.](#) See Montoya, *supra* note 7, at 5 Mich. J. Race & L. at 884, 33 U. Mich. J.L. Reform at 300 (quoting Ann Scales on “the quid pro quo” offered to law students and professors by the status quo—that is, the appearance of power in exchange for saying nothing and doing nothing to threaten it.)

[53.](#) *Id.* at 5 Mich. J. Race & L. at 850, 33 U. Mich. J.L. Reform at 266.

[54.](#) See *id.* at 5 Mich. J. Race & L. at 894-96, 33 U. Mich. J.L. Reform at 310-12. For a kindred argument on the centrality of property law in the dispossession of Blacks and Chicanos, see generally Luna, *supra* note 16.

[55.](#) See Bender, *supra* note 7, at 5 Mich. J. Race & L. at 915, 33 U. Mich. J.L. Reform at 331.

[56.](#) See *id.* at 5 Mich. J. Race & L. at 922-26, 33 U. Mich. J.L. Reform at 338-42; see also Iglesias, *supra* note 10, at 605 (making similar observations about the impact of legal education on minority students and the pressing need for reforms in the structure of legal education, the profession, and the delivery of legal services to the poor).

^{57.} See generally Guerra, *supra* note 27; Johnson, *supra* note 12; Wiessner, *supra* note 27 (discussing the state of indigenous peoples in the configuration of Latina/o identities and social realities); Guadalupe T. Luna, *Gold, Souls and Wandering Clerics: California Missions, Native Californians and LatCrit Theory*, 33 U.C. Davis L. Rev. (forthcoming 2000); Symposium: *Understanding the Treaty of Guadalupe Hidalgo on its 150th Anniversary*, 5 Sw. J. L. & Trade Am. 5 (1998); Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties*, 5 Sw. J. L. & Trade Am. 121 (1998); George A. Martinez, *Dispute Resolution and the Treaty of Guadalupe Hidalgo: Parallels and Possible Lessons for Dispute Resolution Under NAFTA*, 5 Sw. J. L. & Trade Am. 147 (1998). For the first published volume of LatCrit scholarship exploring intersections between LatCrit legal theory and Spanish legal history, culture and institutions, see generally *Colloquium: Spain, The Americas, and Latinas/os: International and Comparative Law in Triangular Perspective*, 9 U. Miami Int'l & Comp. L. Rev. (forthcoming 2000) (presenting papers from first international colloquium on LatCrit theory hosted by the Universidad de Malaga Facultad de Derecho and co-sponsored by the University of Miami Center for Hispanic and Caribbean Legal Studies in June 1999). For a description of the substantive themes organizing the First and Second LatCrit Summer Colloquia on Spain, the Americas, and Latinas/os, see *LatCrit en Espana Colloquia* (visited November 28, 2000) <<http://nersp.nerdc.ufl.edu/~malavet/latcrit/spain/spain99.htm>>.

^{58.} See generally Kapur & Mahmud, *supra* note 36.

^{59.} Iglesias, *supra*note 6, at 180 (grounding the international move in LatCrit theory in the imperative of ensuring that “our particular experiences of oppression... inspire us to imagine a broader more inclusive community, based on our common humanity ...”).

^{60.} See *id.*

^{61.} Kapur & Mahmud, *supra* note 36, at 5 Mich. J. Race & L. at 1006, 33 U. Mich. J.L. Reform at 422. This point is key. Indeed, LatCrit scholars have repeatedly urged respectful engagement in, and learning from, the work of scholars of color and Third World scholars, whose intellectual efforts oftentimes offer better starting points for critical analysis and whose marginalization in the production and dissemination of knowledge is an important mechanism through which minority interests project their version of reality as inevitable, rational, and just. See, e.g., Iglesias, *supra* note 10, at 658 (urging LatCrit scholars to draw on the writings and analyses of other Third World people and peoples of color in seeking solutions to increasing information inequalities); Kevin R. Johnson & George Martinez, *Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship*, 52 U. Miami L. Rev. 1143 (1999) (urging LatCrit scholars to engage and learn from the rich resources offered by the long history of Chicana/o activism and scholarship).

^{62.} See Iglesias, *supra* note 10, at 599-600 (challenging LatCrit scholars to perform intergroup comparisons in ways that “articulate a broader perspective from which the particular experiences and various claims of different groups can be seen as part of a common struggle for justice”).

^{63.} See Kapur & Mahmud, *supra* note 36, at 5 Mich. J. Race & L. at 1006, 33 U. Mich. J.L. Reform at 422 (noting that “[g]iven its relatively backward economy combined with a fascist political order, Spain may well have been closer to a colonized formation than a metropolitan one.”)

^{64.} See Perez-Sanchez, *supra* note 34, at 5 Mich. J. Race & L. at 972- 73, 33 U. Mich. J.L. Reform at 388-89 (reflecting on the significance of choosing a transgendered transvestite as the witness to history and vantage point on the compelling stakes implicated by the transition to democracy and its possible reversal).

^{65.} Indeed, given the hegemonic power of the United States, it would be particularly odd for Latinas/os living in the United States to invoke Spain's colonial history as a reason for eschewing our commonalities with subordinated groups within Spain, including Spaniards marginalized and subordinated by precisely such categories as class, race, national origin, gender, and sexual orientation. Certainly, peoples in non-hegemonic states might take a similar view toward the subordination of Latinas/os in the United States. Both positions are equally misguided by essentialist constructions.

^{66.} See generally African Americans in the Spanish Civil War: "This Ain't Ethiopia, But It'll Do" (Danny Duncan Collum ed., 1992). We thank Mari Matsuda for inspiring us to explore the history of Black American internationalist Patriots. See generally Mari J. Matsuda, [Foreword: McCarthyism, the Internment and the Contradictions of Power, 40 B.C. L. Rev. 9 \(1998\)](#), [19 B.C. Third World L.J. 9 \(1998\)](#).

^{67.} African Americans, *supra* note 66, at 5.

^{68.} See *id.* at 23-26, 35-36.

^{69.} See *id.* at 20.

^{70.} For reflections on the significance of class and the legal structures of socioeconomic subordination in LatCrit theory, see Elizabeth M. Iglesias, Institutionalizing Economic Justice: A LatCrit Perspective on the Imperatives of Linking the Reconstruction of "Community" to the Transformation of Legal Structures that Institutionalize the Depoliticization and Fragmentation of Labor/Community Solidarity, 2 U. Pa. J. Lab. & Emp. L. 773 (2000) (LatCrit sources cited therein); see also Elizabeth M. Iglesias, Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis, 45 Villanova L. Rev. (forthcoming 2000). For further insight into the broad theoretical and political agenda emerging from the LatCrit organizers' decision to center class in LatCrit discourse, see Class in LatCrit: Theory and Praxis in a World of Economic Inequality, LatCrit V Substantive Program Outline (visited November 28, 2000) <<http://nersp.nerdc.ufl.edu/~malavet/latcrit/lcvdocs/substantiveprogram.htm>>.

^{71.} James Yates, Mississippi to Madrid: Memoir of a Black American in the Abraham Lincoln Brigade 95-96 (1989).

^{72.} See Cho, *supra* note 21, at 439-41; Angela Harris, [Foreword: The Jurisprudence of Reconstruction, 82 Cal. L. Rev. 741, 754 \(1994\)](#); Chris K. Iijima, The [Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm, 29 Colum. Hum. Rts. L. Rev. 47, 50 \(1997\)](#); Patricia Williams, [Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times, 104 Harv. L. Rev. 525, 529-30 \(1990\)](#).

^{73.} See, e.g., Sumi Cho & Robert Westley, Historicizing Critical Race Theory's Cutting Edge: Key Movements that Performed the Theory, in Critical Race Theory: Histories, Crossroads, Directions (Francisco Valdes, Jerome McCristal Culp, Jr. & Angela Harris eds.) (forthcoming).

74. See generally Francisco Valdes, [Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility in Social Justice Scholarship-Or, Legal Scholars as Cultural Warriors](#), 75 *Denv. U. L. Rev.* 1409 (1998).

75. See Valdes, *supra* note 74, at 1426-47.

76. See Cho, *supra* note 21.

77. See, e.g., Iglesias, *supra* note 10, at 623 (noting that the new intergroup solidarities enabled by a critical deconstruction of the Black-White paradigm “cannot be promoted at the expense of our theoretical and political commitments to combating the particular forms of racism experienced by Black people,” particularly given our increasing recognition of the intersectionality and interconnectivity that makes “Latina/o identity” as much Black as it is Hispanic, indigenous, and Asian).

78. See Valdes, *supra* note 74, at 1447 (discussing strategic quasi-essentialism in Queer sociolegal contexts); Wildman, *supra* note 19, at 311 (discussing strategic essentialism in LatCrit Theory).

79. See, e.g., Robert S. Chang, [The End of Innocence, or Politics After the Fall of the Essential Subject](#), 45 *Am. U.L. Rev.* 687 (1996).

80. See generally Francisco Valdes, *Outsider Scholars, Legal Theory & OutCrit Perspectivity: PostSubordination Vision as Jurisprudential Method*, in *Critical Race Theory*, *supra* note 73.

81. Bender, *supra* note 7, at 5 *Mich. J. Race & L.* at 924, 33 *U. Mich. J.L. Reform* at 340.

82. See Valdes, *supra* note 9, at 1093-94 (presenting a synopsis of LatCrit theory’s four functions: the production of substantive knowledge, the advancement of social transformation, the expansion and connection of antistatist struggles, and the cultivation of antistatist communities and critical coalitions).

83. See generally Francisco Valdes, [Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins](#), 8 *Yale J.L. & Human.* 161 (1996) (describing some of the sex/gender and sexual orientation norms that underlie and animate androsexism and heterosexism to produce the patriarchal form of homophobia—heteropatriarchy—that still prevails in Euroamerican societies, including the United States, today).

2. Berta Esperanza Hernandez-Truyol · & Sharon Elizabeth Rush, · *Culture, Nationhood, and the Human Rights Ideal*, 5 MICH. J. RACE & L. 817 (2000)

This Symposium on Culture, Nation, and LatCrit Theory continues the exciting work of a very young but productive branch of critical movements. LatCrit is a theoretical movement initiated as a distinct discourse within critical legal theory. Its origins are traceable to the first colloquium organized with the purpose of having Latina/o law professors and their friends critically explore the position of Latinas/os within the Academy and society. It precipitated an inquiry concerning what the politics of identity mean through a Latina/o lens, which, by necessity, is a panethnic prism. This first colloquium took place during the 1995 Annual Meeting of the Hispanic National Bar Association in Dorado, Puerto Rico. That gathering started the momentum for the regular planning of reuniones that promote the interrogation of what it means to be Latina/o in our diverse world, which necessarily promotes the relating of the Latina/o condition to other groups' locations, interests, and issues. Indeed, a central goal and foundational premise of LatCrit is to be diverse and inclusive. [n.1](#)

This Symposium on nation and culture illustrates these LatCrit goals and advances them. The two main works and the commentaries on them are rich explorations and representations of the voices and concerns of LatCrit theory. This Foreword engages all the works by focusing on the concept of voice and silence. Part I *819 locates the works in the axis of silence and power. Part II explores how critical theory and international human rights norms can be used to develop a progressive methodology to analyze and detect the exclusion or silencing of myriad voices. This Part develops a LatCritical Human Rights paradigm that, by internationalizing voice, serves as a useful tool to explore power-based silencing. Finally, in Part III, the authors illustrate how the proposed paradigm can focus the issues of culture and nation in a way that allows us to promote a non-essentialist, anti-subordination, inclusive personhood ideal.

0. I. Silent Complicity

In her essay, *The Paradox of Silence: Some Questions about Silence as*

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Resistance, [n.5](#) Professor Roberts focuses on the ambiguity surrounding the meaning of silence. She examines the difficulty we have as educators in knowing whether silence is resistance or whether it is a defense mechanism, often involuntarily imposed on minorities to protect ourselves from hostile voices. [n.6](#) Moreover, Professor Roberts highlights that hostile voices are heard by subordinated people everywhere: from the doctor, the welfare agent, and even the welfare law itself. [n.7](#) She agrees with Professor Montoya that our challenge perhaps is “not to figure out a theoretical distinction between subjugation and resistance, but to listen to those who have been silenced so that we might learn how to work toward a more just society.” [n.8](#)

Professor Roberts is correct about the importance of listening to silenced people. This is readily apparent in Professor Gema Perez-Sanchez’s article, *Franco’s Spain, Queer Nation?*, [n.9](#) an informative and thoughtful examination of the effort by Francisco Franco and his administration to repress socially deviant behavior, particularly homosexuality. Although seemingly unrelated to the topic of silence, silence is a significant aspect of the article. Specifically, Professor Perez-Sanchez’s article makes a significant contribution to the literature because of “the lack of historical studies about Spanish-speaking lesbians, gays, bisexuals, and transgendered people.” [n.10](#) She speaks to the silence of other scholars who have chosen not to write about homosexuality in Franco’s oppressive regime.

Professors Ratna Kapur and Tayyab Mahmud enrich our understanding of Franco’s oppression of sexual minorities in their essay, *Hegemony, Coercion, and Their Teeth-Gritting Harmony: A Commentary* *821 on *Power, Culture, and Sexuality in Franco’s Spain*. [n.11](#) They provide a rich critique of Professor Perez-Sanchez’s presentation of her theoretical understanding of the relationship between State power and repression and offer alternative ways of understanding that part of Spain’s history. Similarly, Professor Peter Kwan’s piece, *Querying a Queer Spain Under Franco*, [n.12](#) supports the importance of Professor Perez-Sanchez’s analysis of the dearth of literature in this area and pleads for a more thorough explanation of her claim “that under Franco, Spanish nationalism was somehow dependent upon or even threatened by the Spanish gay community, . . . since . . . lesbians were simply invisible to Francoism and gay men were deeply fearful and closeted.” [n.13](#)

Professor Kwan’s insight provides a more subtle but important way in which all of the pieces in this Symposium are related to silence. The articles and comments speak volumes about the way in which complicity in silence promotes hegemony. Thus, not only is it important to listen to the people who have been silenced—Professor Montoya herself, those who want to teach about “difference,” the sexual minorities under Franco’s regime—but it is also important to ask: Why are majority members who believe in justice afraid to speak out when they see injustice?

As the following story highlights, most of us are not above speaking out. Recently, at our first faculty meeting of the year, one of the co-chairs of our appointments committee presented the hiring policy to us for adoption. Detailed

in the proposed policy were our many curricular needs, as well as a statement that we are committed to diversity in hiring. Moreover, the co-chair emphasized that because two African American colleagues had resigned within the last two years and a third was on a two-year visit at another law school (and unclear as to whether she would return), it was especially important for us to diversify our faculty.

The immediate response to the co-chair's comments came from a colleague who opined that it seemed that an emphasis on diversity in hiring in recent years had interfered with our ability to fill curricular needs. He stated that our policy ought to be to hire the best qualified candidates who will teach the courses we need to have taught. Although the former chair of appointments noted *822 that in the past, offers to diverse candidates were consistent with both quality and curricular coverage, few other colleagues expressed support for a curricular need approach to hiring and intimated that quality and diversity were mutually exclusive.

This sentiment evoked a rebuttal from Kenneth Nunn, our Associate Dean for Law Center Affairs, the only African American on the active faculty. He was clearly offended by the suggestions that to diversify the faculty we needed to lower our standards. Many, if not the majority of us, were also offended by the suggestion, which became apparent as we talked about it afterward.

Not surprisingly, the more vocal members of the faculty could not refrain from reiterating their beliefs. One comment in particular impugned the integrity of the entire appointments committee, however. A member of that committee immediately stated how the comment had offended her, and "I agree" came from across the room before the meeting was adjourned.

Shortly after the meeting, Professor Nunn resigned from his position as Associate Dean. He could not believe that none of us publicly supported him as he tried to defend the position that diversity and quality go together. In light of the general unsupportive environment of racial minorities at the law school, the absence of public support at the faculty meeting was too much for him. Silence through an omission can be as actively destructive and hurtful as any commission. This underlying and powerful theme of silence and silencing permeates the works in this Symposium issue. All of the situations presented opportunities for the majority to speak against the injustices they witnessed. Oppressive regimes are allowed to exist because members of a powerful group, through their silence, act in complicity with the oppressors. Some may think their silence is ambiguous. As between the victim and the majority complicitor, however, it is clear who has the greater responsibility to break the silence in the face of injustice.

Thus, the topic of silence is multifaceted. Depending on context, it can be evidence of oppression, resistance, or complicity. This Symposium is an opportunity to explore the global dimensions of silence in the international human rights arena.

1. II. Re/Forming Law: Critical Theory and Human Rights

Critical Race Theory (CRT) generally, and LatCrit specifically as part of that philosophy, is a movement that at its core is committed to humanitarian conceptions of personhood—conceptions that transcend the limitations of current equality doctrine. [n.15](#) Human rights norms that reflect and dovetail with these CRT aspirations were first comprehensively embodied in a 1948 United Nations document known as the Universal Declaration of Human Rights. [n.16](#) *824 By declaring the universality of human rights, signatory nations broke the silence of complicity and committed themselves to speak up for the silenced minorities. This declaration was a revolutionary articulation and embrace of a plethora of individual rights central to personhood, including not only civil and political rights but also social, economic, cultural, and solidarity rights. [n.17](#) The Universal Declaration, together with CRT, provides a new voice which, in turn, facilitates an analytical construct from which to consider this Symposium's works.

The globalization of domestic critical theory reconfigures the human rights idea, both domestically and internationally, and transforms it into a truly inclusive paradigm of dignity and personhood. Simultaneously, localizing international human rights norms and principles effects a paradigm shift in which domestic language of citizenship and equality, in other words, voice, speaks of incorporating international human rights notions of personhood and human dignity. [n.20](#)

Indeed, considering the statist implication of norms, human rights law is an important component of a project of liberation. In its short formal existence, human rights law has effectively reconfigured the doctrine of sovereignty, the formerly omnipotent power of the state [n.30](#) to do as it wished with its nationals, wherever they might be, and with anyone who found himself or herself within its territorial jurisdiction. [n.31](#) Human rights law is revolutionary from a statist perspective in that it renders individuals subjects of international law, rather than just objects. [n.32](#) Under the human *827 rights idea, states are accountable for the treatment of all persons, citizens and non-citizens alike, within its borders. [n.33](#) Human rights law, then, is a morally compelling tool for denouncing sovereign actions that derogate the dignity and integrity of personhood and citizenship. [n.34](#) The human rights model enables the aspiration to full personhood for all persons of all races and geographies. The regime is not perfect, however; it has structural flaws in its origins and applications that need reconstruction before it can serve its potential for emancipation of the human spirit. It is in this reconstitutive endeavor that local critical theory can inform global norms.

Beyond the geopolitical underpinnings and ramifications of this split, critical theorists can offer additional insights for this division. For one, a critical analysis unmaskes the power imbalance among the actors. During the meetings concerning a single human rights convention, the Western/Northern states, reflecting their "equal access" liberal republican ideology, were comfortable only

with the grant of civil and political rights, that is, those “negative” rights of individuals to be free from governmental interference. [n.45](#) These same states, however, rejected undertaking any positive obligations involving granting social, economic, and cultural rights. [n.46](#)

The hegemonic Western interpretation misleads one to believe that only civil and political rights, the so-called “first generation” rights, are the “real” international human rights. Indeed, the roots of civil and political rights lie in the American Declaration of Independence and the French Declaration des Droits de L’Homme .Rights of Man, documents resulting from the late eighteenth century political and social uprisings that sought to identify *832 impermissible governmental intrusions into individual lives. [n.50](#) Yet, as critical thinkers have underscored, it is important to recall that these eighteenth-century social and political revolutions coexisted with slavery, the decimation of indigenous peoples, and with women’s status as chattel, which are hardly positions of equality or equal access but rather are classic examples of how power can be used to silence. [n.51](#) Thus, while all agree that civil and political rights such as the rights to non-discrimination, liberty, and security of the person are not only desirable but necessary, current interventions into equality discourses require a recognition of their exclusionary beginnings to ensure that all persons benefit from this historical legacy. To be sure, as critical theorists would emphasize, a comprehensive review not only of the documents but also of the position of the majority of the states in the community of nations makes plain that economic, social, and cultural rights are not, and should not be, a second class of rights, even if they are known as the second generation. [n.52](#)

We have shown in a general way how the local insights can serve to develop, expand, and transform the global notions of human rights. Here, for clarification, we offer a few particular examples of the utility of such local interventions. One example pertains to the idea of non-discrimination based on sex, which is embraced by virtually all human rights instruments including the U.N. Charter. The reality of this protection starts to crumble if one looks beyond the non-discrimination clauses to some of the substantive provisions granting specific rights. While Article 2(1) of the ICCPR mandates sex equality, Article 20 provides that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” [n.54](#) On its face, Article 20 does not proscribe, and thus allows, sex-based advocacy of hatred. Canons of construction—both domestic from contract law and international from the Vienna Convention on the Law of Treaties—provide that the general cedes to the specific. Therefore, the omission of sex from Article 20 signifies that sex- based violence if at all undesirable, at least does not rise to the evil of ethnic, race, or religion-based hatred. Such omission is deeply troubling because the world recognizes that sex-based violence and other forms of sex inequalities are prevalent and persistent global problems. [n.55](#) Sex- equality notions are silenced; sex-based hatred is given exclusive public voice.

Certainly, a critically informed analysis suggests that the inconsistency in

the provisions within the ICCPR be resolved so as to maximize the protections against discrimination. Moreover, a critical analysis would also challenge the rules of interpretation that serve to undercut the human rights ideal. Local theory thus is an invaluable tool for the reconstruction of global norms in a fashion sensitive to the intersections of race, sex, ethnicity, class, religion, language, and sexuality. Such critical theoretical interventions are not only appropriate but also necessary for a truly *834 workable human rights model. Women and others who are victims of sex- based discrimination are entitled to an equal voice in a just society.

More disturbing, however, in an analysis of hegemonic power in the international sphere is the definition of racial discrimination in the Race Convention: “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field or public life.” [n.57](#) This definition, by including descent, national, and ethnic origin as racial classifications, effectively internationalizes and institutionalizes the U.S. social construction of the race model—the binary Black/White paradigm. Moreover, the definition in CERD does not take sex into account. It also effectively racializes ethnicity and national origin and has the potential to effect erasures of classifications that are not Black or White. [n.58](#)

This observation identifies the polarization of the economic development of states as a location in which a critical theoretical intervention can inform human rights discourse. A critical unveiling of the origins of human rights concerns also shows the source of the pervasive inequalities attendant to market *836 economies, and to the economic locations of states as core or peripheral, developed or underdeveloped, North or South. [n.63](#)

As previously noted, the polarization of the political interests of states resulted in the severance of the human rights vision into civil and political rights on the one hand and social, economic, and cultural rights on the other. [n.64](#) Currently, economic globalization is having an effect on these historical developments. For example, programs of aid to underdeveloped states were destined for failure, as they were not only highly bureaucratized but were implemented without a thorough comprehension of the various cultures and needs of diverse peoples and of the problems in the societies receiving aid. [n.65](#) Current turmoil surrounding WTO meetings underscores the persisting economic divide. [n.66](#) But it is flawed to compartmentalize economics from civil and political rights. Recent post-Cold War events reveal that great civil and political discord flows if not directly, at least in part, from economic instability and inequality. [n.67](#) The attendant consequences are increased nationalism, ethnic strife, civil war, and human rights abuses, which are challenges that the international community is struggling to resolve, regrettably without marked success. [n.68](#) Significantly, *837 the failure is attributable, in part, to the powerful states’

unwillingness to speak up for and listen to the less powerful states' voices.

Beyond reconceptualizing the discourse of economic globalization, critical theory may have valuable input into crafting the solutions for other conflicts that involve diverse peoples. Critical movements can be instrumental in ensuring that human rights discourse does not simply become an echo of the master narrative, but rather that these discourses assure that it incorporates respect and appreciation for different cultures.

Significantly, however, just as critical theory can contribute to the development and transformation of human rights discourse, the international human rights complex can provide a valuable and useful intervention into critical theory discourse in numerous ways. To elucidate this exciting possibility, we show how such an incorporation of an internationalist view can enrich analysis. *838 Specifically, we use the writings of this Symposium as examples of the utility of a reconstructed human rights paradigm.

First, by providing a construct in which rights are indivisible and interdependent, the human rights framework helps move beyond a comparative sameness/difference approach to equality. [n.70](#) International human rights classifications constitute a more expansive and, consequently, more useful measure of an individual's attainment of dignity, integrity, and full citizenship. For example, the global standards for non-discrimination include categories such as language, culture, and social origin. In regard to providing the bases for any protections at all, [n.71](#) many local environments, including the United States, contest and reject these categories. Moreover, a human rights indivisibility and interdependence analysis requires that these categories as a whole be the measure of an individual's equality, rather than the single-trait fragmented analysis of United States jurisprudence.

Moreover, the multilingualism of the international human rights tradition is a useful addition to domestic critical theory. A body that listens only to one language from its people not only silences groups within its realm that speak different tongues, but also silences outside groups who share the language. Thus, importing the human rights discourse's acceptance of multilingualism serves to promote local acceptance of the voices of othered groups.

This Part explored the relationships of critical race theory to human rights law. Part III reviews how the main works and the comments in this Symposium, without specifically articulating a human rights agenda or even contextualizing their themes within the international human rights framework, embrace the central human rights personhood ideal. This analysis elucidates how globalizing critical theory and localizing human rights norms can redefine notions of participation so that all persons can enjoy their full complement of human rights.

2. III. Retooling the Narratives

The two central works of this Symposium, and their accompanying comments serve to illuminate how a LatCrit human *840 rights paradigm can be a

valuable intervention into the antisubordination project. First, Professor Montoya's basic desire "to deepen the analysis of the interplay between the subordinating aspects of being silenced and the liberatory aspects of silence, its expressive and performative aspects that are part of our linguistic and racial repertoires" [n.75](#) is facilitated by the human rights construct, which protects not only language [n.76](#) but also minority cultures within majority communities [n.77](#) and families. [n.78](#)

Professor Montoya's work provides examples of language's links to subordination. [n.79](#) She explores the negatives of silencing in the African American, [n.80](#) Latina/o, [n.81](#) and gay/lesbian communities. [n.82](#) Yet these examples would be well served by critically informed international human rights analysis that offers the disempowered a framework from which to raise their voices. Similarly, the liberatory aspects of silence are reinforced by the international human rights prohibitions against hate speech—a protection much broader than exists in the United States because of its rejection of hate speech prohibition. [n.83](#) These protections, it seems, supply support to Professor Montoya's observation that ".languages are not neutral vehicles for the transmissions of thoughts .but . . . are imbedded in the history and struggles of the people who use them." [n.84](#)

This critically retooled human rights paradigm also serves to harmonize Professor Montoya's thesis with the commentators' observations. Professor Bender, for example, while recognizing the power of silence to bring out the voices of the disempowered, also shows how silence can be used to further entrench the disempowerment of the subordinated. [n.87](#) In doing so, he concludes that "Professor Montoya's focus on the silencing of race and gender in the law school classroom as the culprit for this 'pernicious' change leads me to question whether my own focus on race and culture makes the false promise to my students of the relevance of race in legal education." [n.88](#)

Professor Roberts's commentary illustrates how human rights norms would enrich analysis. By focusing on how culture and cultural tropes within minority communities can further subordinate the disempowered, Professor Roberts notes that silences may have multiple meanings. [n.92](#) However, she questions whether silence can be a strategy of resistance because of the difficulty of distinguishing silencing and silence as resistance, [n.93](#) and "the complications of incorporating the study of silence into resistance scholarship." [n.94](#) By observing how silence potentially constitutes complicity in subordination, Professor Roberts, without having engaged in a human rights analysis, nevertheless underscores its value. The indivisibility and interdependence approach of the critical human rights model, by eschewing an either-or dichotomizing approach and instead taking a both-and view, [n.95](#) allows the evaluation of silence as both liberating and subordinating.

Significant in the context of Franco's repression of homosexuals is the protection of persons against degradation. [n.105](#) A state's laws and other conduct effecting isolation and degradation of its citizens are anathema to the human

rights ideas of personhood and dignity. As such, rendering sexual others as subhuman constitutes state-sponsored degrading treatment proscribed by human rights norms. In particular, to consider a person illegal and ***844** dangerous [n.106](#) because of his or her affectional orientation is a classification that places a human being in fear for his or her safety. Any person under these conditions is rightly concerned that he or she will be arrested and subjected to aversion therapy. Such threats are effective silencers for many homosexuals. Indeed, to live in such fear is a deep affront to one's dignity as well as to one's feeling of safety and security. [n.107](#)

Moreover, the rights to liberty [n.108](#) and to freedom of movement [n.109](#) are also at risk. Spain's security measures [n.110](#) mandated confinement of homosexuals in special institutions, [n.111](#) permitted "confinement in a re-education institution, .created a prohibition from residing in a place or territory designated .by the court, and .required submission to the surveillance of the delegates." [n.112](#)

This human rights framework also is useful in evaluating the comments on Professor Perez-Sanchez's work. Professors Kapur and Mahmud wish that Professor Perez-Sanchez had been more forthcoming with her conception of state and state power and had focused more on the "relationship between coercion and ideology" as well as the "demarcation of the public and the private." [n.118](#) The suggested critical human rights lens, however, renders these observations less pointed, for a state is responsible for human rights violations, whether they are effected by commissions or omissions. The latter brings into stark relief the role of the public/private divide. If the private sector—civil society—is acting in such a way so as to systematically effect prohibited discriminations, the failure of the state to intervene results in state responsibility.

CONCLUSION

The human rights model we have envisioned serves as a valuable analytical tool for nation and culture. The main works of this Symposium and their respective comments unveil the complexities of ***846** language and silence, resistance and subordination, performativity and the rule of law. Neither nation nor culture can be used as a shield to insulate the state from responsibility and accountability for the oppression of any person within its jurisdiction, or as a sword to eviscerate the rights of those within its reach .

1. See Elizabeth M. Iglesias & Francisco Valdes, [Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas](#), 19 [Chicano-Latino L. Rev.](#) 503, 507- 08 (1998); see generally Symposium, Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory, 53 [U. Miami L. Rev.](#) 875 (1999), 4 [U. Tex. Hispanic L. J.](#) 1 (1999); Symposium, LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship, 2 [Harv. Latino L. Rev.](#) 1 (1997). Thus, the original gathering and those that have taken place since are multiethnic, multiracial experiences where community transcends and embraces racial, ethnic, national, linguistic, sexual, gender, class, and religious differences and commonalities. Significantly, particularly in the context of the importance of literature in the Academy, this young movement has produced an expansive and impressive series of published colloquia. See Symposium, Comparative Latinas/os: [Identity, Law and Policy in LatCrit Theory](#), 53 [U. Miami L. Rev.](#) 575 (1999); Symposium, Difference, Solidarity and Law: Building Latina/o Communities through LatCrit Theory, 19 [UCLA Chicano-Latino L. Rev.](#) 1 (1998); Colloquy, [International Law, Human Rights, and LatCrit Theory](#), 28 [U. Miami Inter-Am. L. Rev.](#) 177 (1996-97); Symposium, LatCrit: Latinas/os and the [Law](#), 85 [Cal. L. Rev.](#) 1087 (1997), 10 [La Raza L.J.](#) 1 (1998); Symposium, LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship, 2 [Harv. Latino L. Rev.](#) 1 (1997); Colloquium, Representing [Latina/o Communities: Critical Race Theory and Practice](#), 9 [La Raza L.J.](#) 1 (1996). In addition, the proceedings of LatCrit V are slated for publication in the Denver University Law Review and the proceedings of LatCrit VI will be published in the University of Florida Law Review. See generally, *The Latina/o Condition: A Critical Reader* (Richard Delgado & Jean Stefancic eds., 1998); Berta Esperanza Hernandez-Truyol, [Borders \(En\)gendered: Normativities, Latinas, and a LatCrit Paradigm](#), 72 [N.Y.U. L. Rev.](#) 882 (1997) [hereinafter Hernandez-Truyol, *Borders (En)gendered*]; Berta Esperanza Hernandez-Truyol, [Building Bridges: Bringing International Human Rights Home](#), 9 [La Raza L.J.](#) 69 (1996) [hereinafter Hernandez-Truyol, *Building Bridges II* (suggesting the use of international human rights to establish Latinas'/os' claim to civil and political rights as well as to social, economic, and cultural rights), Berta Esperanza Hernandez-Truyol, [Building Bridges III—Personal Narratives, Incoherent Paradigms, and Plural Citizens](#), 19 [Chicano-Latino L. Rev.](#) 303, 307-08 (1998) [hereinafter Hernandez-Truyol, *Building Bridges III* (aspiring to building of bridges between and among communities of color within the United States and suggesting the globalizing of those interests as a means of attaining full citizenship and enjoyment of human rights)].

2. Francisco Valdes, Foreword-[Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practice to Possibilities](#), 9 [La Raza L.J.](#) 1, 7 n.25 (1996).

3. Margaret Montoya, [Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse](#), 5 [Mich. J. Race & L.](#) 847 (2000), 33 [U. Mich. J.L. Reform](#) 263 (2000).

4. Steven W. Bender, [Silencing Culture and Culturing Silence: A Comparative Experience of Centrifugal Forces in the Ethnic Studies Curriculum](#), 5 [Mich. J. Race & L.](#) 913 (2000), 33 [U. Mich. J.L. Reform](#) 329 (2000).

5. Dorothy E. Roberts, *The Paradox of Silence: Some Questions about Silence as Resistance*, 5 [Mich. J. Race & L.](#) 927 (2000), 33 [U. Mich. J.L. Reform](#) 343 (2000).

6. See id.
7. See id.
8. Id. at 5 Mich. J. Race & L. at 931, 33 U. Mich. J.L. Reform at 347.
9. Gema Perez-Sanchez, [Franco's Spain, Queer Nation?](#), 5 Mich. J. Race & L. 943 (2000), 33 U. Mich. J.L. Reform 359 (2000).
10. Id.
11. Ratna Kapur & Tayyab Mahmud, [Hegemony, Coercion and Their Teeth-Gritting Harmony: A Commentary on Power, Culture, and Sexuality in Franco's Spain](#), 5 Mich. J. Race & L. 995 (2000), 33 U. Mich. J.L. Reform 411 (2000).
12. Peter Kwan, [Querying a Queer Spain Under Franco](#), 5 Mich. J. Race & L. 989 (2000), 33 U. Mich. J.L. Reform 405 (2000).
13. Id. at 5 Mich. J. Race & L. at 992, 33 U. Mich. J.L. Reform at 408.
14. See Sharon E. Rush, *Loving Across the Color Line: A White Adoptive Mother Learns About Race* (2000).
15. See, e.g., Hernandez-Truyol, *Borders (En)gendered*, supra note 1 (discussing the normative perspective of equality doctrine). Equality narratives in the United States appear fixated on an “equality as sameness” model. This paradigm has generated an awkward jurisprudence on issues of race (particularly in the affirmative action context), sex (especially in the ongoing pregnancy debate), and gendered family hierarchies (notably in discussions about the public and private including essential but unpaid work). See Richard Delgado, *The Coming Race War?* (1996); Charles Lawrence III & Mari J. Matsuda, *We Won't Go Back: Making the Case for Affirmative Action* (1997); James Carney, *Why Talk Is Not Cheap: The Turmoil of Clinton's Race Initiative Is the Latest Evidence of America's Black-White Distrust*, Time, Dec. 22, 1997, at 32 (citing strife among members of the Initiative's advisory board, critics, and even White House staffers over the makeup and goals of the President's Initiative on Race); see also [Geduldig v. Aiello](#), 417 U.S. 484 (1974); **Berta E. Hernandez**, [To Bear or not to Bear: Reproductive Freedom as an International Human Right](#), 17 *Brook. J. Int'l L.* 309 (1991); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 *Ind. L.J.* 375 (1981). Critical race and feminist theorists have challenged the validity and authority of an equality jurisprudence that aspires to and insists upon blindness with respect to race, sex, and class differences—a patently unworkable approach. A realistic reconsideration of the equality paradigm would acknowledge both sameness and difference, serve to resolve concerns about fairness and (in)justice, explain the real incongruity between the goals of full participation in society by all persons and the reality of the invisibility and marginalization of many individuals and groups, and unite, rather than divide, varied but often interdependent communities. 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) (focusing on Latina/o community diversity within the United States); Hernandez-Truyol, *Building Bridges II*, supra note 1, at 69.
16. G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/810 (1948).
17. For writings on these topics by Richard Delgado, a leading critical race theorist, see, for example, Richard Delgado, *The Rodrigo Chronicles: Conversations about America and Race* (1995) [hereinafter Delgado, *The Rodrigo Chronicles*] and Richard Delgado, *When Equality Ends* (1999) [hereinafter Delgado, *When Equality Ends*].

18. See, e.g., [Filartiga v. Pena-Irala](#), 630 F.2d 876, 883 (1980) (noting that, notwithstanding the distinction between binding treaties and non-binding pronouncements, the Universal Declaration of Human Rights is regarded as authoritative law by the international community); see also Statute of the International Court of Justice, 59 Stat. 1055, art. 38 (June 26, 1945) (providing that custom is a source of law); cf. The [Paquete Habana](#), 175 U.S. 677, 700 (1899) (noting that “where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”).

19. See Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science, and Politics in the Paradigmatic Transition* 263 (1995) [hereinafter Santos, *Toward a New Common Sense* (defining “globalized localism” as “the processes by which a given local phenomenon is successfully globalized, be it the worldwide operation of TNC’s, the transformation of the English language into lingua franca, the globalization of American fast food or popular music, or the worldwide adoption of American copyright laws on computer software” and explaining a “localized globalism” as “the specific impact of transnational practices and imperatives on local conditions that are thereby destructured and restructured in order to respond to transnational imperatives.”). My use of the term “globalized localism” refers to the use of a domestic critical concept to inform international norms. The “localized globalism” phrase in this work refers to the use of an international human rights concept to develop, expand, and transform the context, concept, meaning, and application of critical theoretical constructs.

Currently, in both international and domestic spheres, it is virtually impossible to travel through a day without repeated confrontations with the term globalization. However, seldom will one encounter remotely similar definitions. See *id.* Professor Santos defines globalization as the “process by which a given local condition or entity succeeds in extending its reach over the globe and, by doing so, develops the capacity to designate a rival condition or entity as local.” Boaventura de Sousa Santos, *Toward a Multicultural Conception of Human Rights*, *Zeitschrift für Rechtssoziologie* 18.1 1, 3 (1997) [hereinafter Santos, *Toward a Multicultural Conception*; see also Aihwa Ong, *Strategic Sisterhood or Sisters in Solidarity? Questions of Communitarianism and Citizenship in Asia*, 4 *Ind. J. Global L. Stud.* 107 (1996) (defining globalization as “the intensified capitalist integration of the world.”). I use the term globalization to refer to the processes by which inter-, intra-, and transboundary movements of capital, information, and persons serve to influence, affect, and change norms, traditions, and processes of learning, information and goods exchanges, and lifestyles.

20. See **Berta** Esperanza **Hernandez-Truyol**, *Human Rights, Globalization and Culture: Centering Personhood in International Narrative*, in *Moral Imperialism, A Critical Anthology* (forthcoming 2001) [hereinafter Hernandez-Truyol, *Human Rights, Globalization and Culture*; Hernandez-Truyol, *Building Bridges II*, *supra* note 1; Hernandez-Truyol, *Building Bridges III*, *supra* note 1.

21. See, e.g., *Critical Race Feminism* (Adrien K. Wing ed., 1997); *Critical Race Theory: The Cutting Edge*, (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); *Critical Race Theory: The Key Writings that Formed the Movement*, (Kimberle Crenshaw et al. eds., 1995) [hereinafter *Critical Race Theory: Key Writings*; *The Latina/o Condition*, *supra* note 1; *The Politics of Law*, (David Kairys ed., 1998).

22. See Eric Yamamoto, *Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America* (1999).

23. See International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 5 I.L.M. 350.

24. See Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief, G.A. Res. 36/55, U.N. GAOR 3d Comm., 36th Sess., 73d plen. mtg., U.N. Doc. A/RES/36/55 (1982).

25. See Technical Review of the U.N. Draft Declaration on the Rights of Indigenous Peoples, U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

26. See Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 19 I.L.M. 33.

27. See Convention on the Rights of the Child, G.A. Res. 44/25 (1990) (visited Oct. 9, 2000) <<http://www.unicef.org/crc/crc.htm>>.

28. See U.N. Charter, art. 2, para. 1 (explicitly providing that “[the Organization is based on the principle of the sovereign equality of all its Members]”); Report of the World Summit for Social Development, U.N. Doc. A/ CONF.166/9 (1995). But see *Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, U.N. Int’l Arb. Trib, translated in 17 I.L.M. 1 (1978) (finding that U.N. General Assembly Resolution on Permanent Sovereignty Over Natural Resources (Res. 1803) which was supported by major western powers trumped a parallel resolution, U.N. General Assembly Resolution on Permanent Sovereignty Over Natural Resources (Res. 3171), which was strongly supported by developing countries).

29. See, e.g., U.N. World Conference on Human Rights: Vienna Declaration and Programme of Action, U.N. World Conference on Human Rights, 220th mtg., U.N. Doc. A/CONF. 157/24 (1993), reprinted in 32 I.L.M. 1661 (1993) (including a prohibition of private violence as well as economic violence); see also Irwin P. Stotzky, *Silencing the Guns in Haiti* (1997) (discussing the various aspects of society and human well-being in the context of the Haiti situation); **Berta E. Hernandez-Truyol**, Sex, Culture, and Rights: A Re/Conceptualization of Violence for the Twenty-First Century, 60 *Alb. L. Rev.* 607 (1997) (suggesting and providing numerous examples of the inter-connectedness of civil and political rights with social and economic rights, as well as the nexus of culture and economic violence against women).

30. See Louis Henkin, An Agenda for the Next Century: The Myth and Mantra of State Sovereignty, 35 *Va. J. Int’l L.* 115, 118 (1994).

31. For a detailed discussion of the impacts of globalization and sovereignty, see, for example, *Challenging Boundaries: Global Flows, Territorial Identities* (Michael J. Shapiro & Hayward R. Alker eds., 1996); David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (1995); Saskia Sassen, *Globalization and its Discontents: Essay on the New Mobility of People and Money* (1998); and Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (1996).

32. See, e.g., *The Nurnberg Trial*, 6 F.R.D. 69, 110 (1946) (“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”). The Nurnberg and Tokyo tribunals were created to address human rights atrocities committed during World War II and to punish violators. See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 *Am. U. L. Rev.* 1, 9-10 (1982); see generally, Louis B. Sohn, *Cases On United Nations Law* 898-967 (1956).

33. See Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare “Reform”*, 71 *S. Cal. L. Rev.* 547 (1998); Berta Esperanza Hernandez-Truyol, *Reconciling Rights in Collision: An International Human Rights Strategy*, in *Immigrants Out! The New Nativism and the Anti- Immigrant Impulse in the United States* 13, 39 (Juan F. Perea ed., 1997).

34. See Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 *Harv. Hum. Rts. J.* 87 (1993).

35. See Santos, *Toward a New Common Sense*, supra note 19, at 346.

36. See, e.g., Delgado, *When Equality Ends*, supra note 17, at ch. 6 (discussing inherent unfairness of formal and informal legal structures for outsiders).

37. See Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, in *Critical Race Theory: The Cutting Edge*, supra note 21, at 64 (describing the “stories... told by the ingroup... [that provide it with a form of shared reality in which its own superior position is seen as natural”]; Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los Angeles”*, 66 *S. Cal. L. Rev.* 1581 (1993).

The success of the White Man’s control of the world is debatable; but his success in making other people act just like him is not. No culture that has come in contact with Western industrial culture has been unchanged by it, and most have been assimilated or annihilated, surviving only as vestigial variations in dress, cooking or ethics.

Stephanie M. Wildman, *Privilege Revealed* 112 (1996) (citing Ursula K. Le Guin, *Feeling the Hot Breath of Civilization*, N.Y. Times Book Rev., Oct. 29, 1989, at 11); see also Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987) (discussing the myth of egalitarian, color-blind constitution); Regina Austin, *Sapphire Bound!*, 1989 *Wis. L. Rev.* 539 (discussing the need for Black women’s voices so that issues cease to be viewed from White middle class perspective); Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 *Vill. L. Rev.* 767 (1988) (arguing that courts reflect White supremacy and discussing economic costs of racism); Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 *Va. L. Rev.* 539 (1991) (arguing that the failure to present personal experiences reinforces majoritarian perspective); Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 *S. Cal. L. Rev.* 1367 (1992) (arguing that the hearings reflect patriarchal assumptions about women); Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 *U. Pa. L. Rev.* 933 (1991) (critiquing the dominant school of normative jurisprudence); Richard Delgado, *Shadowboxing: An Essay on Power*, 77 *Cornell L. Rev.* 813 (1992) (discussing the dominant culture’s preference for “objective” norms because they are of benefit to the empowered as they define the meaning of the rules); Neil Gotanda, *A Critique of “Our Constitution is Color Blind”*, 44 *Stan. L. Rev.* 1 (1991) (arguing that the color-blind approach promotes White supremacy); Linda S. Greene, *Multiculturalism as*

Metaphor, 41 DePaul L. Rev. 1173 (1992) (arguing that the Supreme Court's "normative vacuum" results in failure to enforce equality and inclusion); Margaret M. Russell, Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film, 15 L. Stud. F. 243 (1991) (noting that movies reinforce and replicate popular culture's view of racial subordination); Robert A. Williams, Jr., [Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination](#), 8 Ariz. J. Int'l & Comp. L. 51 (1991) (arguing that the Supreme Court's jurisprudence dealing with American Indians comes from medieval European tradition and law of colonization brought by Columbus and seeks to legitimate cultural racism).

38. An example of the exclusionary process for defining human rights is the adoption of the Universal Declaration of Human Rights. The Universal Declaration was signed by only 48 states, with 8 states abstaining (including Saudi Arabia, the USSR, South Africa, and Yugoslavia). Today with 185 independent states belonging to the community of nations, the majority of which never voted on the Declaration, this document is nevertheless broadly accepted as embodying a plethora of customary universal human rights norms. See **Berta Esperanza Hernandez-Truyol**, Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution in Women's International Human Rights: A Reference Guide (Kelly Askin & Dorean Koenig eds., 1998) [hereinafter Hernandez-Truyol, Human Rights Through a Gendered Lens; **Berta Esperanza Hernandez-Truyol**, Reconciling Rights in Collision in Immigrants Out!, supra note 33, at 257-59 (describing customary norms and international human rights law); see also Statute of the International Court of Justice, supra note 18, at art. 38 (citing custom as one of the primary sources of international law).

39. For a more detailed analysis of the Universalism-Relativism debate, see Guyora Binder, [Cultural Relativism and Cultural Imperialism in Human Rights Law](#), 5 Buff. Hum. Rts. L. Rev. 211 (1999) and **Berta Esperanza Hernandez-Truyol**, [Women's Rights As Human Rights—Rules, Realities and the Role of Culture: A Formula for Reform](#), 21 Brook. J. Int'l L. 605 (1996).

40. See R. Anand, International Law and the Developing Countries (1987); M. Shaw, International Law (2d ed. 1986); see generally Hernandez-Truyol, Human Rights Through a Gendered Lens, supra note 38.

41. Critical analysis, whether or not expressly framed as such, unpacks in the business context the master narrative of the law and economics ideology too. See, e.g., Claire Moore Dickerson, [Cycles and Pendulums: Good Faith, Norms, and the Commons](#), 54 Wash. & Lee L. Rev. 399, 401, 422 (1997) (arguing that the commercial terrain is not level); Claire Moore Dickerson, [From Behind the Looking Glass: Good Faith, Fiduciary Duty and Permitted Harm](#), 22 Fla. St. U. L. Rev. 955, 969, 977, 1003 (1995) (arguing that the law and economics perspective harms the weaker party and that structural inequality is built into partnerships under the statute drafted and supported by the law and economics scholars).

[42.](#) The Universal Declaration included rights to life, liberty, nondiscrimination, and others such as the prohibition of slavery, inhuman treatment, arbitrary arrest, and arbitrary interference with privacy which are considered civil and political in nature. See International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, arts. 6, 7, 8(1)-(2), 15, 16, 18, 999 U.N.T.S. 171 (including rights such as the right to life; freedom from torture or cruel, inhuman, or degrading treatment or punishment; freedom from slavery and servitude; nonapplicability of retroactive laws; right to recognition as a person before the law; and the right to freedom of thought, conscience, and religion). The Universal Declaration also included rights such as the right to social security, full employment, fair working conditions, an adequate standard of living, and participation in the cultural life of the community which are considered economic, social, and cultural in nature. See International Covenant on Economic, Social, and Cultural Rights, opened for signature Dec. 19, 1966, 993 U.N.T.S. 3.

[43.](#) See Amartya Sen, *Development as Freedom* (1999); *The Quality of Life*, (Martha Nussbaum & Amartya Sen eds., 1993).

[44.](#) See Hernandez-Truyol, *Human Rights Through a Gendered Lens*, *supra* note 38.

[45.](#) *Id.*; see also Mary G. Dietz, *Context is All: Feminism and Theories of Citizenship*, *Daedalus*, Fall 1987, at 1, 4-5. Interestingly, and perhaps ironically, the liberal vision, while stuck on civil and political rights even at the expense of the greater societal good, recognized the inviolability premise: "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.... The rights secured by justice are not subject to political bargaining or the calculus of social interests." *Id.* at 4 (quoting John Rawls, *A Theory of Justice* 3-4 (1971)). Negative rights are those that focus on the individual's personal rights with the consequent effect of placing limits on actions of governments. In contrast, positive rights and those that articulate a social bill of rights have attached to them positive government obligations. See generally Charles Taylor, *Human Rights: The Legal Culture*, excerpted in *International Human Rights in Context: Law, Politics, Morals* 173, 174-76 (Henry J. Steiner & Philip Alston eds., 1996).

[46.](#) See Dietz, *supra* note 45, at 4 ("The life of liberalism... began in capitalist market societies, and as Marx argued, it can only be fully comprehended in terms of the social and economic institutions that shaped it."); Hernandez-Truyol, *Human Rights Through a Gendered Lens*, *supra* note 38.

[47.](#) See Hernandez-Truyol, *Human Rights Through a Gendered Lens*, *supra* note 38.

[48.](#) See *id.*; see also *The Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960*, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960).

[49.](#) See *Feldbrugge v. The Netherlands*, 99 Eur. Ct. H.R. (ser. A) (1986); see also Martin Scheinin, *Economic and Social Rights as Legal Rights*, in *Economic, Social and Cultural Rights* 41, 43 (Asbjorn Eide et al. eds., 1995).

[50.](#) In contrast, while also based on revolution—the anti-colonialist and post-socialist revolutions—the champions of social, economic, and cultural rights sought to impose positive obligations on states for the well being of communities and society.

Appendices

[51.](#) See Romany, *supra* note 34, at 90 (“[The presence of patriarchy in these emancipatory structures [of liberalism reveals the gap between liberal concepts and reality.”]; see also Hernandez-Truyol, *Human Rights Through a Gendered Lens*, *supra* note 38; Ursula Vogel, *Marriage and the Boundaries of Citizenship*, in *The Condition of Citizenship*, 79 (Bart van Steenberg ed., 1994).

[52.](#) See International Covenant on Social, Cultural and Economic Rights, *supra* note 42. At this juncture, it is appropriate to mention that an ongoing debate exists between the Critical Legal Studies school and the Critical Race Theorists regarding the value of rights. See, e.g., Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, [22 Harv. C.R.-C.L. L. Rev. 301, 304 \(1987\)](#) (criticizing critical legal studies); Mark Tushnet, *An Essay on Rights*, [62 Tex. L. Rev. 1363, 1364-71 \(1984\)](#) (noting rights are unstable); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, in *Critical Race Theory: The Cutting Edge*, 84, 86 (Richard Delgado ed., 1995) (noting importance of rights language); see also Robert W. Gordon, *Some Critical Theories of Law and their Critics*, in *The Politics of Law*, *supra* note 21, at 641, 657-58.

[53.](#) See Ong, *supra* note 19, at 109 (defining globalization as “the intensified capitalist integration of the world”); Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, in *Theorizing Citizenship* 184-95 (Ronald Beiner ed., 1995) (proposing a principle of group representation).

[54.](#) International Covenant on Civil and Political Rights, *supra* note 42, at art. 20.

[55.](#) See Human Development Report 1995, U.N. Development Programme (1995).

[56.](#) See International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 23.

[57.](#) *Id.* at 353 (emphasis added).

[58.](#) See Delgado, *When Equality Ends*, *supra* note 17, at ch. 8 (discussing how the Black-White binary erases Latinas/os from the aspirations of civil rights efforts).

[59.](#) See Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, [85 Cal. L. Rev. 1213, 1219 \(1997\)](#), [10 La Raza L.J. 127, 133 \(1997\)](#).

[60.](#) Critical Race Theory: Key Writings, *supra* note 21, at xiv.

[61.](#) See Rhonda Copelon, *The Indivisible Framework of International Human Rights: Bringing it Home*, in *The Politics of Law*, *supra* note 21, at 216, 216- 17; see also Delgado, *The Rodrigo Chronicles*, *supra* note 17, at 95 (discussing the interdependence of “housing, food, medical care, education, and other basic needs,” which are second generation rights, with first generation civil and political rights); Hernandez-Truyol, *Human Rights Through a Gendered Lens*, *supra* note 38.

[62.](#) See Romany, *supra* note 34, at 89 (“International society can thus be viewed as a blown-up liberal state which legislates in accordance with liberal humanistic values and which accepts as part of a social contract those values which refer to the essential dignity and freedom of human beings.”); Young, *supra* note 53, at 16 (“[There is a deep similarity between the underclass problem in rich countries and the problem of poor countries.... [They too are economically ‘not needed and politically harmless, but challenge our moral foundations.’”).

63. See, e.g., Santos, Toward a New Common Sense, *supra* note 19, at 427 (“[The core-periphery hierarchy in the world system is the result of unequal exchange, a mechanism of trade imperialism by means of which surplus-value is transferred from the periphery to the core.”); see also Delgado, When Equality Ends, *supra* note 17, at ch. 3 (discussing impact on quality of life of non-regulation of housing market).

64. See *supra* notes 38-45 and accompanying text.

65. See, e.g., David M. Trubek, Back to the Future: The Short, Happy Life of the Law and Society Movement, 18 Fla. St. U. L. Rev. 1, 23-24 (1990); see also Delgado, When Equality Ends, *supra* note 17, at ch. 3 (discussing the impact of non-regulation on colonies within the United States). But see Jane E. Larson, [Free Markets Deep in the Heart of Texas](#), 84 Geo. L.J. 179 (1995) (suggesting that proper response to informal economics is gradualized formalization to which Larson refers as “regularization” and rejecting “either or” options of “outright deregulation” or “uniform regulation”).

66. See Sam Howe Verhovek, After Riots, Seattle Is Chagrined Yet Cheerful, N.Y. Times, Dec. 6, 1999, at A28 (describing the protests by critics of the WTO, who believe the organization puts the interests of multinational corporations over concerns of ordinary people and the environment); Prague Protests Turn Violent (Sept. 26, 2000) <<http://www.cnn.com/2000/WORLD/europe/09/26/prague.meeting.03/index.html>> (describing the anti-capitalist riots that erupted during the IMF and World Bank meeting in Prague, based on the belief that the IMF and World Bank’s structural, economic, and loan policies are responsible for all of the economic problems of the third world).

67. See Sassen, Globalization and its Discontents, *supra* note 31.

68. See *id.*; see also Ralf Dahrendorf, The Changing Quality of Citizenship, in Theorizing Citizenship, *supra* note 53, at 16-17 (noting that post communist states do not have a “bourgeoisie” concerned both about civil rights and economic growth which results in a confusion that, in turn, makes persons seek a “citizenship” that is formulated on a desire to belong to a homogeneous group—a “deplorable” result as “the true test of the strength of citizenship rights is heterogeneity.”).

69. See generally, Critical Race Feminism, *supra* note 21; Critical Race Theory: Key Writings, *supra*, note 21; Critical Race Theory: The Cutting Edge, *supra* note 21; Global Critical Race Feminism (Adrien K. Wing, ed. 2000); The Latina/o Condition, *supra* note 1.

70. For a brief discussion of the interdependence/indivisibility perspective, see Rhonda Copelon, The Indivisible Framework of International Human Rights: Bringing it Home, in The Politics of Law, *supra* note 21, at 216, 216-17; Hernandez-Truyol, Gendered Lens, *supra* note 38.

71. See *Hernandez v. New York*, 500 U.S. 352 (1991) (addressing issues of language-based discrimination); *Rust v. Sullivan*, 500 U.S. 173 (1990) (refusing to extend constitutional protections regarding right to abortion to include public funding for the same); *Hopwood v. Texas*, 84 F.3d 720 (5th Cir. 1996) (concerning race and culture issues).

72. Critical Race Theory: Key Writings, *supra* note 21, at xiv.

73. See, e.g., Perea, *supra* note 59 (noting how the Black/White paradigm does not serve Latinas/os well in the struggle for attainment of equality).

Appendices

[74.](#) See Thomas Franck, *The Power of Legitimacy Amongst Nations* (1990); Thomas Franck, *The [Emerging Rights to Democratic Governance](#)*, 86 *Am. J. Int'l L.* 46 (1992); Saskia Sassen, *Toward a Feminist Analytics of the Global Economy*, 4 *Ind. J. Global L. Stud.* 7 (1996); see also Hernandez-Truyol, *supra* note 39.

[75.](#) Montoya, *supra* note 3, at 5 Mich. J. Race & L. at 850, 33 U. Mich. J.L. Reform at 266.

[76.](#) See International Covenant on Civil and Political Rights, *supra* note 42, at art. 2.

[77.](#) See *id.* at art. 27.

[78.](#) See *id.* at art. 23.

[79.](#) See generally Montoya, *supra* note 3.

[80.](#) See *id.* at 5 Mich. J. Race & L. at 849, 33 U. Mich. J.L. Reform at 265.

[81.](#) See *id.* at 5 Mich. J. Race & L. at 873-79, 33 U. Mich. J.L. Reform at 289-95.

[82.](#) See *id.* at 5 Mich. J. Race & L. at 849, 33 U. Mich. J.L. Reform at 265.

[83.](#) See International Covenant on Civil and Political Rights, *supra* note 42, at art.

19.

[84.](#) Montoya, *supra* note 3, at 5 Mich. J. Race & L. at 850, 33 U. Mich. J.L. Reform at 266.

[85.](#) *Id.*

[86.](#) See *id.*

[87.](#) See generally Bender, *supra* note 4.

[88.](#) *Id.* at 5 Mich. J. Race & L. at 920, 33 U. Mich. J.L. Reform at 336.

[89.](#) See Montoya, *supra* note 3, at 5 Mich. J. Race & L. at 894-98, 33 U. Mich. J.L. Reform at 310-14.

[90.](#) Bender, *supra* note 4, at 5 Mich. J. Race & L. at 922, 33 U. Mich. J.L. Reform at 338.

[91.](#) [500 U.S. 352 \(1991\)](#) (allowing for the peremptory exclusion of bilingual jurors); see also Juan F. Perea, *Latina/o Identity and Pan-ethnicity: Toward Latcrit Subjectivities: Five Axioms in Search of Equality*, 2 *Harv. Latino L. Rev.* 231 (1997).

[92.](#) See generally Roberts, *supra* note 5.

[93.](#) See *id.* at 5 Mich. J. Race & L. at 928, 33 U. Mich. J.L. Reform at 344.

[94.](#) *Id.*

[95.](#) See Hernandez-Truyol, *Human Rights, Globalization and Culture*, *supra* note 20.

[96.](#) Santos, *Toward a Multicultural Conception*, *supra* note 19, at 13.

[97.](#) See generally Perez-Sanchez, *supra* note 9.

[98.](#) See *supra* note 42 and accompanying text.

[99.](#) See James D. Wilets, [Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective](#), 60 *Alb. L. Rev.* 989 (1997); James D. Wilets, [International Human Rights Law and Sexual Orientation](#), 18 *Hastings Int'l & Comp. L. Rev.* 1, 66 n.295 (1994).

[100.](#) See Universal Declaration of Human Rights, *supra* note 16, at art. 2.

[101.](#) See International Covenant on Civil and Political Rights, *supra* note 42, at art. 2.

[102.](#) See International Covenant on Social, Cultural and Economic Rights, *supra* note 42, at art. 2, 3.

[103.](#) Universal Declaration of Human Rights, *supra* note 16, at art. 2; International Covenant on Civil and Political Rights, *supra* note 42, at art. 2, cl. 1; International Covenant on Social, Cultural and Economic Rights, *supra* note 42, at art. 2, cl. 2.

[104.](#) See Universal Declaration of Human Rights, *supra* note 16, at art. 7; International Covenant on Civil and Political Rights, *supra* note 42, at art. 7; International Covenant on Social, Cultural and Economic Rights, *supra* note 42, at art. 3.

[105.](#) See Universal Declaration of Human Rights *supra* note 16, at arts. 5, 7; International Covenant on Civil and Political Rights, *supra* note 42.

[106.](#) See Perez-Sanchez, *supra* note 9, at 5 Mich. J. Race & L. at 958 n.56, 33 U. Mich. J.L. Reform at 374 n.56.

[107.](#) See Universal Declaration of Human Rights, *supra* note 16, at art. 3 (calling for the right to life, liberty, and security of the person); International Covenant on Civil and Political Rights, *supra* note 42, at art. 9 (calling for the right to liberty and security of the person).

[108.](#) See International Covenant on Civil and Political Rights, *supra* note 42, at art. 9; Universal Declaration of Human Rights *supra* note 16, at art. 3.

[109.](#) See International Covenant on Civil and Political Rights, *supra* note 42, at art. 12; Universal Declaration of Human Rights, *supra* note 16, at art. 13.

[110.](#) See Perez-Sanchez, *supra* note 9, at 5 Mich. J. Race & L. at 960, 33 U. Mich. J.L. Reform at 376.

[111.](#) See *id.* at 5 Mich. J. Race & L. at 964 n.85, 33 U. Mich. J.L. Reform at 380 n.85.

[112.](#) *Id.* at 5 Mich. J. Race & L. at 959 n.58, 33 U. Mich. J.L. Reform at 375 n.58.

[113.](#) International Covenant on Civil and Political Rights, *supra* note 42, at art. 27.

[114.](#) See *id.* (protecting minorities from imposition of majority norms); see also Hernandez-Truyol, Women's Rights as Human Rights, *supra* note 39.

[115.](#) See Perez-Sanchez, *supra* note 9, at 5 Mich. J. Race & L. at 944- 45, 33 U. Mich. J.L. Reform at 360-61.

[116.](#) See *id.*

[117.](#) See *id.* at 5 Mich. J. Race & L. at 971-86, 33 U. Mich. J.L. Reform at 387-403.

[118.](#) Kapur & Mahmud, *supra* note 11, at 5 Mich. J. Race & L. at 998, 33 U. Mich. J.L. Reform at 414.

[119.](#) See, e.g., Hernandez-Truyol, Borders (En)gendered, *supra* note 1 (analyzing the role of culture in Latina/o identity).

3. Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces In Legal Communication, Pedagogy And Discourse*, 5 MICH. J. RACE & L. 847 (2000).

Language and voice have been subjects of great interest to scholars working in the areas of Critical Race Theory and Latina/o Critical Legal Theory. Silence, a counterpart of voice, has not, however, been well theorized. This Article is an invitation to attend to silence and silencing. The first part of the Article argues that one's use of silence is an aspect of communication that, like accents, is related to one's culture and may correlate with one's racial identity. The second part of the Article posits that silence can be a force that disrupts the dominant discourse within the law school classroom, creating learning spaces where deeper dialogue from different points of view can occur. The third part of the Article focuses on the silencing of racial issues within legal discourse and public policy debates, a silencing that is a mechanism for racial control and hegemony. The Article uses the work and imagery of Mikhail Bakhtin, a Russian literary critic, to analyze how silence can have centering and de-centering linguistic force, offering performative and communicative choices that affect racial identities.

[The centripetal forces of the life of language, embodied in a "unitary language," operate in the midst of heteroglossia [Language is stratified not only into linguistic dialects . . . but also—and for us this is the essential point—into languages that are socio-ideological: languages of social groups [and "professional" . . . languages. [n.1](#)

***848 Introduction**

Language analysis has been a topic of major concern within Latina/o Critical Legal Studies ("LatCrit") since its inception. [n.2](#) LatCrit scholars have developed a number of themes in analyzing how language has been an important mechanism for the economic and cultural marginalization of Latina/o communities as well as of other communities of color. [n.3](#) However, language always has been, and remains, a vehicle for resistance and a resource for the collective identity of Latina/o communities. [n.4](#) Major LatCrit themes include 1)the connection between language and identity; [n.5](#) 2)the historical, geographic, and familial dimensions of language loss and forced assimilation; [n.6](#) and 3)the relationship between language and racial performances. [n.7](#)

***849** Silence and silencing have been among other linguistic concepts [n.8](#) that have already appeared in the writings of Race Critics and LatCrits exploring

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the relationship between language and subordination. For example, Patricia Williams has noted that while the long silence of African Americans has been broken and their history of being spoken for is over, the struggle now is to give their stories “a hearing of [their own]” so they are not merely the ironic sound of “silent voice[s.]” [n.9](#) In addition, the official silencing represented by the English-Only Movement through its use of law to proscribe the public use of Spanish and other minority languages has been vehemently criticized by LatCrits and others. [n.10](#) Some of the most significant work on silence and silencing has been done within Queer Theory, exposing the ways in which invisibility and its counterpart, inaudibility, are imposed on sexual minorities. [n.11](#) Queer Theory also examines discriminatory public policies that aim to silence gays, lesbians, bisexuals, and transgendered persons, such as the military’s purportedly liberal “Don’t Ask, Don’t Tell” regulations. [n.12](#)

Other aspects of silence, such as performative and communicative aspects, have been eloquently described by the Asian American Crits—particularly by Sharon Hom [n.13](#) and Margaret *850 (H.R.) Chon. [n.14](#) In describing the work of other Chinese women artists and writers, Hom calls attention to the “many tongues that silence, too, can speak.” [n.15](#) She cautions against “the logocentric privileging of ‘voice’ that can colonize the very differences we seek to recognize.” [n.16](#)

This Article seeks to deepen the analysis of the interplay between the subordinating aspects of being silenced and the liberatory aspects of silence, its expressive and performative aspects that are part of our linguistic and racial repertoires. Languages are not neutral vehicles for the transmission of thoughts. Instead, languages are imbedded in the history and struggles of the people who use them. I posit that silence is a crucial component of the languages of communities of color—especially those that are bi/multilingual. Bi/multilingual communities deploy silence in ways that connect them to others in their own racial/ethnic communities and distinguish them from the dominant monolingual English majority. Thus, silence can disturb and disrupt the linguistic hegemony that is inherent in and coalesces the power relations between the dominant majority and communities of color, relations that are stabilized by the ideology of White supremacy.

I relate silence within cultural discourse to silence in classroom discourse and to silence in legal discourse to show how silence and silencing are used to draw and maintain the borders of racialized power. The three concepts build on one another: One needs to have an understanding of silence and silencing as gendered and cross-cultural discourses to understand silence and silencing as pedagogical discourses; and finally one needs to understand both silence and silencing as legal discourse. (See Figure 1.) In other words, in order to understand how silence and silencing infiltrate the law and its structures and actors, one needs to understand how legal pedagogy compounds the potentialities of silence and silencing that are present in the linguistic relationships of a multiracial, polyglot, and fragmented society.

***851** Figure 1

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

1. The Imagery Of Bakhtin's Centripetal and Centrifugal Forces—Mikhail Bakhtin, an early Twentieth Century Russian literary critic, did foundational work through his study of the novel in articulating how language is heteroglossic (literally “different tongues”). [n.17](#) Bakhtin contended that the meaning within language is not static; any utterance has multiple meanings. [n.18](#) Moreover, the meanings of words evolve over time and from place to place. [n.19](#) Bakhtin explains, [Language is heteroglot from top to bottom: it represents the co- existence of socio-ideological contradictions between the present and past, between differing epochs of the past, between different socio-ideological groups in the present, between tendencies, schools, circles and so forth, all given a bodily form. These “languages” of heteroglossia intersect each other in a variety of ways, forming new socially typifying “languages.” [n.20](#) ***852** Bakhtin argued that meaning occurred because of this heteroglossia that both resulted from and contributed to “dialogic relationships”—the multitude of historical, social, and economic aspects of events that affected and shaped meaning. [n.21](#) A core characteristic of Bakhtin's conceptualization of language was its dialogic nature. For him, language was interactive, understandable “only in terms of its inevitable orientation towards another.” [n.22](#)

Using a Bakhtinian vocabulary, I assert that legal language and legal discourse seek to be “unitary” in their rejection of certain types of “heteroglossia,” especially in their resistance to the languages and silences of subordinated groups, such as people of color, sexual minorities, and others who have been historically oppressed.

The beginning epigram from Bakhtin about the centripetal and centrifugal forces of language suggests the central theme of this paper. [n.23](#) I posit that the law and traditional legal discourse, grounded in an ideology of White supremacy, produce a centripetal force that constantly centralizes power and privilege within the hands of those dedicated to maintaining the status quo. On the other hand, the languages of outsiders produce centrifugal forces that decentralize and destabilize that power and privilege. (See Figure 2.) Silence and silencing are important features of this tension between the centripetal force and the centrifugal forces that inhere in language.

***853** Figure 2

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

I use the imagery of centripetal force in connection with the subordinating consequences of silencing. Throughout this Article, I develop the idea that persons and communities of color are silenced by the dominant majority, who maintain racial hegemony, in part, by enforcing a “unitary” language with a controlled and limited set of meanings. In part, this occurs by authorizing a legal pedagogy that creates a cadre of legal professionals who have been socialized to accept a linguistic regime in which the topic of race is not discussed. These legal professionals—judges, lawyers, and law professors—participate in and reproduce a legal hierarchy that depends on silence and silencing. One way that the dominant majority maintains its racial hegemony is by privileging certain types of silence (such as the constitutional right against self-incrimination) [n.24](#) and by ritualizing other types of silence (such as the typical responses to racialized hate speech).

***854** Comparatively, I use the imagery of centrifugal force in connection with the liberatory heteroglossic potential and reality of silence. Communities of color use silence to communicate resistance and opposition to those who marginalize them. [n.25](#) The meanings of silence are complex, varied, and often beyond the interpretive understanding of the dominant culture. Such resistance is also evident in the law school classroom, where students of color can withdraw their participation as a way of destabilizing the power dynamics and resisting the pressures to assimilate to the socializing norms of the credentializing experience.

2. Organization of Article—This Article is an invitation to notice and attend to silence as it is used by people of color, especially in classrooms. First it explores how silence and race are correlated to different language systems. Second, it analyzes how silence is experienced in the law school classroom. Finally, this Article looks at how silence is managed through legal discourse. This Article is also a preliminary and tentative exploration of silence and silencing as discursive mechanisms used by this society to sustain racial arrangements within an ideology of White supremacy.

Boaventura de Sousa Santos, a noted sociologist and sociolegal scholar, has written that silence has been neglected as an object of study by Western social scientists for these four reasons: [First, silence constitutes a threat not only to accepted scientific boundaries but also to established methods of social research. Second, social scientists tend to feel more confident in speculating with words about words than in speculating with words about silence. . . . Third, the usefulness of studies of silence has not yet been demonstrated, and will not be so until the language/silence rhythms in different societies begin to be decoded. Fourth, and most importantly, Western civilization is inherently biased against

silence and this necessarily affects our scientific preferences and capabilities. [n.26](#) Acknowledging these impediments, this Article is an attempt to develop a concatenated analysis of silence and silencing. As more fully described below, this analysis links silence as it is used in ***855** communication and performance by subordinated racial groups, usually within languages other than English, with the classroom silence of students of color as well as with the silencing of the topic of race within legal discourse.

Because silence is by its nature ambiguous, [n.27](#) it can be difficult to distinguish silence from silencing. That is, it can be difficult to know when someone is holding silence as a matter of will and agency in contrast to being “silenced”—made to be quiet because her verbal and/or nonverbal expressions are rejected, devalued, or misinterpreted. Consequently, each section provides examples of how subordinated groups are silent in courtrooms, classrooms, and as subjects of legal discourse. The analysis attempts to “decode the language/silence rhythms” in these examples, as proposed by Professor Santos. [n.28](#)

The first part of this paper surveys the extensive literature on silence produced within the disciplines of socio-linguistics, literature, religion, literary criticism, and music. I focus on the cross-cultural meanings of silence and its use by peoples of color, especially women of color. Silence has multiple meanings and therefore I discuss how it is invoked in different ways. More important for purposes of the racial analysis of this paper, I describe silence as a characteristic of the communication systems of people of color, especially those from non-English linguistic communities, and therefore an important mechanism by which they perform their racial identities. I argue that there is a nexus between racial discrimination and racialized bilingualism and the use of silence. The judicial opinions in *Hernandez v. New York*, [n.29](#) where Latinos were excluded from jury service because of their hesitancy (that is, their momentary silence) in saying that they could abide by the official interpretation of the testimony of Spanish-speaking witnesses, demonstrate that silence can have discriminatory consequences for language minorities. [n.30](#) I contend that the silence was racially coded by the prosecutor, who arrogated to himself the right to interpret the silence in a way that was detrimental to the potential jurors and devastating in its consequences for the citizenship rights of the Latina/o community. [n.31](#)

***856** The second part of the Article builds on the analysis of cultural discourse laid out in the first part. Utilizing the research on silence from other disciplines, I draw implications for the law school classroom, where silencing is an important aspect of the experience of many students of color. Using the work of Paolo Friere, [n.32](#) I posit that it is possible to teach to the silence and challenge the practices that systematically mute the voices of the students of color. Further, I propose that silence is a pedagogical tool that can be used effectively to normalize the different communication styles that are present in a classroom with racial, ethnic, and gender diversity, and to de-emphasize the dominant language patterns of the White majority. In this way silence has the centrifugal forces described by Bakhtin. The use of silence—especially by a professor who is a

woman of color—carries some risk because it can create disorienting experiences that are likely to be resented by some students. On the other hand, it can be a significant positive signal to students of color that their language patterns are not deficient. Moreover, within law school clinics, the skills of client interviewing and counseling can be improved through the understanding and use of silence, especially for the significant portion of low-income clients who are from communities of color.

Finally, in the last section of the Article I examine the dynamics of silence and silencing within the larger parameters of the law and legal discourse. Using the insights about cultural discourse from the first section and racial power as it is reproduced by the discursive dynamics within law school classroom from the second section, I focus on the pervasive silencing of the topic of race as it relates to legal doctrine, institutions, and actors. Information about identity markers—racialized, gendered, and sexual facts that define reality and histories for subordinated populations—is systematically defined as irrelevant by judges, legislators, and law professors. I discuss one well-known case, *Meritor Savings Bank v. Vinson*, [n.33](#) and one obscure one, *Williams v. City of New York*, [n.34](#) to show that traditional legal reasoning ignores the racial contexts of disputes. In this way silence can have a hegemonic effect, deluding us into thinking that race, gender, sexual orientation, and other characteristics of identity do not have to be mentioned because they do not matter; their alleged transparency proves their irrelevance.

***857** In this last section, I argue that whole areas of law, such as property, criminal law, and constitutional law, are taught with a deliberate inattention to issues of race. This silence creates a worldview that is imbedded with the values and interests of White supremacy.

I conclude the Article with a personal narrative [n.35](#) involving hate speech. Hate speech is a particularly difficult legal injury because it implicates so much about silence and silencing. With the narrative I try to use the technique of implicature [n.36](#) to show how hate speech exposes the contradictions in legal practices in a particularly effective manner. I link this personal narrative to an historical one about Sor Juana Inez de la Cruz, a Seventeenth Century poet and nun who was silenced by the Catholic Church after publicly supporting the right of women to study and have intellectual freedom. [n.37](#) Ecclesiastical silences and silencings were as imposed and controlled by the Church in that era as legal silences and silencings are by the nation- state today.

0. I. Silence and Silencing: Their Cross-Cultural and Cross-Racial Aspects

A. Theorizing Silence And Silencing: Their Cross-Cultural and Gendered Qualities And so / We stay / Quiiiiiiiet. [n.38](#) Belonging to a society and participating in the political and civil life of the society are basic rights of citizens. [n.39](#) Being denied the right to participate and therefore to belong can have

devastating consequences for a community, especially when the denial *858 is related to one's collective relations, one's racial/ethnic identity, or one's way of being in the world as learned from one's family and community. "Cultural citizenship refers to the right to be different (in terms of race, ethnicity, or native language) with respect to the norms of the dominant national community, without compromising one's right to belong, in the sense of participating in the nation-state's democratic processes." [n.40](#) This section examines the way silence can be used as a racial marker, that is, as a way of being seen as different by the dominant culture or as a way of differentiating oneself from the dominant community. I demonstrate that such differences can lead to limitations on the exercise of one of the main prerogatives of citizenship, namely, the right to serve as a juror.

The spoken word is one of the primary tools of lawyers and law professors. The law demands that students and practitioners use words effectively. Communication, however, is not just a matter of using words; much of the meaning of our interactions is transmitted through nonverbal gestures, or paralingual noises that accompany our words—the smiles, frowns, eyebrow movements, the ums and the ah ha's. Silence is also one of the choices available to us in our repertoire of communicative devices. Silence, however, is differentiated from words, gestures, and utterances in that it is both the context and the background for spoken communication and part of the code of meaning. Theories connecting silence to other elements of vocal and non-vocal communication are useful as a basis for evaluating the sociopolitical and sociolegal consequences of silence and its counterpart, voice. An analysis of silence came from Bernard P. Dauenhauer, who offered three profiles of silence: "intervening silence," as with the timing of jokes or the pacing of literary works; "fore-and-after silence," the fringe of silence that precedes and follows expressions of sound; and "deep silence." [n.41](#) Silence in any of these profiles can be either benign or malign; it "can be as distressing and misery-laden as it can be consoling and peace-*859 bearing." [n.42](#) Dauenhauer's early analysis of silence ended with a statement of its characteristics: "Silence is, inter alia 1) a deliberate human performance. But 2) it cannot be completely performed by an individual acting alone." [n.43](#) This notion of silence as an interactive process is central to an understanding of silence and is consistent with the Bakhtinian view of language as dialogic. [n.44](#)

Deborah Tannen, [n.45](#) and her collaborator Muriel Saville-Troike, [n.46](#) were among the first to include a gendered and cross-cultural analysis in their study of silence. [n.47](#) Saville-Troike described silence as having different dimensions, structures, and symbolic meanings, with its use acquired in ways that are analogous to the acquisition of spoken language according to the norms of particular speech communities. [n.48](#) For her, silence has what she terms "dimensions": first in the sense that not all silence is communicative; that is, at times silence is merely the absence of noise. [n.49](#) Secondly, the use of silence is subject to the norms and conventions of different speech communities. [n.50](#)

As with words, the use of silence is regulated in different cultures according to age, rank, gender, and other social characteristics and may be proscribed or prescribed at different times and in different places. [n.51](#) Religious or meditative silence, as within the Quaker, [n.52](#) Church of God, [n.53](#) Catholic, and Hindu [n.54](#) traditions, illustrates variations in the manner in which silence is regulated or defined.

***860** The manner in which silence is used can also depend on the extent to which information is communicated explicitly or implicitly, which can correlate with whether the culture is individualistic or collectivistic. [n.55](#) Linguists use the terms “low-context communication” to refer to direct and precise statements in which meanings are embedded in the messages being transmitted and “high-context communication” to language systems that involve understatements, indirect statements, and the interpretation of pauses in conversation. [n.56](#) Low-context communication is more characteristic of individualistic cultures, and high-context communication is more characteristic of collectivistic cultures. [n.57](#) Silence is highly valued in high-context cultures, while in low-context cultures, directness is valued and ambiguity will be eliminated by explicit communication. [n.58](#)

Another aspect of silence is its capacity to be used intentionally or inadvertently to deceive or mislead. [n.59](#) For example, silence is sometimes introduced as evidence in trial proceedings to determine the guilt or innocence of a defendant. [n.60](#) Silence, however, is nuanced and may be difficult to interpret. Saville-Troike offers the following symbolic or attitudinal meanings for silence: nonparticipation, anger, sorrow, respect, disapproval, dislike, indifference, alienation, avoidance, mitigation, concealment, mystification, dissimulation, and image manipulation. [n.61](#) Silence is communicative in other ways as well. For instance, it often substitutes for words in emotionally charged conversations, in delicate situations, or when the topic involves taboos. [n.62](#) In Japanese culture, silence is so important that there is a word, *ma*, for spaces or pauses in conversation that express meaning. [n.63](#) One linguist has listed the following typical meanings of silence: 1) lack of information; 2) no pressure to talk; ***861** 3) thinking about what to say; 4) speed of thinking; 5) avoid argument; 6) agreement; 7) disagreement; 8) doubt; 9) boredom; 10) uncertainty; 11) wondering; 12) impoliteness; 13) punishment; 14) disturbance; 15) inarticulateness; 16) concern; 17) preoccupation; 18) isolation; 19) anger; and 20) empathic exchange. [n.64](#)

Just as silence has meaning in verbal communications systems, it also has meaning in other systems of expression, such as the arts. Musical, theatrical, and artistic works often integrate silence as a purposeful element of the production: two extreme examples are John Cage’s famous composition, *4’33,”* and Robert Rauschenberg’s *White Paintings*. [n.65](#) Cage’s composition consists of four minutes and thirty-three seconds of silence and Rauschenberg’s canvas is perfectly blank. [n.66](#) Both have been described “as neutral surface[s], collecting the surrounding environment into the work itself.” [n.67](#)

Silence is also communicative in the sense that it is learned in the same way that voiced communication is learned. The study of the acquisition of speech patterns by children reveals that in learning how to make the appropriate sounds for words, children also learn how to use silence appropriately, by being shushed at various times and places. [n.68](#) Speech ethnographers who inquire into “what can be said when, where, by whom, to whom, in what manner, and in what circumstances . . . also consider who may not speak.” [n.69](#)

In a recent work, Robin Patric Clair, a communication theorist, surveys previous book-length studies of silence as well as the contributions of feminist scholars to the understanding of gendered silence. [n.70](#) Clair then examines the ways in which marginalized groups are not only silenced by the dominant culture but also participate in the silencing of other marginalized peoples. [n.71](#) Clair uses sexual harassment narratives from the workplace and the university milieu to *862 show how individual, collective, and institutional responses can contribute to what she calls the “organization of silence.” [n.72](#) This phrase is intended to have Gramscian overtones because she is referring “to the ways in which interests, issues and identities of marginalized people are silenced and to how those silenced voices can be organized in ways to be heard.” [n.73](#) Clair’s work draws on the work of many feminists who have used silence as emblematic of women’s oppression, such as Catherine A. MacKinnon, [n.74](#) as well as those, such as Mary Daly, [n.75](#) Tillie Olsen, [n.76](#) Adrienne Rich, [n.77](#) and Audre Lord, [n.78](#) who have addressed silence as a central topic in their explorations of sexism and patriarchy.

*863 B. Silence and Silencing: Cross-Cultural Meanings

Communication can be difficult even among persons with a common language and similar backgrounds and worldviews. Words have multiple meanings, and intonations and gestures can contribute to the ambiguity of expressive speech. To this complexity we can add silence; it is, in and of itself, ambiguous. [n.80](#)

Deborah Tannen has analyzed the negative value of silence, especially when it is being misinterpreted and misjudged by persons from different cultural traditions. [n.81](#) After studying the speech patterns of New Yorkers (and New York Jews in particular), [n.82](#) she described their conversational style as fast talkers or “crowders.” [n.83](#) Fast talkers are associated with interrupting and making others feel upset, dissatisfied, or incompetent. [n.84](#) But fast talkers can also feel uncomfortable because the speech of slow talkers is punctuated with pauses, which fast talkers experience as rude silences that break the pace of the conversation. [n.85](#) Conversation is a process of taking turns and can be disrupted when the participants are unaccustomed to the other’s use of silence. [n.86](#) The fast talker can be confused about whether the slow talker is silent or merely pausing before continuing, and the slow talker can end up feeling cramped. [n.87](#) Tannen

offers the following example: “Teachers, for example, know the problem of determining whether a student who has been called on is pausing because s/he doesn’t know the answer *864 (silence as omission of something), or because s/he is formulating the answer (silence representing underlying action).” [n.88](#)

Tannen indicates that the speed of conversational pacing is relative and has meaning only with reference to expectations that are largely culturally based. [n.89](#) So the negative valuation of the slow talker is based on the fast talker’s perception that s/he has nothing to say or is unwilling to speak, while the fast talker gives the slow talker the impression of crowding out others. [n.90](#)

Indigenous Peoples [n.91](#) have been identified as one group having a greater tendency towards silence than the dominant Euro-American norm. [n.92](#) This image has been formed both through the studies of linguists and ethnographers as well as through widespread stereotypes and caricatures (the “silent Indian”) propagated by the media. [n.93](#) Consider the following:

[It is the coupling of topic control and turn exchange that is largely responsible for the negative stereotypes held by non-Indians of Athabaskans. We hear people say that Athabaskans are ‘passive’, ‘sullen’, ‘withdrawn’, ‘unresponsive’, ‘lazy’, ‘backward’, ‘destructive’, ‘hostile’, ‘uncooperative’, ‘antisocial’, and ‘stupid’. And these are not just the attributions of ignorant bigots. Hippler, Boyer, and Boyer (1978) make these same attributions in a professional article on ethnopsychiatry . . . What the ‘Silent Indian’ sees on the other side of the interaction I cannot say from my own experience, but what we hear on our tapes is an almost breathless rush of talking at them. [n.94](#)

One of the best known studies of silence in Native communities was published by Keith H. Basso in 1972. [n.95](#) Basso began by acknowledging the popular image of Indigenous Peoples (or the *865 American Indian, in his terms) as having a “strong predilection for keeping silent.” [n.96](#) Such impressions were based on popular literature, which describes American Indian culture as having an “instinctive dignity,” “an impoverished language,” or a “lack of personal warmth.” [n.97](#) Basso’s research hypothesized that silence was deployed by Apaches in response to uncertainty and unpredictability in social situations. [n.98](#) Specifically, Basso found that Apaches were likely to remain silent when meeting strangers, [n.99](#) during the early stages of courting, [n.100](#) upon the return of children from boarding schools, [n.101](#) when receiving criticism, [n.102](#) and during periods of bereavement. [n.103](#) Basso hypothesizes that silence is contextual and will be used at different times depending on the social roles of the persons involved in the communication and their status in relation to each other. [n.104](#) Basso concludes the article with reference to similar interpretations of the use of silence among the Navajo. [n.105](#)

An extensive analysis of the use of silence among the Navajo has been done in the context of Peacemaking, their well-established system of traditional dispute resolution. [n.106](#) The author found that there were consistently different interpretations given to silence by Navajos and by non-Navajos. Navajos used silence, aware of the “power of words,” while non-Navajos were likely to

conclude that silence signaled a breakdown in the interaction. [n.107](#)

The novelist/poet/screen writer Sherman Alexie, a Spokane/ Coeur d'Alene Indian, has also incorporated silence into his writing, going so far as to specify the length of the silences. His short story, "Dear John Wayne," [n.108](#) is a fictive (and hilarious) colloquy between a 118-year-old Spokane woman and a cultural anthropologist from Harvard with a specialty in "mid- to late-twentieth-century Native American culture, most specifically the Interior *866 Salish tribes of Washington State." [n.109](#) Alexie has the Harvard anthropologist in a knot about whether his "informant" is telling him the truth about having lost her virginity to John Wayne. [n.110](#) Intriguingly, Alexie uses parentheses to specify the silences at several points in the conversation (e.g., twenty-seven seconds of silence, thirty-two seconds of silence, ten seconds of silence, etc.). [n.111](#) The reader is pulled into a reality in which silence is so important that both the author and his reader must attend to it.

Silence and silencing has been used adroitly by First Nations Peoples in Canada and by other Indigenous writers in resisting the persistent effects of the colonization of language, meaning, and communication strategies. [n.112](#) Living in and with the silencing of genocide and epistemicide—the killing of indigenous knowledge and languages—Indigenous writers are now writing silence into their texts as a way of "eluding the problem of colonial mimicry [n.113](#) . . . by reconfigur[ing colonial language and discourse and re-present[ing English]." [n.114](#) In an extended analysis of silence as a feature of Indigenous verbal and written communication, and the condition of being silenced as a result of the colonization process, the literary critic Dee Horne uses the book *Silent Words* by Ruby Slipperjack as illustrative of a narrative that "affirms First Nations and offers readers an alternative discourse and a pedagogy of silences." [n.115](#)

Drawing on Homi Bhabha's concept of the "third space," [n.116](#) Horne posits that colonized peoples can produce hybrid *867 texts. [n.117](#) These hybrid texts "challenge the colonial discourse without perpetuating it" [n.118](#) and "achieve a genuinely transformative and interventionist criticism of post-colonial reality." [n.119](#) Horne explains:

Slipperjack creates a hybrid form of writing in which she writes in English to critique the written as well as the spoken English of colonizers, yet uses implicature to foreground Ojibway pedagogy. Further, she conveys Ojibway traditions not only through but also between the silent words of print. I am using implicature to refer to the implied meanings, the unspoken words and feelings between the lines of print. I am also drawing on Adam Jaworski's definition in which he writes that implicature is the "unsaid elements of the utterance." In *Silent Words* the unsaid utterances often include unsaid, but implied, Ojibway traditions. [n.120](#)

The silence of Indigenous women in Mexico has been a major topic of study for Lourdes Arizpe, a Mexican social scientist. [n.121](#) She notes that campesinas [peasant women are reduced to caricatures, and that the homogenizing label of Indian "erase[s their linguistic and cultural identities by

lumping them all in the same category.” [n.122](#) In the mid-1980’s (the period about which she writes) Arizpe claims that in Mexico, unlike in Africa and Asia, the dislocation of persons from the provinces to the cities was predominantly female. [n.123](#) The great majority of these young women (70%) moved to the cities to work in service positions, often as domestic laborers. [n.124](#) These women have been multiply marginalized—through the disruptions of the colonial process and its divestiture of the lands of indigenous peoples—up to the contemporary exploitation caused by an ***868** enduring agricultural crisis and an uneven pattern of industrial development. [n.125](#) Warning against assuming that peasant women will conceive of their oppression in terms that are similar to those of women in “rational, individualized Western culture,” [n.126](#) Arizpe nonetheless asserts that “violence can be named in a thousand different languages, but it is still violence . . . [and breaking the silence is the first step.” [n.127](#)

Chicana literary critics, such as Tey Diana Rebolledo, and the writers they analyze have identified silence and voice as central topics in Chicana literature. [n.128](#) In ways that are at once similar to and different from the conditions of Mexican campesinas, Chicanas attribute their silence to the experience of colonization, including the religiously inspired sexual guilt of Catholicism, the patriarchal tensions in the family sphere, and the widespread lack of opportunity for education or non-exploitative employment. [n.129](#) Rebolledo posits that Chicanas form their identities through their writing by placing themselves within historical and political events that have implications for the Chicano/a community. [n.130](#)

In Delia’s Song, Lucha Corpi uses the Third World Strike at the University of California at Berkeley as the setting for her narrative. Rebolledo writes, “Having come from a traditional Mexican American family to Berkeley in the tumultuous late 1960s, Delia seeks understanding of her role in the strike, and through this understanding, she is able to achieve the power to give herself her own shape, to control her own identity.” [n.131](#) Corpi describes the process of being silenced and coming, fearfully, to voice and writing:

I learned silence, painfully, slowly, as one learns to write, stroke by stroke until the letters’ form and sound is etched on the whiteness of the paper, and voice uncovers its reason for being.

***869** Silence then is simply the pause between words, the breath that keeps them alive, the secret element that spans the territory between them.

I have feared you so, Silence, my oldest enemy, my dearest friend. I surrendered my tongue to you once, freely, and I learned your secret. I learned to write. [n.132](#) Maria Herrera-Sobek echoes a similar theme in “Silent Scream:”

So much pain
Inside our throats
We are afraid
That if we speak

We'll yell
 We'll shriek
 We'll moan
 We'll scream
 We'll cry
 And so
 We stay

Quiiiiiiet. [n.133](#) Chicana writers such as Corpi and Herrera-Sobek have focused on the forced silencing experienced by some women. Another prominent Chicana writer, Gloria Anzaldua, has written both about this type of gendered silencing as well as the opprobrium expressed toward Chicana girls and women who do speak up. Few authors write as elegantly as Anzaldua, with her weaving together of Spanish and English, prose and poetry, the words of la nina buena and those of jotos and machas. [n.134](#) This is nothing short of her *870 invention of a hybrid language for mestizaje [n.135](#) /a hybrid language for the practice of hybridity. [n.136](#) Anzaldua mourns the loss of language, culture, and land; the loss is coupled with the imposition of heterosexuality, “unaccented” English, and a tradition of stifling silence in the Mexicano/Chicano culture of the Borderlands. [n.137](#) “[Hablar pa’ ‘tras, repelar. Hocicon, repelona, chismosa; having a big mouth, questioning, carrying tales are all signs of being mal criada. In my culture they are all words that are derogatory if applied to women—I have never heard them applied to men.” [n.138](#)

Anzaldua’s words jerk me back into childhood memories. I am about eight years old; my sister Maria Elena is seven. Our neighbor, Don Archibeque, has nicknames for us. Mari he calls “brinca-charcos,” by “puddle-jumper” I understand him to mean that she is Tomboyish, more active than little Chicanitas should be. He calls me “sabelo-todo” or “know-it-all.” My childish exuberance is bruised by his words. I know he is chiding me not only for acting too smart but more importantly for not knowing my place as a girl, for talking too much, for not holding my tongue.

But lessons like these are hard-wired into us, and they are not easily unlearned. I hear the words that once crushed my spirits spill out of my mouth. I hear myself chiding my daughter, irrationally angry at her for being too much like me. “Sabelo-todo,” I hear myself say. You would think that I would know better. You would think that the memory of my being silenced as a child for not being sufficiently girlish would now silence me as an adult woman so that the cycle does not reproduce itself.

This reverie prompted by Alzaldua’s writing involves one of those linguistic fissures experienced by persons who live between two cultures. Living between two cultures often has the sensation of a slippage in vocabularies, meanings, and experiences. Asian Pacific American women have written about this feeling, sometimes describing it as being at a “loss of words.” [n.139](#) Zhong Xueping, born and raised in Shanghai but educated in the United States and now a professor at Tufts University, was a delegate to the Fourth *871 World

Conference on Women in Beijing. [n.140](#) In describing reunions with relatives after prolonged separations, Zhong reminisces about the misconceptions her relatives and the local people had about a women's conference and her participation in it. [n.141](#) The rumors that were circulating suggested that the international meeting was bringing dangerous elements into China, but any attempt to explain that the meeting was organized to discuss women's issues reduced it to a meeting dealing with trivial matters. [n.142](#) Thus, the two formulations that were available to her to explain what she was doing visiting China as an academic from the United States would be understood either as "dangerous foreign elements" or "trivial women's matters." [n.143](#) Zhong reflects on the ambiguities of communication and the wisdom of silent self-interrogations as she ponders her loss of words:

Maybe feeling speechless is a normal reaction in these situations. Why should I have felt the impulse to explain? Should I have tried harder? Do I necessarily know any better? . . . I may have more access to information than these people [her aunt and other local people, but do I know better simply because I have access to certain knowledge? These may be rhetorical questions echoing some of the debate familiar to us in the United States, but my wondering did keep my mouth shut and my ears open when in China and continues to keep me "sober" when I speak. [n.144](#) Professor Margaret Chon, reviewing Sharon Hom's book and citing to the previous quote, refers to this slippage in language and meaning by observing that "silence is a response to discursive antagonisms created by being between two or more cultural positions." [n.145](#)

The foregoing analyses are presented in order to show the differences and similarities among women of color, especially among those who share the relative privilege of the academic *872 life. However, it would be a mistake to conclude that silence and the condition of being silenced as a woman is an experience that is universally shared by women of color. bell hooks is a notable example of a writer who has taken issue with this construct of gendered silence. She explains, [In black communities (and diverse ethnic communities), women have not been silent. Their voices can be heard. Certainly for black women, our struggle has not been to emerge from silence into speech but to change the nature and direction of our speech, to make a speech that compels listeners, one that is heard. [n.146](#)

Hooks writes about the need for defiance and resistance in the speech of Black women. She found her strength in first "talking back" as a child, seeing youthful courage as the seed for the indomitability of spirit that writing as an independent thinker would require. [n.147](#)

C. Silence as Cultural Expression and Silencing as Cultural Suppression or Silence as Racial Marker and Silencing as Racial Privilege

[The removal of the last two Latino jurors for what in the end is simply their proficiency in the Spanish language, should not be sanctioned. [n.148](#)

As mentioned at the beginning of this Article, both Race Crits and LatCrits have done extensive work on language-based discrimination. [n.149](#) Building on this previous work, I assert that nonverbal components of

communication, including silence, provide the basis on which Latinos and other non-English speakers are racially categorized and subjected to ill treatment. The Hernandez case, described below, is a particularly overt example of what I assert is a misinterpretation of linguistic minorities' intended *873 communications, with discriminatory consequences for both the potential jurors in the case and more generally for linguistic minorities. I believe this type of miscommunication and misreading of silence is frequent and contributes to the stereotyping of linguistic minorities, given the widespread misunderstanding of the meaning of silence, pausing, and hesitations in the speech patterns of non- English speaking communities.

In describing what happens when Whites hear the languages of people of color, I am drawing liberally from the discursive and epistemological model employed by the Canadian sociologist Sherene Razack, who critically examines what happens when Whites look at people of color. [n.150](#) Razack exhorts us [To ask[questions about how relations of domination and subordination stubbornly regulate encounters in classrooms and courtrooms. . . . We need to direct our efforts to the conditions of communication and knowledge production that prevail, calculating . . . who can speak and how they are likely to be heard [n.151](#) Razack argues that this imperial gaze, this frame for seeing the world, is deeply connected to the identity of the colonizers and their sense of superiority. [n.152](#) I am making a related argument with respect to the identifying characteristics of the languages of people of color. The silences, pauses, and hesitations that punctuate their verbal sounds function as audible markers of race and ethnicity. In the Hernandez case the pauses and hesitations are the linguistic characteristics that allowed the prosecutor to dismiss the Latinos from the juror pool. [n.153](#) When, as in this instance, silence functions as a racial marker for Latinos, the right to silence Latinos functions as racial privilege for the prosecutor. The prosecutor arrogated to himself, with the eventual sanction of the state and federal courts of appeal, the right to interpret the Latinos' silence as contradicting their spoken words. I contend that this act of withdrawing civic rights because of Latinos' linguistic differences is racial privilege and an act of racial subordination.

***874** 1. *Dionisio Hernandez v. New York*

- a. The Supreme Court decision—The case of *Hernandez v. New York* came before

(0) the Supreme Court on appeal from the New York Court of Appeals, which had

affirmed the defendant's conviction on two counts of attempted murder and

criminal possession of a weapon. [n.154](#) Defendant challenged the conviction

on the basis of *Batson v. Kentucky* [n.155](#) as a violation of his equal

protection rights because the prosecution used its peremptory challenges to exclude Latinos from the jury. The Court affirmed the judgment of the New York state courts and held that the prosecutor had offered race-neutral explanations for excluding the Latinos from jury service. [n.156](#) To quote Justice Kennedy, “the prosecutor did not rely on language ability without more, but explained that the specific responses and the demeanor of the two individuals during voir dire caused him to doubt their ability to defer to the official translation of Spanish-language testimony.” [n.157](#)

What follows is an analysis of what the Court was referring to as “demeanor.” I argue that the prosecutor was interpreting the hesitancy on the part of the potential jurors—their pausing before speaking, their silence—in a manner that was consistent with his worldview. Indeed, I think the prosecutor did not know enough about nonverbal communication, particularly cross-cultural communication, to understand that silence, pauses, and hesitations are encoded with meaning in relation to the words and the language being spoken. I further assert that silence with its multiple meanings is an unexplored aspect of linguistic discrimination.

The point is that the prosecutor lacked the information to know what the Latino jurors meant by their silence; after all, they were never asked about it. I do not claim to know with any exactness what they were communicating nonverbally. What I am questioning, however, is the unequivocal certainty with which the prosecutor drew his conclusion.

(1) b. The Facts in *Hernandez v. New York*—On a fateful day in 1987, Dionisio

Hernandez fired several gun shots at his girlfriend, Charlene Calloway, and her mother, Ada Saline. [n.158](#) Three shots *875 struck Ms. Calloway.

[n.159](#) In aiming at her mother, Hernandez instead hit two men who were in a nearby restaurant. [n.160](#) All of the victims survived. [n.161](#)

At trial, the prosecutor exercised his peremptory challenges to dismiss four potential jurors, who constituted all of the panel members who were Hispanic (although the prosecutor was uncertain whether one who was surnamed Mikus was Hispanic). [n.162](#) The prosecutor, in volunteering his reasons, explained: I felt that from their answers they would be hard pressed to accept what the interpreter said as the final thing on what the record would be, and I even had to ask the Judge to question them on that, and their answers were—I thought they both indicated that they would have trouble, although their final answer was they

could do it. I just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it. [n.163](#)

After extended discussions among the attorneys and the judge, the trial court judge twice rejected the motion for a mistrial. On appeal, the New York Court of Appeal, in a memorandum opinion, affirmed the trial court's rejection of the defendant's Batson claim on the ground that the prosecutor had provided race-neutral reasons for his peremptory strikes sufficient to rebut the Latino defendant's prima facie showing of discrimination. [n.164](#) The New York Court of Appeals affirmed, accepting the explanation from the prosecutor that potential jurors Mikus and Gonzales [n.165](#) "each had given him a basis to believe from words and actions that their Spanish language fluency might create difficulties in their accepting the official court interpreter's translation of the testimony of the Spanish-speaking witnesses." [n.166](#)

***876** 2. A Linguistic Contextualization—Many scholars have analyzed the Hernandez case. [n.167](#) Some have focused on the discriminatory effects of this judicial opinion on bilingual, especially Spanish-speaking, individuals and communities. [n.168](#) One scholar has critiqued this series of opinions from the point of view of cognitive science and sociolinguistics, arguing, inter alia, that it is not possible for a bilingual person to "put aside" one language in favor of another. [n.169](#) Another scholar has focused on the importance of the Hernandez case to an understanding of how nonverbal

or

demeanor testimony is used to assess credibility, both with respect to potential jurors during voir dire and witnesses during trials, by prosecutors, judges, and juries. [n.170](#)

While I completely agree with the analysis about the bilingual person's inability to turn off her understanding of a language in which she is fluent, I want to emphasize a different aspect of the communication that occurred between the potential jurors and the prosecutor. Namely, I want to focus on the hesitancy, the silence with which they responded and which the prosecutor interpreted as an answer in the negative. The prosecutor is quoted by the Court of Appeals as replying, "I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try. . . ." [n.171](#) It must be noted that the prosecutor decided not to believe the words of the potential jurors who had assured him that they could accept the official interpreter's version. Why then did the prosecutor disbelieve their words and choose instead to give a particular meaning to their demeanor, that is, their lack of eye contact and their hesitancy?

***877** Linguists and legal scholars have studied many aspects of nonverbal communication, including kinesics (also called body language), paralanguage (the sounds of oral language, such as pitch, tone, and volume), and proxemics (the

space between speakers and the placement of such objects as chairs, desks, etc., to enhance the effectiveness of the communication). [n.172](#) In fact they contend that most of the meaning—from sixty to more than ninety percent of a communicated message—is contained in the nonverbal conduct of the speaker. [n.173](#) Despite the historical importance that has attached to demeanor in the assessment of credibility, psychologists who study deception conclude that credibility cannot be accurately determined through nonverbal behavior. [n.174](#)

The prosecutor dismissed the Latinos in the Hernandez case for what he concluded was deception—namely, that their claim that they could abide by the official interpretation of the Spanish testimony was belied by their hesitancy in responding and their lack of eye contact. [n.175](#) But if the above-mentioned social science research is accepted, the Latinos' demeanor did not accurately reflect their cognitive processes.

I do not contend, however, that the prosecutor should have read the Latinos' lack of eye contact and their silence in the face of his questioning as having no importance. To the contrary, given the nexus of language and culture to race and especially the link between performance and racial identities, I posit that such differences as the cultural rules about eye contact and silence are the types of markers that denote racial boundaries. The Latinos were *878 explicitly "otherized" [n.176](#) in this racialized incident and as a result of this Batson inquiry. [n.177](#) The prosecutor, joined by the judge and the defense counsel, depended on a variety of racialized stimuli—their last names and probably their somatic and sartorial appearances (skin, hair color, and clothing styles), as well as how they sounded through the Spanish they spoke and the nonverbal behaviors they exhibited—to conclude that a racialized inquiry about their exclusion as jurors was necessary. Their nonverbal behaviors, including their silence, was one of the racial markers relied upon to categorize them and then to exclude them as jurors. The racial categorizing that occurred in that courtroom depended not only on how Whites look at people of color but also how Whites hear people of color. So that when Sherene Razack exhorts us "to ask questions about how relations of domination and subordination stubbornly regulate encounters in courtrooms" [n.178](#) and to "direct our efforts to the conditions of communication and knowledge production that prevail, calculating" who can speak and how they are likely to be heard, [n.179](#) she is connecting this conceptual frame relied on by Whites, this way of seeing and hearing the world, to the racial superiority that forms the identities of the dominant White majority. This way of seeing and hearing the world—of not hearing the silences of the Latinos as communicating anything other than what the prosecutor said they meant—evidences the racial privilege of the legal actors (including the prosecutor and the judges at trial and in the subsequent appeals). In Bakhtinian terms, the prosecutor and the judges imposed an interpretation on Latinos' silence that had centripetal effects, eliminating the possibility for multiple *879 (or heteroglossic) meanings to their silence. Consequently, if silence was a racial marker for the Latinos, their silencing instantiated the racial privilege of the dominant majority through the

actions of the prosecutor and the judges.

1. II. Silence and Silencing And Pedagogical Discourse

The first part of this Article attempts to develop an argument that links silence to racial identities both in terms of how Whites see and hear non- Whites and in terms of how people of color present themselves to the world. Drawing on the work of sociolinguists and other scholars, I have argued that one's use of silence is an aspect of communication that, like accents, is related to one's culture and that, in some situations, may correlate with one's racial identity. I build on this cross-cultural analysis of silence and silencing in this next section, linking the dimensions of silence and silencing within cultural discourse with those of pedagogical discourse within the law school classroom.

The answer lies in the complex nature of silence, itself. Silence can signify nothing, or it can communicate a great deal, all depending on context. [n.180](#)

At different times during the academic year, I remind students that the architecture and design elements of our law school magnify some voices and silence others. I point out that the "well" at *880 the front of the room, the podium, and the directional and raked seating are all intended to give prominence to the professor's voice. I note that even though the room is designed with a half-circle seating arrangement, it is difficult for the students to talk among themselves. Their bodies are oriented toward the front of the room in order to see the eyes, hear the voice, and read the face of the professor rather than those of the other students. I make comparisons between the classroom and the courtroom, where official hierarchy and deference is even more rigidly enforced than in most classrooms; in courtrooms, silence is gaveled into existence and maintained, like in churches, as part of the protocol of the space.

I use this architectonic analysis to make us all aware of how silence and voice are regulated in the law school classroom; we are socialized to speak and not to speak at certain times and in certain places. But silence is not experienced, understood, or used in the same manner by all law professors and law students. We come into the world of legal education with individual propensities toward and different collectivized understandings and norms about silence. To this context of personal experience, we add new information and experiences about silence and our in/ability to voice ourselves in legal spaces and legal discourses.

During the period from 1988 to 1992, feminists within the legal academy wrote about silence as a persistent aspect of classroom dynamics and the experience of feeling silenced reported by many White women law students (and significant numbers of both male and female students of color). [n.181](#) This scholarship prompted a *881 number of panels at academic meetings that considered the issue of silence in the classroom. [n.182](#) Today there is wider

acknowledgement, among feminists and non-feminists, that many female students (and male students of color) are reluctant to speak in the classroom. [n.183](#) Several recent surveys have confirmed this, but there seems also to be more acceptance of this reality and less current scholarship aimed at naming, describing, and altering it.

I have found that the silence in the classroom has a different feel once it is named for the students. Once I raise silence as a topic and analyze silence as volitional, meaningful, and culturally relative, I find that the students become more aware of silence and occasionally deploy it as a communicative strategy. I occasionally stand at the podium and hold silence while noting the time. The first time I do this, I can feel the tension among the students. They do not know what is expected of them; sometimes one of the more gregarious students will begin talking. After I hold silence long enough so that they have all “heard” it, I ask them to estimate how long we have been quiet. Although I rarely hold silence longer than fifteen seconds, their estimates are frequently double or triple the time. I take the opportunity to teach about silence and to talk about its cultural and linguistic characteristics. I discuss various meanings of silence. For example, I explain that the pause before one speaks can be of various lengths, and that longer pauses do not necessarily mean that the speaker is waiting to be “saved” from her muteness. I also mention devices such as implicature. [n.184](#) I explain that some students are prepared to answer quite rapidly while others are slower in preparing a response. Despite the conventional wisdom that overvalues quickness, I announce that I will wait for those who do not think aloud and who need more time to collect their thoughts before speaking. My purpose is to give those who need more time the opportunity to pause and process their thoughts without having to fear that they will be interrupted by ***882** those who are quicker to speak (the “crowders”). [n.185](#) I want to help the students hear each others silences and defeat the tendency to reach negative conclusions about pauses and hesitancy. Once classroom silence is introduced as a pedagogical technique and concern, students are more able to interpret their own silences, their meanings, and whether their silences are volitional. I often have former and current students come talk to me about the panic they are experiencing, their fears about speaking in class, or their perception that they are not heard or that their silences expose their failures. I have done practice sessions with students in which we rehearse what they will say, sometimes by having them ask for time to pause before answering: “Give me a moment while I gather my thoughts.”

Because verbal adroitness is so valued as evidence of legal ability, silence in the law school classroom can be menacing and anxiety-producing for both teachers and students. Nonetheless, teachers and students can become better communicators through a greater understanding of silence. For those of us who are working under the aegis of LatCrit theory and praxis, creating learning spaces where deeper dialogue from different points of view regularly occurs is a pressing objective. If we are to disrupt the centripetal forces of the dominant legal discourse, we must learn new skills, new ways of thinking together. Silence can

be such a disruptive influence.

One of the most influential educational theorists of the late Twentieth Century is Paulo Freire, a Brazilian teacher and writer. [n.186](#) He is widely known for his critique of what he termed “banking” education. [n.187](#) This method of education considers students to be:

***883** Passive learners receiv[ing deposits of pre-selected, ready-made knowledge. The learner’s mind is seen as an empty vault into which the riches of approved knowledge are placed. This approach is also referred to as “digestive” . . . education. [n.188](#) Freire argued that schools supported the status quo by ignoring racism, sexism, the exploitation of workers, and other forms of oppression; blocked social change; and inhibited the development of “conscientization,” a learning process by which a person becomes aware of oppression and how to become a part of a collective process to resist oppression and change the world. [n.189](#) Freire observed that traditional education functions to control the conduct of large groups of people without “the overt force of a police state, [by adapting learners to kinder, gentler controls: career choices (specialization), authority (dependency) and the good life (consumerism).” [n.190](#)

(0) Freire also names and describes a “culture of silence:”

A characteristic [of . . . oppressed people in colonized countries, with significant parallels in highly developed countries. Alienated and oppressed people are not heard by the dominant members of their society [who . . . prescribe the words to be spoken by the oppressed through control of the schools [, thereby effectively silencing the people. [n.191](#) By quoting the work of Paulo Freire in the context of an analysis of the dynamics of the law school classroom, I am not drawing a simplistic analogy between the conditions in the favelas of Brazil and those in the elite environment of law schools in the United States. There is, however, a similarity in the silencing of students, here and there, that is connected to a hegemonic method of education that is intended to produce students who are dedicated to the maintenance of the status quo, even though that status quo is oppressive to them.

The pedagogical techniques that are utilized in the law school classroom, which is designed architectonically and epistemologically to be hierarchical, have been repeatedly shown to alienate ***884** and silence students, especially students of color and women from different backgrounds. Because of the effects of legal education, law students have been described as “becom[ing belligerent, hostile, argumentative, and demanding” [n.192](#) and suffering from a high level of clinical depression. [n.193](#) Another scholar with an explicitly feminist perspective has observed that there is a quid pro quo in law school: “you get a graduate degree in a relatively short period of time[, and . . . the appearance of power. People will listen to what you say. The system’s reward in this bargain, if it has trained you

right, is that you won't say anything, really, or at least nothing threatening to it." [n.194](#)

This silencing in the law school classroom is centripetal in the Bakhtinian sense because of the strong imposition of one right way of thinking/speaking as lawyers. The notion of a legal heteroglossia, a multiplicity in the meanings, formats, linguistic formulae, etc., is virtually heretical. The law school classroom is characterized by its silences and the overt silencing of anything that is not legal orthodoxy. For the most part, current legal education is the same as it was one hundred years ago when it was implemented by Dean Christopher Columbus Langdell at Harvard Law School: It still depends on a limited set of materials—appellate opinions—that are discussed in a certain manner—through the Socratic method, using a purportedly objective, decidedly dispassionate, and typically adversarial approach. Silence, particularly that of students of color and women, can potentially have centrifugal effects in the form of resistance to the oppressiveness of the indoctrination and professionalization. But more often, silence is a form of self-censoring, resulting in centripetal, or power-centering, effects.

Silence, and waiting till people are ready to give information, are also central to Aboriginal ways of seeking any substantial information. [n.195](#) *885 Law professors, lawyers, and law students can benefit from learning to utilize silence when communicating in cross-cultural relationships and settings. While there is very little research concerning silence in the clinical scholarship produced in law schools, silence and its connection to interpersonal skills in the health industry has received considerable attention. [n.196](#)

The use of silence in doctor-patient communications has been widely studied, both in the treatment of somatic illnesses and psychiatric conditions. [n.197](#) This research can help us inquire into analogous situations involving lawyers and clients. Some studies report the lack of information disclosed to patients for their decision-making. For example, one study in a family practice clinic of a teaching hospital examined the process by which women and their doctors decided whether to perform pap smears. [n.198](#) The doctor's authority and medical knowledge creates an asymmetrical power relationship with the patient that can manifest itself in terms of whether or when the woman undresses for the procedure or whether she is referred to a specialist. [n.199](#) Poor communication results in conflict between the female patient and her doctor, conflict that is often negotiated through silence. [n.200](#) This phenomenon was also described in a historical study of the relationship between doctors and patients. [n.201](#) The author concludes:

The history of the physician-patient relationship from ancient times to the present bears testimony to physicians' caring dedication to their patients' physical welfare. The same history, by its account of the silence that has pervaded this relationship, also bears testimony to physicians' inattention to their patients' right

and need to make their own decisions. . . . Challenging the long-standing tradition of silence requires nothing less than uprooting the prevailing authoritarian value and belief systems and replacing them with more egalitarian ones. [n.202](#) *886 More recently, the relationship between doctors and patients has been changed by several forces, such as the rise of health consumerism and health care marketing. [n.203](#) These forces have been the impetus for focusing on patient satisfaction, especially in light of new research demonstrating that different types of communication can produce positive clinical outcomes. [n.204](#) Because of the accelerated changes that have overtaken the medical profession, physicians have had to become better communicators, and using silence has proven to be a key technique that helps them interact effectively with their patients. [n.205](#) Doctors report that taking more time with patients, listening to them, and learning to be quiet is as important to the patients, especially those with life-threatening illnesses, as empathy and care. [n.206](#)

Doctors are not the only professionals who could benefit from utilizing silence in practices associated with empathy and care. The efficacy of using silence when lawyers are interviewing clients from indigenous or aboriginal cultures has been analyzed by Diana Eades, an Australian socio-linguist. [n.207](#) She was responsible for groundbreaking work in the case of *The Queen v. Robyn Bella Kina*, [n.208](#) in which the Queensland Court of Criminal Appeals accepted socio-linguistic evidence and established the necessity of having cultural differences in communication accommodated in the representation of linguistic minorities. [n.209](#)

According to an account by Eades, Robyn Kina was charged with the murder of her male partner of several years. [n.210](#) She was represented by lawyers from the Legal Aid Commission and Aboriginal Legal Services, government run legal offices that are grossly under-staffed. [n.211](#) In the period of eight months before her trial, she was interviewed by six different solicitors or barristers. [n.212](#) She pleaded not guilty but was convicted in one of the shortest murder trials in *887 Queensland history, requiring only three hours of evidence and fifty minutes of jury deliberations. [n.213](#)

Years later, her case became the subject of considerable public interest when she was featured on a television special on victims of domestic abuse who kill their violent partners. [n.214](#) Her story came to light because the interview techniques employed by journalists were different from those used by her lawyers. [n.215](#) Eades analyzed the interactions in this way:

In 1988 Kina was communicating in an Aboriginal way. The lawyers who interviewed her were not able to communicate in this way, and they were not aware that their difficulties in communicating with her involved serious cultural differences The way that lawyers are trained and the way they generally interview clients is not conducive to Aboriginal ways of communicating. On the other hand, the way that the TV journalists and the counselor communicated with Kina was quite similar, as it happens, to Aboriginal ways of communicating. [n.216](#) The following summary accounts for the way that Aboriginal people seek

information:

. . . [In situations where Aboriginal people want to find out what they consider to be significant or certain personal information, they do not use direct questions. It is important for Aboriginal people to respect the privacy of others, and not to embarrass someone by putting them 'on the spot.' People volunteer some of their own information, hinting about what they are trying to find out about. Information is sought as part of a two-way exchange. Silence, and waiting till people are ready to give information, are also central to Aboriginal ways of seeking any substantial information. Although we can recognise these ways of seeking information in Standard English, we use them in mainstream society only in *888 sensitive situations. In Aboriginal interactions these are the everyday strategies used to seek substantial information. [n.217](#)

The story that eventually emerged was that Kina had been the victim of years of physical abuse, including hair pulling, kicking, and anal rape. [n.218](#) On the day of the murder, her partner threatened to rape her fourteen-year-old niece. [n.219](#) When he lunged at Kina with a chair over his head, she stabbed him once in the chest. [n.220](#) He staggered back, fell, and died shortly after. [n.221](#) A successful appeal was subsequently initiated by the Attorney General. [n.222](#)

While Diana Eades' work involved the highly differentiated context of Australian aboriginal persons being represented by White, English-monolingual lawyers, some of the lessons derived from that situation are equally applicable in the United States and of benefit to both Whites and non-Whites, as well as to bilingual lawyers and law students. The clinical skills of client interviewing and counseling can be improved through a greater understanding and use of silence. In some clinics at the University of New Mexico Law School, we now introduce the concept of silence and the importance of listening for silence as clients disclose the emotional and often disturbing details of their legal problems. Drawing on the work of Diana Eades, we offer two formats for interviewing: the scripted interview and the uninterrupted narrative. The scripted interview is the more typical interview style of lawyers in which the student uses a series of open- and closed-ended questions to learn the client's story. The uninterrupted narrative interview allows the client to set the pace and determine the organizational framework for the story, with the clinical student holding an attentive and respectful silence.

The Robyn Kina case is distributed to UNM clinical students along with information about the gendered and cross-cultural aspects of silence. Students need to understand the socio-linguistic and literary dimensions of silence; they need to hear silences—their own and those of others—and give silence its communicative importance before they are prepared to experiment with it as part *889 of their interviewing techniques. The shared and/or divergent cultural backgrounds of the client and the clinical student, the nature of the legal problem, and the purpose of the interview all help in determining what interview format is most appropriate.

As I indicated earlier, my analysis in this second section on pedagogical discourse depends on the first section in which I explain that silence has importance from both linguistic and racial performative perspectives. Using silence as a heteroglossic technique in the classroom is context-sensitive; students may respond differently to the technique because silence is culturally relative. The dynamics of silencing are very difficult to alter because the hierarchical effects are so pervasive after just a few weeks of law school. It is difficult, therefore, to move out of a “banking” method of teaching and to create a more egalitarian learning environment. Nonetheless, an increased awareness of the silencing effects of traditional teaching methods in the classroom may help mitigate law students’ sense of alienation from their studies and work.

Moreover, an awareness of silence and the silencing effects of the “banking” method can disrupt the hegemonic racial dynamics of the classroom. It is likely that students of color, including monolingual-English, African American students, bring different linguistic, thus heteroglossic, backgrounds into the classroom; their backgrounds may include different orientations towards silence and voice. Creating a classroom conversation about the “culture[s of silence” can validate the students’ lived experiences and normalize the cadences and rhythms of english. [n.223](#) These pedagogical interventions can have centrifugal effects—decentering effects on the linguistic and racial dynamics of the classroom. [n.224](#)

***890 E. Silence as a Racialized Performance in the Law School Classroom**

During the Spring 2000 semester I taught a seminar on Race, Racisms and the Law. The class was highly diverse with students from varied racial, linguistic, and geographic backgrounds with differing ideological commitments. One of the more vocal students was a self-described “Chicano nationalist.” [n.225](#) He was passionate, provocative, and controversial, and his comments improved the class by leading me to include discussions on internal and external U.S. colonies and on assimilation as co-optation, especially the socialization and professionalization of scholars of color.

Midway through the semester I distributed a version of this Article and led the students in a discussion of racialized silence. This student was noticeably quiet. He was also silent during the next class meeting. During a break I heard one of the students ask him why he was not participating. He responded that he agreed with my analysis that silence can be a form of resistance against the curriculum and pedagogy of the law school classroom and he had, therefore, decided to remain silent.

I overheard this conversation. Perhaps I was meant to overhear it. I was perplexed and vexed by his self-silencing, asking myself—but why in this class, why in my class? This class was, after all, an opportunity to talk about the oppressive aspects of the curriculum and the pedagogy.

His silence was very effective from many perspectives. First, his silence

was performative in the sense of being self-conscious, calculated, and an exercise of power. [n.226](#) Second, his silence was performative in the sense of seizing the attention of his fellow students and making them and me aware that he was communicating without words. Third, his silence was a challenge to the classroom dynamics as they simultaneously both defied and reproduced the traditional content and format of the law school classroom. After all, the subject may have been Race and Racisms, but the materials studied were mostly cases, statutes, and law review articles, and the discussion in many ways depended on a legal vocabulary, on presuppositions and norms that support a capitalistic and imperialistic ***891** political system, even though we were attempting to expose such norms and assumptions.

This example illustrates several points I am making about silence and silencing. First, his silence was a powerful form of communication. It attracted the attention of the class and demanded to be interpreted. Second, his silence was racialized and performative. This student often peppered his remarks with Spanish phrases and spoke forcefully from a perspective that was framed by his Chicano identity. I understood his silence to be a similar reference to his bilingual background, to his recognition that silence has a different and nuanced valence within the Indo-Hispano culture of Northern New Mexico and that he was consciously placing himself within that frame with his calculated silence. By doing so, he was using silence to mark himself racially, as he had often done with his spoken Spanish. Finally, his silence was ambiguous in that it was difficult to know whether he was silent or silenced, whether he was exercising power or experiencing powerlessness. Perhaps the point of his performance for purposes of this analysis is that these are not either/or situations. Perhaps silence and silencing sometimes, although not always, operate simultaneously.

I would like to think that his reading of this Article expands his performative choices so he can make a strategic move from feeling silenced to deliberately holding silence. Consequently, his internal script that interpreted the silence has been altered.

[Sor Juana's work tells us something, but to understand that something we must realize that it is utterance surrounded by silence: the silence of the things that cannot be said. [n.227](#)

This section discusses the centripetal and centrifugal forces within the language of the law. The previous section focused on the silencing within the law school classroom of certain sectors of the classroom—women and persons of color particularly. This section focuses on the silencing within legal discourse and public policy debates of certain ideas and topics, most notably issues of race.

***892** I contend that the silencing of race throughout the legal system, in classrooms and in courtrooms, is one of the principal mechanisms for maintaining the ideology of White supremacy. It is the practice of hegemony through education. From a Freirean perspective, students are denied the ability to

participate in liberatory education because of this systemic silencing about racism and other types of oppression.

Issues are systematically and consistently framed within legal discourse to elide issues of race (as well as sexual identity, class, and other identity characteristics). [n.228](#) The silencing of racialized information is largely why the law feels alien and alienating to those for whom race or other identity characteristics are reality-defining and often the starting point for legal analysis. [n.229](#) Maintaining silence about facts or aspects that are reality-defining often makes one feel complicit in one's own marginalization. Moreover, this silence, which is imposed through the norms of legal discourse, diminishes one's ability to deploy silence for a range of other communicative strategies. That is, it is more difficult to be silent, to hold silence as a strategy of resistance and agency when silence is de rigueur anyway.

The silencing of information about race, gender, and other identity characteristics operates at two levels: at the level of individual disputes—what I am calling the “micro level,” where incidents in which race is arguably relevant are resolved with a resolute inattention to, and silencing of, the racial aspects; and at the level of whole areas of law, the “macro level,” which determines how these areas of the law are defined and how disciplinary and professional worldviews are formed. One way that White supremacy is maintained is through multiple levels of obfuscation and elision. In this instance White supremacy is maintained by maintaining a world view in which race does not matter and therefore does not have to be discussed, especially by those legal actors—judges, prosecutors, legislators, and lawyers—who make and enforce the rules by which this society is regulated and governed.

In 1988 Lucinda Finley wrote a passionate plea to feminists “to grapple with the nature of law itself . . . and the extent to which its language and its process of reasoning are built on male conceptions *893 of problems and of harms and on male . . . methods of analysis.” [n.230](#) In 1989 she responded to her own exhortation with an article that analyzed women's silence in the law and the connection of legal reasoning and discourse to that silence. [n.231](#) Finley argued that legal language and reasoning are male and patriarchal, and that efforts at making meaningful change are hampered by the fact that the law constitutes a certain social reality for the powerful by making social arrangements appear normal, neutral, and inevitable. [n.232](#) This androcentric quality of legal language presents women with a dilemma. Devising a woman-centered legal language is not a feasible alternative, but neither can the law realistically be abandoned. [n.233](#) Finley asserts, “[l]aw will continue to reflect and shape prevailing social and individual understandings of problems, and thus will continue to play a role in silencing and discrediting women.” [n.234](#) Finley concludes that “critical awareness of the dilemma is itself important.” [n.235](#)

Finley's description of legal language and legal discourse is even more salient when applied to White supremacy. As Professor Crenshaw argues, issues are systematically and consistently framed [n.236](#) within legal discourse to elide

the race and class characteristics; legal education requires fundamental change in order to eliminate the hegemonic effects of legal language and legal discourse. [n.237](#)

***894** A. Macro-level Silences and Silencing in Legal Discourse

The Framers [of the Constitution] sought to mute the controversies and contradictions surrounding race and slavery by omission. They tried to erase the issue. . . . This eracism infects legal education and limits its effectiveness. . . . We must learn to talk about the deep issues in law and culture, to openly debate them rather than smother them in silence. [n.238](#)

Many law students arrive at law school with intentions of engaging in social change through public interest work but leave after three years with commitments to careers with law firms and corporate America. [n.239](#) This pernicious change in personal values and commitments away from progressive lawyering toward law firms and other organizations that support the status quo reveals the hegemony of law school socialization. This socializing works by creating a certain professional worldview that is supported by explanations of how the law facilitates and maintains social arrangements—a silencing, in effect. If students' perceptions and aspirations are formed within a disciplinary discourse largely uncharted with respect to race or gender, then students are deprived of a basic understanding of the ways in which the law maintains the current allocation of power and privilege along racial and gender fault lines.

Property law, a course taught in virtually every law school to every first year law student, serves as a good example of the socializing process of law school. In this society, the most significant forms of property in most people's lives are wage income, home ownership, and employer-funded pension plans. Yet, most students complete two semesters of property classes with virtually no understanding of the historical or contemporary explanations for the wide disparities in property ownership between Whites and persons of color or the role the law has played in residential segregation. Moreover, there is virtually no mention of the colonization project of the United States, conducted through war and intrigue, that divested native/indigenous peoples from their lands, and conquered one-third of the territory of Mexico, all of Puerto Rico, and the Pacific islands of Guam, the Phillipines, and Hawai'i. [n.240](#) Instead, students are drilled with the particularities of future interests, the Statute of Uses, and acquiring title over wild animals. In short, the law of property, as currently conceived, does not provide an analysis for students about property, power, and White supremacy—either in terms of how the larger society came to collectively own the land and resources that is now the United States, or how White people came to individually own most of the land and the resources of the country.

George Lipsitz uses the term “the possessive investment in whiteness” [n.241](#) to describe the relationship between whiteness and asset accumulation in our society, to connect attitudes to interests, to demonstrate that white supremacy is

usually less a matter of direct, referential, and snarling contempt than a system for protecting the privileges of whites by denying communities of color opportunities for asset accumulation and upward mobility. [n.242](#)

Lipsitz's analysis supports my contention that silence and silencing in legal discourse is crucial in the maintenance of White supremacy, because lawyers, who are often strategically positioned throughout society to unmask, disrupt, and subvert it, overwhelmingly choose to benefit from it. Legal discourse and law school's socialization ensures it. The "[collective exercises of power that relentlessly channel rewards, resources, and opportunities from one group to another]" [n.243](#) are rendered invisible, normal, and inevitable so long as race remains an inappropriate topic for classroom discussion and legal discourse in general, and so long as law students are not given the analytical tools and straightforward data about these wealth-producing and wealth-allocating processes. This is the case even though those collective exercises of power are facilitated through legal procedures and legal institutions.

Property law could be reconceptualized and reframed to describe the workings of legal structures and processes that maximize the opportunities for Whites to become home owners and wealth *896 accumulators, while minimizing the opportunities for non-Whites to enjoy the same social benefits. As described by Lipsitz, public policy after the New Deal Era denied the farm worker and domestic labor sectors that were disproportionately minority the protections that were extended to Whites under the Wagner Act and the Social Security Act. [n.244](#) The trade unions negotiated higher wages, medical insurance, pensions, and job security, but, because of their blatantly discriminatory practices, Whites were overwhelmingly the beneficiaries. [n.245](#) It was federal housing agencies that most directly employed racist practices to prevent minorities from benefiting from a massive post-war housing boom and federally subsidized loan funds. [n.246](#) The Federal Housing Agency ("FHA") and private lenders diverted housing loans toward White communities, thereby creating White suburbs and abandoned communities of color. [n.247](#) Through a plethora of public investment projects in urban renewal, highway construction, and the expansion of water supplies and sewage facilities, societal resources to meet the housing and shelter needs of White residential enclaves were allocated at the expense of communities of color. [n.248](#) Lipsitz provides the following example: "The Federal Housing Administration and the Veterans Administration financed more than \$120 billion worth of new housing between 1934 and 1962, but less than 2 percent of this real estate was available to nonwhite families—and most of that small amount was located in segregated areas." [n.249](#) Such interlocking policies as red-lining, sales of substandard housing, and foreclosures, overseen by the FHA and the Department of Housing and Urban Development, destroyed the housing markets in inner- cities. [n.250](#) If all of this were not enough, state and local governments placed in these communities "prisons, incinerators, toxic waste dumps, and other projects that further depopulated these areas" and led to decreased political power. [n.251](#)

Property law is not the only law school subject in which White supremacy, its analysis of race, and its allocational consequences go unexamined. Criminal law and constitutional law are also not subjected to a comprehensive and systematic analysis of how they *897 construct and sustain the imbalance in racial relations in this society. Criminal law is the law school subject in which race is dealt with most explicitly, largely because a disproportionate number of the defendants are men of color. [n.252](#) More than in other subject areas, the insights from the perspective of a critique of White supremacy, such as the demonizing of juveniles of color through the over- policing of communities of color, [n.253](#) the criminalization of childbearing for drug-addicted mothers, [n.254](#) the use of racial profiling in policing, [n.255](#) the wrongful association of drug usage with communities of color, or the lack of adequate legal representation (even in death penalty cases), [n.256](#) have been integrated into the conventional discourse about crime in this society. Unfortunately, however, stereotypes about people of color as violent and predatory are reinforced in the law school curriculum by what is said as well as what is left unsaid. The relentless pressure to get through the conventional topics, especially since the multistate bar exam further structures what is to be taught and how students are to be socialized and professionalized with inattention to race, [n.257](#) leaves little time to establish a sociolegal context that connects the criminal justice system to the de/formation of racial relations. Constitutional law is an area in which race has been central both to the framing of the document and the subsequent interpretation of its provisions by the Supreme Court and the other federal courts. Yet the word slavery, representing the single most pressing and divisive issue among the delegates at the Constitutional Convention, is not even mentioned, despite its centrality to the framing process. [n.258](#) This “omission of references to or acknowledgment of *898 racial issues that either implicitly or explicitly present themselves” has been dubbed “eracism.” [n.259](#) Constitutional law is everywhere taught as the allocation of powers between the federal government and the state and the separation of powers among the three branches of government. [n.260](#) Yet whether with respect to the threat of secession to federalism, the relation of slavery to the Commerce Clause, or the Dred Scott case to judicial review, racial issues might vaguely be hinted at within cases and texts, but meaningful racial implications are usually completely ignored.

While this section focuses on three examples of basic law school courses that typically ignore issues of race, the examples are somewhat idiosyncratic, because virtually any course could be chosen from virtually any law school for a parallel analysis of the elisions of race. This type of organization is both a matter of decisions by individual law professors and evidence of a broader discourse of law embedded within a White racial context that is rendered transparent and therefore almost impossible to name and problematize. That is the centripetal force and the hegemony of this “un-raced” discourse.

Not only is legal doctrine developed to obfuscate the importance of the racial context to entire areas of law, but this silence is maintained in particular disputes. Legal actors—judges, lawyers, scholars, deans, and professors—are socialized to maintain a decorum that protects this silencing. In this section, I use two cases as examples of situations in which the race of the parties is never mentioned in the published opinions. Given the importance of *Meritor Savings Bank v. Vinson* [n.261](#) to the development of the law of sexual harassment, it should not be surprising that some attention has been paid, particularly by feminists, to the fact that the race of neither party is referenced in the opinions of the various ***899** courts that considered the issues. The other example I provide is a little known tort case, *Williams v. City of New York*. [n.262](#)

Perhaps the best known case involving gender discrimination and sexual harassment is the *Vinson* case. Yet the District Court, the D.C. Circuit, and the Supreme Court never mention that the women who were harassed and the harasser are African American. The incidents involving the abuse occurred in the 1970's, and the case was litigated in the 1980's, before intersectionality theories, [n.263](#) which argue for the linkage between and among such identity markers as race and gender, had become familiar in scholarship by Race Crits and Fem Crits. Even today, few discrimination cases have been filed effectively and prosecuted alleging discrimination on the basis of both race and sex. The early requirement that women of color choose between these characteristics in order to ground a discrimination claim created an unnecessarily high hurdle. [n.264](#)

What is interesting for purposes of this examination of silence and silencing is the resistance of White feminist scholars and contemporary casebook editors to recognizing the potential salience of race in the legal arena. The commentaries of legal feminists regarding the issue of race in the *Vinson* case are particularly instructive. In 1991, Professor MacKinnon wrote:

As I mentioned, both Mechelle Vinson and Lillian Garland are African-American women. Wasn't Mechelle Vinson sexually harassed as a woman? Wasn't Lillian Garland pregnant as a woman? They thought so. The whole point of their cases was to get their injuries understood as "based on sex," that is, because they were women. The perpetrators, and the policies under which they were disadvantaged, saw them as women. What is being a woman if it does not include being oppressed as one? When the Reconstruction Amendments "gave Blacks the vote," and Black women still could not vote, weren't they kept from voting "as women?" When African-American ***900** women are raped two times as often as white women, aren't they raped as women? That does not mean their race is irrelevant and it does not mean that their injuries can be understood outside a racial context. Rather, it means that "sex" is made up of the reality of the experiences of all women, including theirs. It is a composite unit rather than a divided unitary whole, such that each woman, in her way, is all women. So, when white women are sexually harassed or lose their jobs because they are pregnant, aren't they women too? [n.265](#) In a series of open letters published in the same

volume, one woman responded to MacKinnon's discussion of the Vinson case, stating, "[a limited concept of experience "as a woman" is implicit in your treatment of Mechelle Vinson's agency in the formulation of sexual harassment legal doctrine. Mechelle Vinson brought action against her employer as a woman, but more accurately as a Black woman." [n.266](#) In 1992, another commentator observed,

The Supreme Court opinion in *Meritor v. Vinson*, purports to look at the record as a whole, yet it fails to make any mention of the fact that Mechelle Vinson was African-American. The Court demonstrated no perception of the interplay between racial and sexual discrimination as directed against women of color, or the potential impact of that interplay on Vinson's credibility. Yet, "discrimination against women of color often operates differently, is fueled by different factors and results in different stereotypes, than discrimination against either men of color or white women." The Court's failure to discuss Vinson's race reveals their perspective that it was not legally significant or even relevant. One legal commentator suggests that "only white people have been able to imagine that sexism and racism are separate experiences." [n.267](#) *901 While these and other scholars have written about Mechelle Vinson's racial background, [n.268](#) I have found only one reference that notes that the harasser, Sidney Taylor, was also African-American. [n.269](#) Students of employment discrimination are not likely to know about the racial context of the Vinson case because virtually none of the basic hornbooks or casebooks makes any mention of it. [n.270](#) It is difficult, if not impossible, for teachers and students to interrogate the decision by the Courts to elide information about race if the information is not available to them. Consequently, their mindset about legal discourse and the salience of race within it is not likely to be challenged or changed.

As I have become more sensitized to this silence about race, I have noticed it even in situations in which the racial context is obviously salient. For example, *Williams v. City of New York* is a personal injury and wrongful death case where the decedent's mother sought to recover damages from the City of New York for the negligence of the Manhattan & Bronx Surface Transit Operating Agency. [n.271](#) The decedent, Thomas Williams, was a twenty-year-old high school graduate who had been working at McDonald's for three years. [n.272](#) He lived with his mother, who suffered from arthritis, and his four nieces and nephews. [n.273](#) He helped with the chores, cared for the children, bought his own clothes, and planned or hoped to begin college soon. [n.274](#) He earned approximately \$4500 per year and contributed fifty dollars per week to the household and ten dollars worth of groceries. [n.275](#)

The jury entered a verdict in the gross amount of \$600,000 (or \$510,000 net, reduced by 15%, the decedent's share of the fault). [n.276](#) *902 On appeal, the Supreme Court of New York reduced the gross damages to \$325,000 (or \$276,250 net), after concluding that the decedent had never gained consciousness after the accident and therefore was not entitled to recover damages for the pain and suffering element of the personal injury claim. [n.277](#)

In computing the loss of support, the jury can consider anticipated lifetime earnings and loss of services to the household and the beneficiary's life expectancy. [n.278](#) In this case, if we assume a life expectancy of his mother of seventy years and a current age of forty years, the loss of her son's life is worth about \$760 per month. Is race not relevant when considering these elements? Would a White son with aspirations of college in the context of responsible life habits be valued equally? Is it likely that juries do not notice the race of plaintiffs or their representatives? Actuarial tables are routinely shown with racial and gender data because life expectancy and work- life expectancy are both a function of one's race and gender in this society and others. [n.279](#) Yet the legal actors in the Williams case concluded that race did not matter and should not be mentioned.

The norms and behaviors of professionalism—the prevailing worldview—that are authorized and preferred within the dominant and purportedly race-neutral discourse impede students from understanding that race is often salient in the resolution of issues that seemingly have nothing to do with race. For example, most tort cases, such as the Williams case, fail to mention the race of the wrongful death victim, even though the victim's race is likely to be a factor in the determination of the worth of the decedent's life. Making it uncomfortable for those in the legal profession to talk about race in any situation makes it unlikely that it will receive a systemic and intensive analysis.

(1) C. A Synthesis of Silence and Silencing in Legal Discourse

In the first two sections of this Article my analysis focused on individual and cultural dimensions of silence and silencing within different linguistic areas from a pedagogical perspective. My purpose ***903** in discussing the silencing of the topic of race within legal discourse was to demonstrate the effects of silence and silencing outside of a specific communicative context and in a complex multi-cultural situation. In this section, I develop several related ideas: 1) throughout this society (and it may be equally true in many other societies) there is an amnesia about the historical connections between the law and the racial divisions in the society; 2) this amnesia is reinforced by the law schools who teach the law as though it were race-neutral; and 3) legal actors—lawyers, judges, legislators, and law professors—maintain this silence, valorizing this race-neutral illusion with norm-setting consequences for the entire society. The result is that this society has no widely accepted vocabulary for a discourse on race.

I began this section with a quote from Octavio Paz, referring to the Seventeenth Century Mexican nun and poet, Sor Juana Inez de la Cruz. Paz, her biographer, writes that during her lifetime, her poems were widely read in Mexico, Spain, and the entire Spanish-speaking world. [n.280](#) More recently she has again come into literary vogue as a brilliant writer, an iconoclast, and a feminist. [n.281](#) She lived an extraordinary life, first, as a favorite of royalty of

New Spain (as Mexico was then known), and later, as a famous and controversial intellectual. [n.282](#) She is said to have had every type of gift and talent: she was beautiful, elegant, articulate, courageous, and blessed with an unusual breadth of intelligence. Unexpectedly, she gave up the world and entered a convent where [she [wrote love poems, verses for songs and dance tunes, profane comedies, sacred poems, an essay in theology, and an autobiographical defense of the right of women to study and cultivate their minds. [n.283](#) At the height of her international fame, however, she “gives up everything, surrenders her library and collections, renounces literature, and finally . . . dies at the age of forty-six.” [n.284](#) *904 During Sor Juana’s life, she was silenced onto death. Her writing was imbedded in silence: “the silence of the things that cannot be said.” [n.285](#) Her writings are examples of a forced implicature. Paz cautions us that:

When we read Sor Juana, we must recognize the silence surrounding her words. That silence is not absence of meaning: on the contrary, what cannot be said is anything that touches not only on the orthodoxy of the Catholic Church but also on the ideas, interests, and passions of its princes and its Orders. Sor Juana’s words are written in the presence of a prohibition; that prohibition is embodied in an orthodoxy supported by a bureaucracy of prelates and judges. [n.286](#)

Today, unlike Sor Juana, public intellectuals are no longer at the theological mercy of the Catholic Church, its Bishops, and inquisitors. [n.287](#) But I contend that there is a legal orthodoxy with its bureaucracy of professors, lawyers, and judges who seek to, and do, exercise a similar control over public discourse and debate as the Church did in the Seventeenth Century.

This is the ultimate centripetal effect of racialized silences. The legal bureaucracy has declared public debate a race-neutral zone and enforces it through its design of legal education and legal institutions.

The orthodoxy on racial silence is so diffused and its effects so implicated in legal processes that it all is of one piece. Noting the implication of Sor Juana in her own silencing, Octavio Paz writes: “[Usually the author is part of the system of tacit but imperative prohibitions that forms the code of the utterable in every age and society [Transgressions were, and are, punished with severity.” [n.288](#) Unlike the Church’s orthodoxy of the Seventeenth Century, today’s orthodoxy on race and silence hardly depends on enforcement through a sovereign. In and out of the law’s bureaucracies (in and out of law classrooms, in and out of faculty meetings, in and out of courtrooms), we are effectively silenced about race, racism, and oppression.

***905 D. Silence and Silencing: A Personal Narrative**

The date is Monday, April 11, 1995; there is a faculty meeting scheduled for 4 p.m. I am in my third year of teaching; many days I feel I am not doing well. My first Article has been published, [n.289](#) but at times I feel oddly diminished by it in the eyes of my colleagues. I conclude that most have not read it and that those who have merely dismiss it. It is not really legal scholarship, they say. I am

advised to write a traditional article showing that I can analyze cases or interpret statutes. But I am a story teller and a yarn weaver; it comes to me through imitation, from sitting near my grandfather's wheelchair to listen to his folktales [n.290](#) and at my grandmother's kitchen table to hear her hilarious mitotes y chismes about neighbors, friends, and relatives. Stories defined my childhood world; they drew the lines for me around what was funny, polite, and irreverent. As kids, we learned about the adult world through stories—about pregnancies, break-ups, illness, death, and even sex, in the vaguest of terms. And so stories become the way I make sense of my adult world—my life as a student, a lawyer, a mother, and now as a professor. Professor. By May 1995, the title no longer seems so strange when I see it next to my name. Professor Montoya. I am growing to like teaching, writing, and public speaking.

But I digress. On this April afternoon, I enter the women's bathroom on the second floor of the law school. I am in the bathroom stall when my eye catches my name scrawled on the door. I feel myself inhale, my heart is racing, my eyes fill with tears. There is graffiti covering the top third of the door. It has been marked through, but with the door at an angle, I can make out the words. I am having trouble breathing, my knees are buckling, my ears are buzzing, my eyes and nose are leaking. I read the words: IF YOU LIKE HEAD / AND HAVE A BIG BLACK DICK / PROF. MONTOYA WILL GIVE IT A LICK.

I make it down to the Dean's office. I am crying incoherently. I tell him there is graffiti about me, in the women's bathroom. He does not ask what it says. I realize he does not want to know. Instead, he instructs his assistant to go see about it. She returns and says it has been taken care of. I try to compose myself for the faculty meeting. I sit in the chairs against the wall rather than at the table. During the Dean's report, he tells the faculty that there has been an incident. A resolution is introduced, deploring the *906 incident. Someone wants to know what has happened. Another colleague says that she saw the graffiti, and it was a vile expression of racism and sexism. Someone sitting next to me passes me a note that says, "time for mascaras." [n.291](#) Finally, I say that the graffiti was about me, but I don't give any details.

Are you wondering why I was silent? In retrospect, I was silent because I had been well-trained, even in situations of intense emotions. I read the signals of those around me; I knew how to act—I knew to be silent.

After the meeting, a colleague drives me home. I fall into my husband's arms. I cannot talk; he does not know what has happened. I cry for what seems like hours. Finally, he or I or both of us together decide to go buy some spray paint and return to the law school. By now, all that remains is darkly blackened words. I hear the bee-bees in the spray paint as my husband stands next to me removing any trace of the offending words. That is his intent. He wants it to be gone, as do I. That night I write the following:

An Open Letter to a Graffiti Writer:

On Monday afternoon, I found your message in the women's bathroom. I have no other way of reaching you so I have decided to respond to you with an open

letter. Graffiti of the kind you wrote is hate speech and it can only be countered by being responded to. Silence in the face of hate speech makes us all complicit.

We are part of a community that is charged with delicate and weighty responsibilities. As a law school, we are charged with studying the norms and the rules we use to regulate the behavior of all of us who come together as a society. We place a high value on our ability to listen to diverse opinions and to work towards consensus, or when disputes occur to resolve them. As a community, we strive to communicate about difficult issues. As lawyers, effective communication is our product and our process.

Graffiti is the antithesis of what we aspire to at this law school. Graffiti is anonymous, public, secretive, intentional and harmful. Graffiti [n.292](#) is a grenade. Graffiti may hit the intended target but it also splatters all those exposed to it.

***907** I try to picture you writing the vulgar words. It must have been scary. If you had been caught, the penalties would have been severe, possibly leading to expulsion. What could I have done to provoke you to engage in such risky behavior? What button did I press that so angered you that you decided to strike out at me and in striking out at me put yourself in jeopardy.

You and I are now linked in a way we were not before. When I walk through the forum or the lunchroom, I will wonder if you are watching me, perhaps waiting to attack again. I can't stop you. I can offer you an alternative. You have gotten even. You have hurt and embarrassed me and I have to assume that you felt hurt by me in the past.

I invite you to write back or to suggest another way for us to communicate. Anonymously if you prefer.

- Prof. Montoya

I never sent the letter. Three days later I went to the campus police to file a complaint. I wanted the incident investigated and knew that I would have to initiate the process. When I told the officer in charge that I wanted to complain about a hate crime, he misunderstood me and led me outside, thinking I said I wanted to complain about a hit and run. I was handed a clipboard and told to fill out a complaint form. I filled it out, but I never filed it. I still have it in a folder.

Today that bathroom door remains a silent reminder of that April day. I can still see the tiny streaks that formed when my husband sprayed away those cruel words. In my mind, I see the words each time I enter that bathroom. Today I feel a certain bond with that space—we were both defiled, the space and I. I never stopped using that bathroom; I did not want the incident to have power over me. But it has. Even now as my fingers tap out these words. I have been very conflicted, to the point of a day-in-bed-migraine, as I contemplated writing about this. [n.293](#) It is hard to know what gives me greater power—holding silence or breaking silence. Perhaps it would be best to be silent and not spread this story, a story that gives birth to thoughts that I cannot even imagine. Finally, I have decided that this incident silenced me, that my silence has not been volitional. Perhaps that was its purpose.

***908** Were it to happen again, I tell myself that I would react very differently. I would insist on taking a picture of the offending words, blowing it up poster-size or bigger, and even hanging the toilet stall door in the forum, in the center of the law school, for all to see. I truly do believe that hate speech must be seen, heard, experienced, and, most importantly, responded to. My instincts were correct that unhappy night when I wrote my open letter.

We can be socialized into silence even when we have been trained to deal with ugly incidents involving race and genitalia and sex. We can be deluded into a sense of false propriety by hate speech. The virulent racism and sexism (homophobia and other prejudices) of hate speech are too often covered over with silence. For all the reasons I have been exploring in this Article, I contend that the legal culture that we participate in, with its language, discourse, practices, and courtesies, inveigles us into silence about incidents having to do with race, and most especially about incidents having to do with race, genitalia, and sex acts. Round and round we go; legal actors locked in dances to the lyrics of “Don’t ask, Don’t tell.”

Part of the explosive potential of racialized hate speech is that it threatens to blow the lid off the silence that is typically maintained over public discourse and legal discourse. The centripetal power of legal discourse is tested during these episodes when the legal structures, institutions, and actors are forced to confront the tremendous centrifugal force of hate speech. Suddenly there is racism at its nakedest. But our training and socializing wins the day, and silence descends. The orthodoxy on racial silence is so diffused and its effects so implicated in legal processes that it all is of one piece. Noting the implication of Sor Juana in her own silencing, Octavio Paz writes: “[Usually the author is part of the system of tacit but imperative prohibitions that forms the code of the utterable in every age and society [Transgressions were, and are, punished with severity.” [n.294](#) Unlike the Church’s orthodoxy of the Seventeenth Century, today’s orthodoxy on race and silence hardly depends on enforcement through a sovereign. In and out of the law’s bureaucracies (in and out of law classrooms, in and out of faculty meetings, in and out of courtrooms), we are effectively silenced about race, racism and oppression.

***909 Conclusion**

This Article attempts to develop a theory about silence and silencing as they relate to race relations in a polyglot and multiracial society like the United States. This theorizing is done within the developing traditions of the anti-subordinationist movement called LatCrit (or Latina/o critical legal theory). Consequently, this Article draws primarily on scholarship, histories, narratives, and life experiences from the Latina/o world.

Borrowing Bakhtinian vocabulary, this conceptualization of silence and silencing incorporates the imagery of rotational forces, i.e., the centripetal and centrifugal forces, to describe the centering or de-centering effects of language.

The centripetal force is linked to the notion of a “unitary” language, one that allows only limited meanings for words and for nonverbal cues, such as silence. The centrifugal force is linked to “heteroglossia,” the multi-tongued meanings that are available for words and other codes within languages that are free to draw from the experiences of people and their diverse life experiences. While these forces are typically conceived in opposition to one another, I prefer to think of them as more relational than binary. Other students of Bakhtin agree that: [his sense of duality does not arise from, nor does it depict, a concept of binary opposition, but rather leads in the opposite direction and stresses the fragility and ineluctably historical nature of language The discursive interaction Bakhtin illustrates, therefore, certainly suggests the presence of forces that oppose and struggle; however, it seems to resemble the reciprocal and unending dynamism, say, of Taoist yin and yang tendencies more than a dichotomous process. . . . [n.295](#)

***910** Figure 3

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

The following tabular display of the various aspects of discourse that I have discussed in this Article may clarify the comparison of these forces. (See Figure 4.) However, this type of display has the tendency to be viewed as binary, which is why I have placed it here in close proximity to the yin/yang symbol that I think better illustrates my analysis. (See Figure 3.) Because classroom silences can be volitional or imposed or both at once, I have shown this relationship with a double arrow.

***911** Figure 4

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Antonio Gramsci theorized that “[hegemony . . . operates in a dualistic manner: as a general conception of life for the mass of people, and as a scholastic programme or set of moral-intellectual principles which is reproduced by a sector of the educated stratum.” [n.296](#) Consequently, because of the role that academics play in the production and maintenance of the forces of hegemony, I think it is particularly appropriate that LatCrits consider the hegemonic effects of the law school classroom and of legal discourse, more generally.

LatCrits and other progressive scholars of color can use silence in a counter-hegemonic manner, namely, we can learn to hear silence in oral and written communications and inquire into its meanings; we can learn to hold silence as a means of resistance or as a way of communicating counter- majoritarian values;

and we can teach with and about silence in order to introduce courtesies and modes of behavior that disrupt and subvert the dominant conventions.

[n.1.](#) M. M. Bakhtin, *The Dialogic Imagination* 271-72 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans. 1981). It is sometimes said that the centrifugal force is a “pseudo” force because it exists only in what physicists call rotating reference frames and not in inertial reference frames. See *Centrifugal Force: A Fictitious Force?* (visited December 13, 1999) <<http://observe.ivv.nasa.gov/nasa/space/centrifugal/centrifugal5.html>>. Consequently an observer watching a car go around a curve would observe the car being “forced” to the center of the curve through centripetal force while the occupants of the car would feel the centrifugal forces pushing the car toward the edge of the curve. See *id.*

[n.2.](#) The history of LatCrit is partially recorded in the symposia that have been published in connection with conferences and gatherings that have fostered this new school of jurisprudence and critical theory. See Colloquium, *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 *La Raza L.J.* 1 (1996); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 *Harv. Latino L.Rev.* 1 (1997); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 *Chicano-Latino L. Rev.* 1 (1998); Symposium, *Latinas/os and the Law*, 10 *La Raza L.J.* 1 (1998), 85 *Cal. L. Rev.* 1087 (1997); Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 *U. Miami L. Rev.* 1 (1999); Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33 *U.C. Davis L. Rev.* 1 (forthcoming 2000).

[n.3.](#) See Steven Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 *Am. U. L. Rev.* 1027 (1996); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 *Minn. L. Rev.* 269 (1992).

[n.4.](#) See generally *The Latina/o Condition*, “Part XI: English-Only, Bilingualism, Interpreters: You Mean I Can’t Speak Spanish?” (Richard Delgado & Jean Stefancic eds., 1998).

[n.5.](#) See Madeleine Plasencia, “*Suppressing the Mother Tongue*”—*Anti-Subordination and the Legal Struggle Over Control of the Means of Communication*, 53 *U. Miami L. Rev.* 989 (1999) (positing that language contributes to a person’s self-identity and her self-esteem).

[n.6.](#) See John Hayakawa Torok, *Finding the Me in LatCrit Theory: Thoughts on Language Acquisition and Loss*, 53 *U. Miami L. Rev.* 1019 (1999) (arguing that language analysis can help clarify the racialization of Latina/o and Asian American groups by comparing racial discourses that use the White-over-Black language with those that use the “colonizing settler-over-native” language).

[n.7.](#) See Margaret E. Montoya, Mascaras, *Trenzas y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 *Harv. Women’s L.J.* 185, 219 (1994), appearing contemporaneously in 15 *Chicano-Latino L.Rev.* 1, 35 (1994) (an enactment through bilingual autobiographical narratives of the idea that race is performance—how we show ourselves to the world).

[n.8.](#) For a superb article on accent discrimination, see Mari Matsuda, *The Voices of America: Accent, Antidiscrimination Law, and a New Jurisprudence for the Last Reconstruction*, 100 *Yale L.J.* 1329 (1991). See also Christopher David Ruiz Cameron, *How the Garcia 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).

[n.9.](#) Patricia J. Williams, *The Rooster’s Egg: On the Persistence of Prejudice* 138-49 (1995).

[n.10.](#) See Juan F. Perea, [Los Olvidados: On The Making of Invisible People](#), 70 *N.Y.U. L. Rev.* 965 (1995); Yvonne Tamayo, [Literal Silencing/Silenciando La Lengua](#), 53 *U. Miami L. Rev.* 995 (1999).

[n.11.](#) Some of the foundational work has been done by the Chicana writer and cultural critic Gloria Anzaldua. See Gloria Anzaldua, *Borderlands, La Frontera: The New Mestiza* (1987); Gloria Anzaldua, *Making Faces, Making Soul: Haciendo Caras* (1990) [hereinafter Anzaldua, *Making Faces*].

[n.12.](#) See Jewelle Gomez, *Because Silence is Costly*, in *Forty-Three Septembers* (1993); Darren Lenard Hutchinson, "Claiming" and "Speaking" Who We Are: Black Gays and Lesbians, Racial Politics, and the Million Man March, in *Black Men on Race, Gender, and Sexuality: A Critical Reader* 28 (Devon W. Carbado ed., 1999); Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights: The Deployment of Race/Sexual Orientation Analogies in the Debates about the "Don't Ask, Don't Tell" Policy*, in *Black Men*, *supra*, at 283; Oliva M. Espin, *Women Crossing Boundaries: A Psychology of Immigration and Transformations of Sexuality* 133-44 (1999).

[n.13.](#) See *Chinese Women Traversing Diaspora: Memoirs, Essay, and Poetry* (Sharon Hom, ed. 1999)(citing the work of King-Kwok Cheung, *Articulate Silences: Hisaye Yamamoto, Maxine Hong Kingston, Joy Kogawa* (1993) and the choreography of Eleanor Yung).

[n.14.](#) See Margaret (H. R.) Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 *UCLA Asian Pac. Am. L.J.* 4 (1995).

[n.15.](#) *Id.* at 9.

[n.16.](#) *Id.*

[n.17.](#) See Bakhtin, *supra* note 1, at 263 et seq.

[n.18.](#) See *id.* at 272.

[n.19.](#) See *id.*

[n.20.](#) *Id.* at 291.

[n.21.](#) See *id.* at 426.

[n.22.](#) George Kalamaras, *Reclaiming the Tacit Dimension: Symbolic Form in the Rhetoric of Silence* 27 (1994) (quoting Terry Eagleton, *Literary Theory: An Introduction* 117 (1983)).

[n.23.](#) Michael Holquist, a leading Bakhtinian scholar, describes the centripetal and centrifugal forces: "These are respectively the centralizing and decentralizing ... forces in any language or culture.... The rulers and the high poetic genres of any era exercise a centripetal—a homogenizing and hierarchicizing—influence; the centrifugal (decrowning, dispersing) forces of the clown, mimic and rogue create alternative 'degraded' genres down below." Bakhtin, *supra* note 1, at 425.

[n.24.](#) See generally Haig Bosmajian, *The Freedom Not to Speak* (1999)(arguing that the freedom to be silent is as politically important as the freedom of speech); Peter Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (1997)(examining the source and extent of the right to remain silent).

[n.25.](#) See *infra* text accompanying notes 112-45 for examples of the use of silence by women of color to communicate resistance to or awareness of subordination.

[n.26.](#) Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science, and Politics in the Paradigmatic Transition* 148-50(1995).

[n.27.](#) See Adam Jaworski, *The Power of Silence: Social and Pragmatic Perspectives* 69 (1993).

[n.28.](#) See *supra* text accompanying note 26.

[n.29.](#) [500 U.S. 352 \(1991\).](#)

[n.30.](#) See [id.](#) at 355-58.

[n.31.](#) For details regarding cultural citizenship, see William V. Flores & Rina Benmayor, *Latino Cultural Citizenship: Claiming Identity, Space and Rights* 57 (1997).

[n.32.](#) See *infra* text accompanying note 186.

- [n.33.](#) [477 U.S. 57 \(1986\).](#)
- [n.34.](#) [564 N.Y.S.2d 464 \(App. Div. 1991\).](#)
- [n.35.](#) As this Article was about to go to press, I decided to delete this narrative and so informed the editors. The telling of the story had been cathartic and healing for me, but ultimately I felt that the story might have more emotional weight than this last section needed. I subsequently learned from the editors that Professor Dorothy Roberts had commented on the story in her response to my paper so I concluded it was only fair to leave the paper in the form the commentators had received it. Even now, however, deciding to break my silence about this incident is a difficult and conflicting decision for me. The narrative is in print with my daughters' consent.
- [n.36.](#) See infra text accompanying note 120.
- [n.37.](#) See infra text accompanying note 280-86.
- [n.38.](#) Maria Herrera-Sobek, Silent Scream, quoted in Tey Diana Rebolledo, Women Singing in the Snow: A Cultural Analysis of Chicana Literature 121 (1995).
- [n.39.](#) See generally Flores & Benmayor, supra note 31.
- [n.40.](#) Id. at 57.
- [n.41.](#) Bernard P. Dauenhauer, On Silence, 3 Research in Phenomenology 9, 10-24 (1973). Dauenhauer further subdivided deep silence into the silence of intimates, liturgical silence, and what he called the "silence of the 'to- say.'" Id. at 18-24. This last mode, the "what-is-said," is embedded in the "silence of what-ought-to-be-said." Id.; see also Robert L. Scott, Rhetoric and Silence, 36 Western Speech 146 (1972) (exploring the privilege or obligation of remaining silent and its relation to contemplation and rhetoric); Richard L. Johannesen, The Functions of Silence: A Plea for Communication Research, 38 Western Speech 25 (1974) (extending the examination of silence to its role in political and civic life and in pathological settings such as counseling and psychotherapy).
- [n.42.](#) Dauenhauer, supra note 41, at 23.
- [n.43.](#) Id. at 26.
- [n.44.](#) See supra text accompanying note 21.
- [n.45.](#) Deborah Tannen has written two best sellers but is also a prolific scholar. See generally Deborah Tannen, That's Not What I Meant: How Conversational Style Makes or Breaks Your Relations with Others (1986); You Just Don't Understand: Women and Men in Conversation (1990).
- [n.46.](#) Muriel Saville-Troike is a Professor of English at the University of Arizona.
- [n.47.](#) See generally Perspectives on Silence (Deborah Tannen & Muriel Saville-Troike, eds., 1985).
- [n.48.](#) See Muriel Saville-Troike, The Place of Silence in an Integrated Theory of Communication, in Perspectives on Silence, supra note 47, at 3-18. For an annotated bibliography of early works on silence, see Emma Munoz- Duston & Judith Kaplan, A Sampling of Sources on Silence, in Perspectives on Silence 235 supra note 47.
- [n.49.](#) See Saville-Troike, supra note 48, at 4.
- [n.50.](#) See id.
- [n.51.](#) See id.
- [n.52.](#) See Daniel N. Maltz, Joyful Noise and Reverent Silence: The Significance of Noise in Penecostal Worship, in Perspectives On Silence, supra note 47, at 121-23. Maltz writes, "[the concept of 'silence' was a central aspect not only of the spiritual behavior of the individual Quaker, but also of the primary form of corporate Quaker worship, the 'silent meeting'" Id. at 123.
- [n.53.](#) For a novel analysis of scriptural interpretation of silence, see John Carroll Brown, Beyond the Silence: The Role of Silence in Determining Authority (1999).
- [n.54.](#) See Saville-Troike, supra note 48, at 7.
- [n.55.](#) See Joseph A. DeVito, The Interpersonal Communication Book 52 (8th ed. 1998).
- [n.56.](#) See id.
- [n.57.](#) See id.

[n.58.](#) See id. at 54.

[n.59.](#) See Saville-Troike, supra note 48, at 7.

[n.60.](#) See id.

[n.61.](#) See id. at 17.

[n.62.](#) See id. at 7.

[n.63.](#) See Tomohiro Hasegawa & William B. Gudykunst, Silence in Japan and the United States, 29 J. of Cross-Cultural Psychology 668, 669 (1998). The purpose of Hasegawa's and Gudykunst's study was to examine the use and attitudes toward silence in Japan and the United States. This study found that silence was viewed more negatively in Japan than in the United States, contrary to prevailing cultural stereotypes. See Hasegawa & Gudykunst, supra, at 681.

[n.64.](#) See id. at 681 n.2. These meanings were found to be consistent for both Japanese and Americans. See id. at 687.

[n.65.](#) See Christopher Lynwood Shultis, Silencing the Sounded Self: John Cage and the Experimental Tradition in Twentieth Century American Poetry and Music 98 (1993) (unpublished Ph.D. dissertation, University of New Mexico); see generally Gisele Brelet, Music and Silence, in Reflections on Art: A Source Book of Writings by Artists, Critics, and Philosophers (Susanne K. Langer ed., 1961).

[n.66.](#) See Brelet, supra note 66, at 23.

[n.67.](#) Id.

[n.68.](#) See Saville-Troike, supra note 48, at 11.

[n.69.](#) Id. at 13.

[n.70.](#) See generally Robin Patric Clair, Organizing Silence: A World of Possibilities (1998).

[n.71.](#) See id.

[n.72.](#) Clair uses Antonio Gramsci's concept of hegemony to examine how sexual harassment narratives are framed in order to appeal to and support the perceptions and interests of those with institutional power derived from gender, racial, and economic inequalities and disparities. See id. at 73-98. She examines the practices of universities in handling sexual harassment complaints through "say no," "keep a record," and "report it" policies and characterizes them as a process of bureaucratization, commodification, and privatization. Id. at 99-121. She also uses the story of one man's sexual harassment incident to explore issues of resistance and oppression as "self-contained opposites." Id. at 127-34.

[n.73.](#) Id. at 187. Because Gramsci's work on hegemony is referred to by LatCrit theorists, I offer this extended quote explaining the concept:

According to Gramsci, in order for the dominant group to control the masses both coercion and hegemony are required. No dominant group can rely entirely on coercion. For if the dominant group uses physical force and threats of death or other punitive measures as its sole means of control, it will expend huge amounts of time and energy in the control process. Furthermore, complete control through coercion is more likely to lead to resistance through revolution or rebellion because coerced people have little to lose. Eventually, systems of control become "normalized" into everyday practices, which are regulated through institutions such as the family, education, religion, systems of law and law enforcement, medicine, and general administration. These systems guarantee, "relations of domination and effects of hegemony."

Id. at 47. (quoting Michel Foucault, Discipline and Punish: The Birth of the Prison 141 (1979)).

[n.74.](#) See Catharine A. MacKinnon, Only Words 3 (1993) (describing women's suffering and pain, abuse, and terror as "unspeakable").

[n.75.](#) See Mary Daly, Beyond God the Father 93 (1973) (referring to two kinds of gendered silence: 1) over women's achievements in a patriarchy-controlled history; and 2) over the "arguments for and evidence of the matriarchal period").

[n.76.](#) See Tillie Olsen, Silences (1978).

Appendices

- [n.77.](#) See Adrienne Rich, *On Lies, Secrets, and Silence: Selected Prose 1966-1978* (1979).
- [n.78.](#) See Audre Lord, *Sister Outsider* (1984).
- [n.79.](#) K.H. Basso, 'To Give Up on Words': Silence in Western Apache Culture, in *Language and Social Context* 67 (Pier Paolo Giglioli ed., 1972) (citing an Apache maxim).
- [n.80.](#) See Jaworski, *supra* note 27, at 69. Jaworski explains that some scholars have tried contextual explanations for the meanings of silence while others have used a taxonomic approach, "providing more or less elaborate lists of possible meanings and functions of silence." *Id.* at 69-70 (citing seven scholars who have used a taxonomic approach).
- [n.81.](#) See Deborah Tannen, *Silence: Anything But*, in *Perspectives on Silence*, *supra* note 47, at 93-109.
- [n.82.](#) In addition to the variations in silence, Tannen identified their particular conversational style as having these characteristics: fast rate of speech; fast rate of turntaking; persistence (i.e., if a linguistic turn is not acknowledged, try again); marked shifts in pitch; marked shifts in amplitude; preference for storytelling; preference for personal stories; tolerance of and preferences for simultaneous speech; and abrupt topic shifting. See *id.* at 102.
- [n.83.](#) See *id.* at 106.
- [n.84.](#) See *id.*
- [n.85.](#) See *id.* at 106-09.
- [n.86.](#) See *id.* at 108.
- [n.87.](#) See *id.* at 106-09.
- [n.88.](#) *Id.* at 107.
- [n.89.](#) See *id.* at 109 (stating that "fast" or "slow" speech means faster or slower than expected, and that the expectation of the conversation speed varies by culture).
- [n.90.](#) See *id.*
- [n.91.](#) In this paper I use the collective term Indigenous Peoples or the adjective Indigenous to refer to Native Americans, American Indians, and Canadian First Nations Peoples.
- [n.92.](#) See Devito, *supra* note 55, at 245.
- [n.93.](#) See Ron Scollon, *The Machine Stops: Silence in the Metaphor of Malfunction*, in *Perspectives on Silence*, *supra* note 47, at 21, 24 (citing Arthur E. Hippler et al., *Tanaina Ethnopsychiatry, Past and Present: A Reflection of Cultural Personality Dynamics*, 15 *Internord* 117 (1978)).
- [n.94.](#) *Id.*
- [n.95.](#) Basso, *supra* note 79.
- [n.96.](#) *Id.*
- [n.97.](#) *Id.*
- [n.98.](#) See *id.* at 83.
- [n.99.](#) See *id.* at 71.
- [n.100.](#) See *id.* at 73.
- [n.101.](#) See *id.* at 74.
- [n.102.](#) See *id.* at 77.
- [n.103.](#) See *id.* at 78.
- [n.104.](#) See *id.*
- [n.105.](#) See *id.* at 84.
- [n.106.](#) See Leslie P. Fagre, *Cross-cultural Uses and Meanings of Silence in Peacemaking Mediation in the Navajo Peacemaker Court and the Metro Court Mediation Program* (1995)(unpublished manuscript on file with the Michigan Journal of Race & Law).
- [n.107.](#) See *id.* at vi.
- [n.108.](#) See Sherman Alexie, *The Toughest Indian in the World* 189 (2000).
- [n.109.](#) *Id.* at 190.
- [n.110.](#) See *id.* at 192.
- [n.111.](#) See *id.* at 189-90, 192-94, 195.

[n.112](#). See generally Dee Horne, *Contemporary American Indian Writing: Unsettling Literature* (1999).

[n.113](#). Mimicry has received considerable attention from post-colonial scholars, such as Homi Bhabha and Edward Said. See Horne, *supra* note 112, at 3 (explaining that “[the colonial mimic who attempts to repeat colonizers is actually engaged in a re-presentation of them wherein the colonial mimic is still disavowed as other, as different from the colonizer”).

[n.114](#). *Id.* at 52. Horne writes, “The subtitle of my book alludes to the way in which [writers are unsettling (both in the sense of subverting and in the sense of decolonizing) mainstream literature. An underlying premise is that, although American Indians have undergone imperialism and neocolonialism, they are still being colonized.” *Id.*; see also *id.* at xvii. (explaining that “although American Indians have undergone imperialism and neocolonialism, they are still being colonized.”). I would like to express my gratitude to my colleague Kip Bobroff for providing me with this and other sources on Indigenous silence.

[n.115](#). *Id.* at 53.

[n.116](#). Homi Bhabha’s concept of hybridity, or a “third space,” creates “the hybrid moment of political change. Here the transformational value of change lies in the re-articulation, or translation, of elements that are neither the One ... nor the Other ... but something else besides, which contests the terms and territories of both.” *Id.* at xix (quoting from Homi Bhabha, *The Location of Culture* 28 (1994)).

[n.117](#). Horne problematizes the notion of hybridity by acknowledging its connections to assimilation. “Nonetheless, hybridization need not be assimilation—one culture dominating and taking over another culture—but can be a recognition of the interactions between cultures.” *Id.* at xvii-xviii.

[n.118](#). *Id.* at xix.

[n.119](#). *Id.* (citing Bill Ashcroft, et al., *The Empire Writes Back: Theory and Practice in Post-Colonial Literatures* 180 (1989)).

[n.120](#). *Id.* at 54.

[n.121](#). See Lourdes Arizpe, *Peasant Women and Silence*, in *Women’s Writing in Latin America: An Anthology* (Sara Castro-Klaren et al. eds., 1991).

[n.122](#). *Id.* at 335.

[n.123](#). See *id.*

[n.124](#). See *id.* at 336.

[n.125](#). See *id.*

[n.126](#). *Id.* at 338.

[n.127](#). *Id.*

[n.128](#). See *Infinite Divisions: An Anthology of Chicana Literature* (Tey Diana Rebolledo & Eliana S. Rivero eds., 1993); *Latina: Women’s Voices from the Borderlands*, (Lillian Castillo-Speed ed., 1995); *In Other Words: Literature by Latinas of the United States* (Roberta Fernandez ed., 1994); *Breaking Boundaries: Latina Writing and Critical Readings* (Asuncion Horno-Delgado et al. eds., 1989).

[n.129](#). See, e.g., *Infinite Divisions*, *supra* note 128, at 1-35 (outlining the history, tradition of, and inspiration for Chicana literature).

[n.130](#). See *id.*

[n.131](#). Tey Diana Rebolledo, *Women Singing in the Snow: A Cultural Analysis of Chicana Literature* 121 (1995); see also Marta Ester Sanchez, *Setting the Context: Gender, Ethnicity, and Silence in Contemporary Chicana Poetry*, in *Contemporary Chicana Poetry: A Critical Approach to an Emerging Literature* 1, 1 (1985)(setting Chicana literature in a social and historical context).

[n.132](#). Rebolledo, *supra* note 131, at 123 (quoting Lucha Corpi, *Delia’s Song* 150 (1995)). For a different construction of learned silence through the loss of language, the attenuation of family ties, and the harboring of secrets, see Richard Rodriguez, *Aria*, in *Hunger for Memory: The Education of Richard Rodriguez* 11 (1981). In his subsequent memoir, a more nuanced book, Rodriguez remembers an incident concerning his own prejudices about silence.

Appendices

He is challenged by three Asian students in his Freshman English course at Berkeley: “We think, Mr. Rodriguez, that you are prejudiced against Asian students. Because we do not speak in class.” Rodriguez admits, “I did have a bias, an inevitable American bias, that favored the talkative student.” Richard Rodriguez, *Days of Obligation: An Argument with My Mexican Father* 173 (1992).

[n.133.](#) Maria Herrera-Sobek, *Silent Scream*, quoted in Rebolledo, *supra* note 128, at 123.

[n.134.](#) Translation: words of “good girls” and those of “gays” and “dykes.”

[n.135.](#) *Mestizaje* is the Spanish word for hybridity, referring to racial mixing or miscegenation. The word has become a metaphor for cultural and disciplinary syncretism evident in the writing of many Chicano/a writers and scholars.

[n.136.](#) See generally Renato Rosaldo, *Culture & Truth: The Remaking of Social Analysis* 216-17 (1989).

[n.137.](#) See Anzaldua, *How to Tame a Wild Tongue*, in *Borderlands/ la frontera: The New Mestiza* 53 (1987).

[n.138.](#) *Id.* As Gloria Anzaldua often writes without translating, and this Article honors her decision not to do so.

[n.139.](#) Roundtable on the Fourth World Conference on Women and the NGO Forum, 1995, in *Chinese Women Traversing Diaspora*, *supra* note 13, at 240.

[n.140.](#) See *id.* at 211.

[n.141.](#) See *id.* at 238-40.

[n.142.](#) See *id.* at 239.

[n.143.](#) *Id.*

[n.144.](#) *Id.* at 240.

[n.145.](#) Margaret Chon, *Being Between: A Review Essay of Chinese Women Traversing Diaspora: Memoirs, Essays, and Poetry*, 17 *Loy. of L. A. Ent. L.J.* 571, 574 (1997) (Professor Chon admits the challenge to her identity as an Asian American woman lawyer that these stories about the diasporic experience represent with their disruptions of language, identity, locus, and epistemology.).

[n.146.](#) bell hooks, *Talking Back*, in Anzaldua, *Making Faces*, *supra* note 11, at 207, 207-08.

[n.147.](#) See *id.*; Cf. Audre Lorde, *The Transformation of Silence into Language and Action in Sister Outsider* 40, 41 (1984) (Facing cancer, she writes, “death ... the final silence ... might be coming quickly ... without regard to whether ... I had only betrayed myself into small silences.”).

[n.148.](#) [People v. Hernandez, 553 N.Y.S.2d 85, 93 \(1990\)](#) (Kaye, J., dissenting).

[n.149.](#) See *supra* text accompanying notes 2-10.

[n.150.](#) See Sherene H. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (1998).

[n.151.](#) *Id.* at 10.

[n.152.](#) See *id.*

[n.153.](#) See [Hernandez v. New York, 500 U.S. 352 \(1991\)](#).

[n.154.](#) See [id. at 355](#).

[n.155.](#) [476 U.S. 79 \(1986\)](#) (requiring a three-step inquiry into claims that a prosecutor has used peremptory challenges in a constitutionally discriminatory manner).

[n.156.](#) See [Hernandez, 500 U.S. at 352](#).

[n.157.](#) [Id. at 360](#) (emphasis added).

[n.158.](#) See [id. at 355](#).

[n.159.](#) See *id.*

[n.160.](#) See *id.*

[n.161.](#) See *id.*

[n.162.](#) See *id.* at 356.

[n.163.](#) Id. at 357 n. 1 (emphasis added). For a penetrating analysis of “how responses to subordinate groups [including the cultural rules of eye contact are socially organized to sustain existing power arrangements,” see Razack, *supra* note 150, at 10.

[n.164.](#) See [People v. Hernandez, 528 N.Y.S.2d 625, 626 \(N.Y. App. Div. 1988\).](#)

[n.165.](#) There were four Latino jurors, two of whom, Munoz and Rivera, were excused because both had brothers who had been prosecuted by the same District Attorney’s office, and there was thus a doubt that they could be unbiased. See *New York v. Hernandez, 553 N.Y.S.2d 85, 86 (1990).*

[n.166.](#) Id. (emphasis added.)

[n.167.](#) See *infra* notes 168-70.

[n.168.](#) See Alfredo Mirande, ‘[Now That I Speak English, No Me Dejan Hablar \[’I’m Not Allowed to Speak’\]: The Implications of Hernandez v. New York, 18 Chicano L. Rev. 115 \(1996\);](#) Andrew McGuire, [Peremptory Exclusion of Spanish-Speaking Jurors: Could Hernandez v. New York Happen Here?, 23 N.M. L. Rev. 467 \(1993\);](#) Lisa J. Soto, [The Treatment of the Spanish Language and Latinos in Education in the Southwest, in the Workplace and in the Jury Selection Process, 3 Hispanic L.J. 73 \(1997\);](#) Juan F. Perea, [Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish, 21 Hofstra L.Rev. 1 \(1992\);](#) Salvador Mendoza, Jr., [When Maria Speaks Spanish: Hernandez, the Ninth Circuit and the Fallacy of Race Neutrality, 18 Chicano L.Rev. 193 \(1996\).](#)

[n.169.](#) See Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service, 1993 Wisc. L. Rev. 761.*

[n.170.](#) See Sarah B. Clasby, [Understanding Testimony: Official Translation and Bilingual Jurors in Hernandez v. New York, 23 U. Miami Inter- Am. L. Rev. 515 \(1991-92\).](#)

[n.171.](#) *Hernandez, 553 N.Y.S.2d* at 86, 109, 118 (emphasis added).

[n.172.](#) See, e.g., Jeffrey D. Smith, [The Advocate’s Use of Social Science Research into Nonverbal and Verbal Communication: Zealous Advocacy or Unethical Conduct? 134 Mil. L. Rev. 173, 174-76 \(1991\).](#)

[n.173.](#) See *id.* at 174 n.2.

[n.174.](#) See Marcus Stone, *Instant Lie Detection? Demeanor and Credibility in Criminal Trials, 1991 Crim. L. Rev. 821, 829 (1991)* (Stone concludes that demeanor cannot be the basis for assessing the credibility of witnesses. “There is no known physiological connection between the brain processes of a lying person and any bodily or vocal signs Anxiety or relaxation, even if detected correctly, cannot be relied on to indicate veracity.”); Olin Guy Wellborn, III, [Demeanor, 76 Cornell L. Rev. 1075, 1104 \(1991\)](#) (After acknowledging how entrenched the notion that jurors and judges can discern sincerity or deception is in legal discourse, the author concludes that many experiments with thousands of subjects have shown that people do not in fact have the capacity to detect falsehoods or errors by observing nonverbal behaviour.); Jeremy A. Blumenthal, [A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility, 72 Neb. L. Rev. 1157, 1159 \(1993\)](#) (arguing that extensive social scientific empirical research demonstrates that “typical subjects are unable to use the ‘manner and conduct’ of a speaker to successfully detect deceptive information on any reliable basis”).

[n.175.](#) See *infra* text accompanying notes 178-79.

[n.176.](#) The notion of “otherizing” has been described in this way:

[A kind of consensus has emerged that members of the dominant group—no matter how ‘intimate’ ... their sense of involvement with the people concerned, no matter how deep their proposed interest in the subject—will represent nothing but the assumption of their own kind ... [There will be a tendency, as James Clifford put it, ‘to dichotomize into we-they contrasts and to essentialize the resultant other.’

Mick Gidley, *Representing Others: An Introduction*, in *Representing Others: White Views of Indigenous Peoples* 1, 2-3 (Mick Gidley ed., 1992).

[n.177](#). Once a Batson challenge is invoked and the trial judge determines that there is a good faith allegation by the defense counsel that the prosecutor has used race as a reason for eliminating potential jurors, the prosecutor is required to come forward with race-neutral explanations. [Hernandez v. New York, 500 U.S. at 359-59](#). For this reason, such a colloquy is a clear example of a racialized incident, a moment in which race becomes the focus of the judicial deliberations. See [Batson v. Kentucky, 476 U.S. 79, 96 \(1986\)](#).

[n.178](#). Razack, *supra* note 150, at 10.

[n.179](#). *Id.*

[n.180](#). [Kaufman v. Sup. Ct. of Orange Cty., 64 Cal. Rptr. 2d 264, 268 \(Cal. Ct. App. 1997\)](#). Irving Kanarek, Charles Manson's attorney, was sued by Jose and Hermalinda Rangel for malpractice, fraud, and breach of contract. See [id. at 266](#). He represented himself but then ended up in a mental institution. See *id.* The Rangels' lawyers failed to inform the trial judge about Kanarek's institutionalization and absence at the hearings. See *id.* The trial judge entered a default judgment, and the lawyers proceeded to recover their fees from the Client Security Fund of the California State Bar. See *id.* at 265. Later, Kanarek was released, and he sued, alleging, *inter alia*, abuse of process. The Rangels' attorneys defended, saying that, under California's litigation privilege protecting communications made in or out of court, they had the right to remain silent about Kanarek's hospitalization. See *id.* The appellate court overturned the trial judge, writing, "silence in the face of a duty ... communicated something substantial." [Id. at 269](#); see also Martin Paskind, *The Question of Silence in Civil Lawsuits*, *Albuquerque Journal*, June 16, 1997, at 5.

[n.181](#). See Taunya Lovell Banks, *Gender Bias in the Classroom*, 14 S. Ill. U. L.J. 527 (1990); Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. Legal Educ. 137 (1988); Leslie G. Espinoza, *Constructing a Professional Ethic: Law School Lessons and Lesions*, 4 Berkeley Women's L.J. 215 (1989-90); Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law Schools*, 5 Berkeley Women's L. J. 1 (1990); Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies and Legal Education or "the Fem-Crits Go to Law School"*, 38 J. of Legal Educ. 61 (1988); Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 Vt. L. Rev. 139 (1990); Judy Scales-Trent, [Sameness and Difference in a Law School Classroom: Working at the Crossroads](#), 4 Yale J.L. & Feminism 415 (1992); Janet Taber, et al., [Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates](#), 40 Stan. L. Rev. 1209 (1988); Morrison Torrey, Jackie Casey, & Darin Olson, *Teaching Law in a Feminist Manner: A Commentary from Experience*, 13 Harv. Women's L.J. 87 (1990); Catherine Weiss & Louise Melling, [The Legal Education of Twenty Women](#), 40 Stan. L. Rev. 1299 (1988); Stephanie M. Wildman, *The Classroom Climate: Encouraging Student Involvement*, 4 Berkeley Women's L.J. 326 (1989- 90). For one study that found no significant differences, however, between male and female student satisfaction levels with the law school experience, see Lee E. Teitelbaum et al., [Gender, Legal Education and Legal Careers](#), 41 J. Legal Educ. 443 (1991).

[n.182](#). See, for example, the Classroom Climate Panel at the 20th National Conference on Women and the Law, as well as a January 1991 workshop on law school curricula organized by the Women and the Law Project, American University, Washington College of Law.

[n.183](#). See generally Lani Guinier, et al, [Becoming Gentlemen: Women's Experiences at One Ivy League Law School](#), 143 U. Pa. L. Rev. 1 (1994). There is also wider acceptance of the idea that silence has a politics and that women have been systematically silenced. Jaworski notes that women have used the following techniques to break their silence: "[they introduce into their writing elements of intuitive knowledge and associative thinking; they rely heavily on the use of neologisms; and they rename old concepts, alter the meaning of words (often based on their etymology), and alter syntax." Jaworski, *supra* note 27, at 122.

[n.184](#). See *supra* note 120 and accompanying text.

[n.185](#). See *supra* notes 81-90 and accompanying text.

[n.186](#). See Paulo Freire, *Education for Critical Consciousness* (1973); Paulo Freire, *Pedagogy of Hope: Reliving Pedagogy of the Oppressed* (1995), Paulo Freire, *Pedagogy of the Oppressed* (1970).

[n.187](#). See Tom Heaney, Issues in Freirean Pedagogy (visited May 12, 2000) <<http://nlu.nl.edu/ace/Resources/Documents/FreireIssues.html>> (on file with The Michigan Journal of Race & Law); Mark K. Smith, Paulo Freire and Informal Education (visited May 12, 2000) <<http://www.infed.org/thinkers/et-freir.htm>> (on file with The Michigan Journal of Race & Law).

[n.188](#). Heaney, *supra* note 187.

[n.189](#). *Id.*

[n.190](#). *Id.*

[n.191](#). *Id.*

[n.192](#). Espinoza, *supra* note 181, at 218.

[n.193](#). See *id.*

[n.194](#). Scales, *supra* note 181, at 140-41.

[n.195](#). Diana Eades, Legal Recognition of Cultural Differences in Communication: The Case of Robyn Kina, 16 Language and Communication 215, 218 (1996).

[n.196](#). See *infra* notes 197-206.

[n.197](#). See Lewis Bernstein & Rosalyn S. Bernstein, Interviewing: A Guide for Health Professionals 91 (3d ed. 1980); Lucille Hollander Blum, Reading Between the Lines: Doctor-Patient Communication (1972); Evelyn Liegner, The Silent Patient, 61 The Psychoanalytic Review 229 (1974).

[n.198](#). See Sue Fisher, Doctor-Patient Communication: A Social and Micro-Political Performance, 6 Sociology of Health and Illness 1 (1984).

[n.199](#). See *id.* at 14, fig. 1.

[n.200](#). See *id.* at 1.

[n.201](#). See Jay Katz, The Silent World of Doctor and Patient 2 (1984).

[n.202](#). *Id.* at 28.

[n.203](#). See James J. Hughes, Organization and Information at the Bed-Side: The Experience of the Medical Division of Labor by Hospital Inpatients 5-6 (1994) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

[n.204](#). See *id.*

[n.205](#). See Margaret Gerteis et al., Through the Patient's Eyes: Understanding and Promoting Patient-Centered Care (1993).

[n.206](#). See *id.*

[n.207](#). See Eades, *supra* note 195, at 215.

[n.208](#). See Queensland Court of Appeal, 29.11.93 (No. 221)(unreported).

[n.209](#). See *id.*

[n.210](#). See Eades, *supra* note 195, at 216.

[n.211](#). See *id.*

[n.212](#). See *id.*

[n.213](#). See *id.*

[n.214](#). See *id.*

[n.215](#). See *id.* at 217.

[n.216](#). *Id.*

[n.217](#). *Id.* at 218 (citing a handbook Eades wrote to assist lawyers in Queensland to communicate more effectively with their Aboriginal clients).

[n.218](#). See *id.* at 216.

[n.219](#). See *id.*

[n.220](#). See *id.*

[n.221](#). See *id.*

[n.222](#). See *id.* at 225.

[n.223](#). I have borrowed this capitalization counter-convention from Bill Ashcroft et al., *supra* note 119. The editors note the "need to distinguish between what is proposed as a standard code, English (the language of the erstwhile imperial centre), and the linguistic code, english,

which has been transformed and subverted into several distinctive varieties throughout the world.” Id. at 4.

[n.224](#). My analysis quite probably depends on classrooms that have a critical mass of students of color. With the re-segregation of higher education that is increasingly the reality for many institutions because of judicial and electoral policies, the imperative of altering the racial and linguistic dynamics may be somewhat diminished.

[n.225](#). I provided these pages to the student and asked for his response. I received an e-mail from him telling me that he had no comment. I interpreted his message to mean he did not object or explicitly agree with my version. Nevertheless, his enigmatic response was a sophisticated use of implicature.

[n.226](#). See Richard Poirier, *The Performing Self* (1992)(challenging static meanings and readings of literature and offering instead an approach to literature that accepts its political qualities and explores the potentiality of performance as a process of self-discovery, self-watching, and self-pleasuring). Literature with this self-involved way of reading is offered as “an object lesson for other more distinctly political or social performances.” Id. at xxi.

[n.227](#). Octavio Paz, *Sor Juana, or The Traps of Faith* 5 (1988).

[n.228](#). See *infra* text accompanying notes 229-54.

[n.229](#). See Kimberle Williams Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education 11 *Nat’l Black L.J.* 1-14 (1989) (arguing that a “perspectiveless” norm in the law school classroom burdens minority students by creating the dual dilemmas of objectification and subjectification).

[n.230](#). Lucinda M. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 *Nw. U. L. Rev.* 352, 384 (1988).

[n.231](#). See Lucinda M. Finley, *Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 *Notre Dame L.Rev.* 886 (1989). Finley explains “discourse” as a “term[used in poststructuralist theory, especially as developed in the work of Michel Foucault, [that ‘is not a language or a text but a historically, socially, and institutionally specific structure of statements, terms, categories, and beliefs.’” Id. at 888 n.12.

[n.232](#). See *id.* at 886 *passim*.

[n.233](#). See *id.* at 906.

[n.234](#). Id.

[n.235](#). Id. at 909.

[n.236](#). Gregory Bateson coined the term frame “to explain how individuals exchange signals that allow them to agree upon the level of abstraction at which any message is intended.” Deborah Tannen, *What’s in a Frame? Surface Evidence for Underlying Expectations*, in *New Directions in Discourse Processing* 137, 141 (Roy O. Freedle ed., 1979).

[n.237](#). At about the same time that Lucinda Finley was writing about the patriarchal nature of legal language and legal discourse, Kimberle Crenshaw was devising a similar racialized analysis and urging that more attention be paid to issues of race in legal education. See Crenshaw, *supra* note 229, at 1-14.

[n.238](#). Dirk Tillotson, *Constitutional Racism* (unpublished manuscript on file with author).

[n.239](#). See Robert Granfield, *Making Elite Lawyers: Visions of Law at Harvard and Beyond* (1992).

[n.240](#). See generally Ronald Takaki, *A Different Mirror: A History of Multicultural America* (1993); Howard Zinn, *A People’s History of the United States 1492-Present* (1999).

[n.241](#). George Lipsitz, *The Possessive Investment in Whiteness: How White People Profit from Identity Politics* (1998).

[n.242](#). Id. at viii.

[n.243](#). Id. at 20.

[n.244](#). See *id.* at 5.

[n.245](#). See *id.*

[n.246](#). See *id.* at 6-7.

- [n.247](#). See id.
- [n.248](#). See id.
- [n.249](#). Id. at 6.
- [n.250](#). See id. at 8.
- [n.251](#). Id.
- [n.252](#). See generally Kathryn K. Russell, *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment and Other Microaggressions* (1998).
- [n.253](#). See generally Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* (1999).
- [n.254](#). See generally Laura E. Gomez, *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure* (1997).
- [n.255](#). See David Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 Mich. J. Race & L. (forthcoming 2001); David Harris, [Factors For Reasonable Suspicion: When Black and Poor Means Stopped and Frisked](#), 69 Ind. L.J. 659 (1994).
- [n.256](#). See generally Louis P. Pojman, *The Death Penalty: For and Against* (1998); Amnesty International, *United States of America: The Death Penalty in Texas: Lethal Injustice* (1998).
- [n.257](#). See Joan Howarth, [Teaching in the Shadow of the Bar](#), 31 U.S.F. L. Rev. 927 (1997).
- [n.258](#). See Tillotson, *supra* note 238, at “Introduction” (unpaginated article). Tillotson notes that James Madison considered climate as one of two causes that divided the States; the other difference among them was their division “principally from the effects of their having or not having slaves.” Id. at note 35 (citing Paul Finkelman, *An Imperfect Union: Slavery, Federalism and Comity* 23 (1981)).
- [n.259](#). Tillotson, *supra* note 238, at n.2. Eracism is described as a “power play... a rewriting of our shared history as an exclusive and ostensibly objective or ‘perspectiveless’ text. It is a dangerous form of historical revisionism that seeks to deny the standing of certain groups. It elevates the history of some and denies that of others. It colors the constitutional nation as White, or ‘transparent,’ simultaneously denying the existence of other perspectives or colors.” Id. at Section 3 (1)(unpaginated article).
- [n.260](#). See e.g. Laurence H. Tribe, 1 *American Constitutional Law* ch. 2 (3d ed. 2000).
- [n.261](#). [477 U.S. 57 \(1986\)](#).
- [n.262](#). [564 N.Y.S.2d 464 \(N.Y. App. Div. 1991\)](#).
- [n.263](#). See, e.g., Kimberle Crenshaw, [Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color](#), 43 *Stan. L. Rev.* 1241 (1991); Harris, *supra* note 181, at 604.
- [n.264](#). See Paulette M. Caldwell, [A Hair Piece: Perspectives on the Intersection of Race and Gender](#), 1991 *Duke L. J.* 365 (analyzing [Rogers v. American Airlines](#), 527 F. Supp. 229 (S.D.N.Y. 1981) in which an airline was permitted to prohibit the hairstyle of a Black woman whose hair was braided into “corn rows.” In alleging a discrimination claim under Title VII, she was required to elect whether the basis for the mistreatment was her race or her sex.)
- [n.265](#). Catharine A. MacKinnon, [From Practice to Theory, or What is a White Woman Anyway?](#) 4 *Yale J.L. & Feminism* 13, 20 (1991).
- [n.266](#). [Open Letters to Catharine MacKinnon](#), 4 *Yale J.L. & Feminism* 177, 180 (1991).
- [n.267](#). Sarah A. DeCosse, *Simply Unbelievable: Reasonable Women and Hostile Environment Sexual Harassment*, 10 *Law & Equality* 285, 294 (1992) (quoting Mary E. Becker, Symposium: *The Law and Economics of Racial Discrimination in Employment: Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in*

Employment, 78 Geo. L.J. 1659, 1675-76 (1991); Angela Harris, [Race and Essentialism in Feminist Legal Theory](#), 42 *Stan. L. Rev.* 581, 604 (1990)).

[n.268.](#) See Linda L. Ammons, [Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome](#), 1995 *Wis. L. Rev.* 1003, 1027 [n.105](#) (“Black women who have tried to get relief under Title VII because they are black and female have had mixed results.”); Alan R. Kabat & Debra S. Katz, Racial and Sexual Harassment Employment Law, in II ALI-ABA Course of Study Materials: Current Developments in Employment Law 547, 554 (1999).

[n.269.](#) See Anna Maria Marshall, Closing the Gaps: Plaintiffs in Pivotal Sexual Harassment Cases, 23 *L. & Soc. Inquiry* 761, 776 [n.24](#) (1998)

[n.270.](#) See Michael J. Zimmer et al., Cases and Materials on Employment Discrimination 185, 587, 627, 641, 643, 655, 657, 662-71, 684 (1997) (failing to mention race whenever the Vinson opinion is referenced or reproduced); Harold S. Lewis, Jr., Civil Rights and Employment Discrimination Law 180-94 (1997) (same).

[n.271.](#) [564 N.Y.S. 2d 464, 464-65 \(App. Div. 1991\).](#)

[n.272.](#) See [id.](#) at 465.

[n.273.](#) See [id.](#) at 465-66.

[n.274.](#) See *id.*

[n.275.](#) See *id.* at 465.

[n.276.](#) See *id.*

[n.277.](#) See *id.* at 465-66.

[n.278.](#) See Edward J. Kionka, Torts in a Nutshell 370 (1992).

[n.279.](#) See e.g., Expectation of Life and Expectation of Death, by Race, Sex, and Age, 1999, in *Am. Jur.* 2d Desk Book 435 (2000).

[n.280.](#) See Paz, *supra* note at 227, at v.

[n.281.](#) See Carlos Fuentes, The Buried Mirror: Reflections on Spain and the New World 201-04 (1992).

[n.282.](#) See *id.* at 203 (“She won praise and fame, but promptly saw the difficulties of being a woman writer in colonial Mexico. Not only would she face male opposition and ecclesiastical oversight, but her time would be drained and her security challenged.”).

[n.283.](#) Paz, *supra* note 227, at 1.

[n.284.](#) *Id.* at 2.

[n.285.](#) *Id.* at 5.

[n.286.](#) *Id.* at 6.

[n.287.](#) Even Sor Juana, although silenced at the time, was ultimately victorious given the contemporary prominence of her work and the resonance of her voice. See Fuentes, *supra* note 281, at 203 (“Yet she defeated her silencers. Her baroque poetry had the capacity to hold forever the shapes and words of the abundance of the New World....”)

[n.288.](#) Paz, *supra* note 227, at 6.

[n.289.](#) See Montoya, *supra* note 7.

[n.290.](#) See generally 1 & 2 Juan B. Rael, *Cuentos Espanoles de Colorado y Nuevo Mexico* (Spanish Folk Tales of Colorado and New Mexico) (1977) (publishing a collection of stories like the oral ones of my grandfather).

[n.291.](#) See Montoya, *supra* note 7. (“Mascaras,” the Spanish word for masks, appears in the title of my first article and refers to the mechanisms used by people of color to deflect the effects of racism and other forms of subordination.)

[n.292.](#) Today in retrospect I would correct this to say “hate speech is a grenade.”

[n.293.](#) See Wendy S. Hesford, Framing Identities: Autobiography and the Politics of Pedagogy 94-118 (1999) (analyzing the risks of constructing women and members of other marginalized groups as victims rather than as agents of their own destinies, risks that are implicit in the use of autobiographical practices, especially within academia that “too often resorts to policy as its major paradigm of action.” *Id.* at 118.)

[n.294.](#) Paz, *supra* note 227, at 6.

[n.295](#). Kalamaras, *supra* note 22, at 27 (internal quotations omitted).

[n.296](#). Carl Boggs, *The Two Revolutions: Gramsci and the Dilemmas of Western Marxism* 161 (1984) (citations omitted).

4. Steven W. Bender, · *Silencing Culture and Culturing Silence: A Comparative Experience of Centrifugal Forces in the Ethnic Studies Curriculum*, 5 MICH. J. RACE & L. 913 (2000)

Using the metaphor of silencing, Professor Margaret Montoya documents the irrelevance of race, gender, and socio-historical perspectives both in legal education and, more broadly, in legal discourse. [n.1](#) Although others have invoked this metaphor, [n.2](#) Professor Montoya's charting of the physical, rather than merely metaphorical, space of silence moves beyond this legal literature in several respects. Viewing silence not just as dead space, Professor Montoya enlivens and colors silence and other nonverbal aspects of communication as positive cultural traits. She demonstrates how silence can be used as a pedagogical tool (a centrifugal force) in the classroom and in client interviews to bring out the voices of women and of men of color. [n.3](#) Moreover, Professor Montoya documents how silence and nonverbal communication, rich with cultural meaning, are misread to the legal detriment of the (non)speaker and others dependent on cross-cultural understanding. [n.4](#) My own experiences in the classroom, an Ethnic Studies *914 classroom filled with students intent on the study and progressive practice of law, validate many of Professor Montoya's experiences and observations.

In Part I, I discuss my own experiences with respect to silence and race in an Ethnic Studies classroom. In Part II, I address the challenges my undergraduate students face in their journey to become progressive lawyers. In Part III, I examine some of the doctrinal pitfalls encountered by new lawyers aspiring to use the law as a mechanism for achieving social justice. Finally, I conclude by discussing the apparent irrelevance of Latino/a perspectives in legal education.

() I. *Silence and Race from an Ethnic Studies Perspective*

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Professor Montoya posits that failure to acknowledge racial issues in the law school classroom, and in traditional legal discourse produces a centripetal force that maintains white privilege. [n.5](#) In contrast, a few years ago I designed an undergraduate course, Chicanos/as and the Law, in the Ethnic Studies curriculum which uses race as the means of introducing students to legal education. [n.6](#) I was moved in part by a concern that the sole undergraduate offering by our law school, Perspectives on the Law, was not situated to attract or to intrigue undergraduates of color. [n.7](#) Particularly, I had in mind Chicano/a students in the Movimiento Estudiantil Chicano de Aztlan (MEChA) organization for which I served as a faculty advisor. I believed that a course focused on race, especially on issues outside the Black-White paradigm of race discourse, would ***915** serve as a catalyst to interest these students in the study and practice of law. [n.8](#)

Since I began teaching Chicanos/as and the Law in 1995, I have used language discrimination as the decentralizing theme (in Professor Montoya's phrasing, as a centrifugal force) for the class. I survey the field of American law using three dimensions of language law and policy that serve to silence the Spanish-speaker's culture: Official English and English-only laws [n.9](#) that govern public speech, English-ability laws and policies, [n.10](#) and private language vigilantism. [n.11](#) Language law enables me to introduce areas of first-year legal curriculum as diverse as torts, [n.12](#) criminal law, [n.13](#) property, [n.14](#) civil procedure, [n.15](#) constitutional law, [n.16](#) ***916** and contracts. [n.17](#) Study of language law also previews more advanced legal curriculum, such as First Amendment, [n.18](#) labor law and employment discrimination, [n.19](#) environmental law, [n.20](#) criminal procedure, [n.21](#) and family law. [n.22](#) Of course, language law is also an appropriate means of introducing students to race-apparent courses of legal study such as immigration law and civil rights. My point is that traditional courses of study in legal education—where race is often silenced—can be effectively introduced and taught through race-apparent themes such as language discrimination.

Language law also serves to illustrate the structure and process of the American legal system. Using the litigation that nullified Arizona's English-only constitutional provision allows me to expose students to the core constitutional concept of supremacy, to the structure of the judicial system and rights to appeal, and to the process in some states of adopting laws by citizen initiative. [n.23](#) In examining the legal challenges to oppression of Latinos/as by means of language law and policy [n.24](#) in governmental and private settings ***917** such as workplaces and the consumer marketplace, I am able to highlight the diverse sources of American law from statutory [n.25](#) to administrative [n.26](#) to constitutional [n.27](#) and common law. [n.28](#)

Our classroom study of language, cultural, and race discrimination in the criminal justice system, as illustrated by the wrongful murder conviction of Santiago Ventura Morales in 1986, brings out many of the dimensions of silence and silencing that Professor Montoya documents. As an eighteen-year-old Mixtec

immigrant from Oaxaca, Mexico, Santiago [n.29](#) was found guilty of stabbing a fellow migrant worker in the strawberry fields outside Portland, *918 Oregon. [n.30](#) Santiago was singled out quickly as the murder suspect when he stuttered and would not look a police officer in the eye during questioning. [n.31](#) Rather than serving as a guilt reflex, as presumed by the white police officer, Santiago's inability to convey an Americanized demeanor of innocence reflected his cultural upbringing in which young Mixtecs do not look their elders in the eye. [n.32](#) At trial, his defense was marred by the assumption that Santiago and the migrant witnesses understood Spanish. [n.33](#) In fact, their primary language was Mixtec, and Santiago and the witnesses had trouble understanding the Spanish interpreter provided by the state. [n.34](#) One juror viewed this judicial circus of witness misunderstandings and confused testimony as part of a criminal enterprise in which "[they all acted kind of guilty." [n.35](#) Indeed, one of the jurors remarked later that "[we don't need so many of 'em [Mexican migrant*919 workers running around here." [n.36](#) Further, Santiago's public defender decided unilaterally that Santiago could not testify in his own defense, [n.37](#) leading at least one juror to assume incorrectly that "he had a long criminal history." [n.38](#) When the guilty verdict was announced, Santiago broke his involuntary silence and began howling in what his public defender described as "horrible sorrow." [n.39](#) Capturing the jurors' reaction to hearing his voice for the first time, Santiago said later "[they realized I was a human then." [n.40](#) When several jurors concluded shortly thereafter that they had succumbed to group dynamics and made the wrong decision, they began a five-year struggle along with local activists that culminated in a successful petition for post-conviction relief that freed Santiago. [n.41](#)

(a) II. Deculturing Forces in Legal Education

I tell my students that after his release from prison, Santiago declared his interest in becoming a lawyer to fight injustice. [n.42](#) No doubt, many of them have the same noble intention. Professor Montoya soundly indicts the deculturing forces in legal education that shift these students away from a commitment to progressive lawyering for social change to the pursuit of a career with *920 conservative law firms in partnership with corporate America. Professor Montoya's focus on the silencing of race and gender in the law school classroom as the culprit for this "pernicious" change leads me to question whether my own focus on race and culture makes the false promise to my students of the relevance of race in legal education. [n.43](#) Surely the undergraduate Ethnic Studies major, immersed in a curriculum rich with socio-historical perspectives, [n.44](#) will be confused, intimidated, and ultimately silenced by the apparent irrelevance of this background in legal discourse. By contrast, I imagine those law students steeped in the language of economics and business in their undergraduate careers may find a more tradeable currency in the law classroom. [n.45](#)

Of equal concern, I wonder whether Professor Montoya's focus on the deculturing of the classroom is too narrow. Race is silenced long before and well after the hegemony of the law school classroom. I worry about my Latino/a

students' performance on the standardized law admissions test. Will the dismantling of affirmative ⁹²¹ action, [n.46](#) part of the broader effort to silence race in legal and higher education, enhance the role of this often culturally inappropriate device? [n.47](#) How culturally appropriate are American law schools where student rankings and self-worth are derived from a twice annual "sit and spill" examination? [n.48](#) Are bar examinations that regulate entry into the profession in an even more rigorous session of endurance and speed any better suited to the culture of students of color? Moreover, assuming that students survive this deculturing gauntlet with their public interest commitment intact, will spiraling debt loads steer them away from often underpaid opportunities in progressive lawyering? [n.49](#) Surely, the journey from ⁹²² an Ethnic Studies education to what Gerald Lopez describes as a rebellious lawyer [n.50](#) is a perilous one.

(b) III. Doctrinal Pitfalls to Progressive Lawyering

What awaits the now-graduated progressive lawyer who aspires to use law as a means of achieving and ensuring social justice? She will find a legal wasteland marked by the increasing conservatism of judges in construing statutes and reigning in common law theories; [n.51](#) the chilling of civil rights actions through "tort reform" measures that reciprocate attorney fee recoveries, eliminate or restrict punitive damage recoveries, and limit class actions; [n.52](#) and the dismantling of statutory guarantees originating in the Civil Rights era in what is now called the post-Civil Rights era. [n.53](#)

On reflection, my undergraduate students ought to see some of this spirit-breaking writing on the wall. Many, if not most, of the language cases they study foretell the doctrinal pitfalls of progressive lawyering for civil rights on behalf of Latinos and Latinas. They learn the difficulty in bridging the judicial and definitional divide between language discrimination and unlawful discrimination on the basis of race or national origin. [n.54](#) They observe how easily a defendant can elude liability for purposeful discrimination under civil rights laws by asserting some pretextual business purpose—for example, that a tavern's English-only policy keeps the peace in the ⁹²³ bar, [n.55](#) or that a landlord's policy to reject non-English speaking applicants is meant to ensure effective communication as to the condition of the premises. [n.56](#) They are exposed to the tendency of courts to defer to the legislature on issues of language policy, and learn, of course, that where the legislature has failed to create positive language rights, the claim to establish such rights under the common law is doomed. [n.57](#) In studying the Supreme Court's refusal to invalidate a prosecutor's use of peremptory challenges to exclude bilingual Latinos/as from the jury, [n.58](#) students see the shortcomings of the doctrine of equal protection to guard against cultural ignorance. In the balancing of detriment and benefit under the doctrines of due process and equal protection, they see undue weight given to protecting

government from the cost of providing Spanish services on the mistaken assumption that extending rights to Spanish-speakers requires recognition of every other language. [n.59](#) Finally, despite its use in striking down Arizona's *924 English-only law, [n.60](#) my students observe the limited reach of the constitutional guarantee of free speech. [n.61](#)

Language law is not unique in its reflection of the deteriorating conditions for progressive lawyering. Surely other thematic rights-based approaches to introduce the study of law, such as those based on gender, class, sexual orientation, immigrant rights, or racial discrimination, would foretell similar obstacles to social justice. These pitfalls expose a separate concern from what Professor Montoya has identified as the curricular avoidance of race in the law school classroom. Law students are rarely schooled in praxis—the means of linking legal strategies to community-based political and social movements for change. [n.62](#) By contrast, my undergraduate students learn about the role that these movements play in the struggle for social justice, a role strong enough that the community-based effort on occasion wholly displaces any legal (lawsuit-based) response. [n.63](#) In the context of language policy, we study the role of community activism in the withdrawal of plans to site a toxic waste incinerator near Kettleman City, California. [n.64](#) Previously, a judge had thrown out the project's environmental impact report because it had not been translated into Spanish for the benefit of the local Spanish-speaking residents. [n.65](#) However, had it not been for community resistance measures that undoubtedly influenced the decision to abandon the project, its proponent could *925 have simply translated the report as the court had ordered and pushed forward with the approval process. [n.66](#)

We also study a recent example of activism against hate speech—a close ally of language discrimination. [n.67](#) In 1998, while a federal court in California was still wrestling with constitutional challenges to the anti-immigrant Proposition 187 adopted four years earlier, the co-sponsor of that initiative erected a billboard in the California desert announcing to travelers “Welcome To California, The Illegal Immigration State. Don't Let This Happen To Your State.” [n.68](#) Within a few weeks, a Latino activist threatened at first to burn and later to repaint the billboard to erase its message of hate directed at immigrants and Latinos/as. Rather than face a confrontation, the billboard owner returned the vinyl sign to the anti-immigrant group not two months after its unveiling. [n.69](#) As *926 Professor Montoya suggests, hate speech too often prompts silence rather than individual or community activism. [n.70](#) As viewed against Montoya's indictment of the silencing of race, it is ironic that proponents of the billboard assailed the activist's tactics as intimidation that “squelched” needed public discourse on race. [n.71](#)

Validating Professor Montoya's observations on the irrelevance of race and socio-historical perspectives in legal education, no administrator has ever

suggested that I offer my Chicanos/as and the Law course to law students. Recently, Professor Frank Valdes at the University of Miami School of Law conducted an e-mail survey that confirmed only a handful of U.S. law schools include meaningful coverage of Latino/a issues in their curricula. [n.72](#) As Professor Valdes concluded, this means that most law students, whether Latino/a or not, graduate “without EVER having studied about, thought about, or discussed legal issues that are especially germane to the fastest growing social group in the country!” [n.73](#)

Today, Latinos/as and their intersection with law and social policy are relevant only at the margins and fringes of legal education. The LatCrit enterprise, well represented in this Symposium, is devoted to challenging the ongoing silencing of race and to urging that the legal profession, legal education, and society recognize the salience of race and of Latinos/as, their culture, and their history, in our collective future.

[n.1.](#) See Margaret E. Montoya, [Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse](#), 5 Mich. J. Race & L. 847 passim (2000), 33 U. Mich. J.L. Reform 263 passim (2000).

[n.2.](#) See, e.g., Keith Aoki, [Introduction: Language Is a Virus](#), 53 U. Miami L. Rev. 961, 968 (1999); Margaret (H.R.) Chon, On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences, 3 UCLA Asian Pac. Am. L.J. 4, 11 (1995); Yvonne A. Tamayo, [Literal Silencing/Silenciando la Lengua](#), 53 U. Miami L. Rev. 995, 995-1001 (1999).

[n.3.](#) See Montoya, supra note 1, at 5 Mich. J. Race & L. at 884-89, 33 U. Mich. J.L. Reform at 300-05.

[n.4.](#) See id. at 5 Mich. J. Race & L. at 873-79, 33 U. Mich. J.L. Reform at 289-95; see, e.g., [Hernandez v. New York](#), 500 U.S. 352, 372 (1991) (upholding rejection of Latino/a jurors in Latino defendant’s trial for attempted murder where the prosecutor exercised peremptory challenges based on his culturally limited interpretation of Latino/a demeanor).

[n.5.](#) See Montoya, supra note 1, at 5 Mich. J. Race & L. at 879-905, 33 U. Mich. J.L. Reform at 295-321.

[n.6.](#) I have offered the course in 1995, 1996, 1997, 1999 and 2000. Latinos/as comprised the majority of the students in at least the first two offerings. Progressive white students, particularly women, have displaced Latinos/as as the dominant group that enrolled in the class in the last two course offerings. Typically there are a few Asian American and African American students as well.

[n.7.](#) In 1993, the University of Oregon’s course description for “Perspectives on the Law” described five thematic segments: (1) law as a grievance-remedial instrument, (2) law as a penal-corrective instrument, (3) law as an administrative-regulatory instrument, (4) law as an instrument for organizing conferral of public benefits, and (5) law as an instrument for facilitating private arrangements. The course was team-taught by five law faculty members including one woman but no faculty of color.

[n.8.](#) My colleague, Keith Aoki, had taught a similar class in 1994 focusing on Asian Americans, “Asian Americans in U.S. Law & Culture,” which he described in his article, Keith Aoki, [Critical Legal Studies, Asian Americans in U.S. Law & Culture, Neil Gotanda, and Me](#), 4 Asian L.J. 19 (1997).

[n.9.](#) “Official English” laws are those designating English as the official state language, whereas “English-only” laws move beyond such symbolism in expressly prohibiting government speech in languages other than English. Several state laws fall somewhere in between,

such as by purporting to preserve and protect the English language and by creating a private enforcement mechanism. See, e.g., [Cal. Const. art. III, § 6 \(2000\)](#).

[n.10.](#) By “English-ability,” I mean to describe laws and policies that withhold benefits or privileges from, or otherwise impose sanctions on, non- English-speaking persons. An example is a state requirement of proficiency in English as a condition to issuing a driver’s license. In a future article, I will identify this trend in legislation, case law, and private action toward requiring English ability as far more punitive than Official English law.

[n.11.](#) See generally **Steven W. Bender**, Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience, 2 Harv. Latino L. Rev. 145 (1997) (identifying the causal link between state Official-English laws and private attacks on non-government speech).

[n.12.](#) See [Ramirez v. Plough, Inc., 863 P.2d 167, 178 \(Cal. 1993\)](#) (holding drug manufacturer had no duty in tort to warn in Spanish of product risks).

[n.13.](#) See discussion of the trial of Santiago Ventura Morales *infra* notes 30-42 and accompanying text.

[n.14.](#) See Howard Mintz, English-only Policy for Tenants Upheld, San Jose Mercury News, Dec. 10, 1998, available in LEXIS, News Library, San Jose Mercury News File (reporting that a California jury had concluded a landlord’s English language policy did not violate federal housing discrimination law).

[n.15.](#) Among other introductions to the process of litigation, my students examine a legal complaint filed in 1990 in an Oregon circuit court against a tavern that enforced its English-only rule against three Latina patrons. See *Portillo v. Howdy Pardner, Inc.*, No. 16-90-08274 (Or. Cir. Ct. Lane County filed Sept. 19, 1990).

[n.16.](#) See [Guerrero v. Carleson, 512 P.2d 833, 839 \(Cal. 1973\)](#) (stating that due process does not compel state agency to provide notice in Spanish to non-English-speaking recipients of reduction or termination of welfare benefits); see also [Flores v. State, 904 S.W.2d 129, 131 \(Tex. Crim. App. 1995\)](#) (holding equal protection not denied to defendant sentenced to prison for want of a Spanish language alcohol diversion program comparable to programs available for English-speaking defendants).

[n.17.](#) See, e.g., Steven W. Bender, [Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace, 45 Am. U. L. Rev. 1027 \(1996\)](#) (examining unfairness in contracts between merchants and non- English-speaking consumers).

[n.18.](#) See [Ruiz v. Hull, 957 P.2d 984, 1000 \(Ariz. 1998\)](#) (holding Arizona’s English-only constitutional amendment infringed on multiple First Amendment interests of the public, public employees, and elected officials).

[n.19.](#) See [Garcia v. Spun Steak Co., 998 F.2d 1480, 1490 \(9th Cir. 1993\)](#) (holding the employer did not violate civil rights of bilingual employees in requiring them to speak only English on the job).

[n.20.](#) See Luke W. Cole, The [Struggle of Kettleman City: Lessons for the Movement, 5 Md. J. Contemp. Legal Issues 67, 74-75 \(1993-94\)](#) (describing examples in struggle to prevent siting of toxic waste incinerator that link language discrimination to environmental racism).

[n.21.](#) See [United States ex rel. Negron v. New York, 434 F.2d 386, 389- 90 \(2d Cir. 1970\)](#) (holding constitutional right to confront adverse witnesses compels appointment of interpreter in criminal trial at state expense).

[n.22.](#) See Sam H. Verhovek, Mother Scolded by Judge for Speaking in Spanish, N.Y. Times, Aug. 30, 1995, at A12 (reporting that Texas judge had instructed a bilingual mother in a child custody proceeding that she was abusing her five-year-old daughter by speaking to her only in Spanish).

[n.23.](#) See Ariz. Const. art. XXVIII, invalidated by [Yniguez v. Arizonans for Official English, 69 F.3d 920 \(9th Cir. 1995\)](#), cert. denied sub nom., [Arizonans for Official English v. Arizona, 520 U.S. 43 \(1997\)](#) (finding plaintiff’s resignation from state employment rendered case moot); see also [Ruiz v. Hull, 957 P.2d 984 \(Ariz. 1998\)](#). Enacted in 1988 by initiative, § 3(2) of Arizona’s constitutional provision prohibiting non-English languages in government speech

provided for exceptions that included those necessary to protect the rights of criminal defendants (e.g., Negron), provide bilingual education to the extent required under federal law, and comply with other federal laws. See, e.g., Voting Rights Act, [42 U.S.C. § 1973aa-1a \(1994\)](#).

[n.24.](#) My emphasis in teaching language law and policy is on the silencing of Spanish and the consequent oppression of Latinos/as. Our study, however, necessarily exposes the potential for oppression of other subordinated groups by means of language policy. For example, my students study accent discrimination in the workplace, an offshoot of English-only policies, that often targets Asian-Americans. See [Fragente v. City & County of Honolulu](#), 888 F.2d 591, 594 (9th Cir. 1989) (holding that Filipino man was not discriminated against when denied position because of his “heavy accent”); see generally Mari J. Matsuda, [Voices of America: Accent, Antidiscrimination Law and a Jurisdiction for the Last Construction](#), 100 Yale L.J. 1329 (1991). In California, particularly, the English-only movement is aimed at both Spanish speakers and Asian immigrants. See Robert S. Chang & Keith Aoki, [Centering the Immigrant in the Inter/National Imagination](#), 85 Cal. L. Rev. 1395, 1425 (1998) (discussing language tensions in Monterey Park in the 1980s); see generally Grace A. Pasigan, [Sign Language: Colonialism and the Battle Over Text](#), 17 Loy. L.A. Ent. L.J. 625 (1997) (examining English-only efforts on the East Coast directed at Asian Americans).

Language politics implicate other subordinated groups. For a discussion of the “Ebonics” controversy surrounding the recognition of Black-English in public education, see Richard Lee Colvin, No “Ebonics” in New Oakland School Plan, L.A. Times, May 6, 1997, at A1, as well as the impact of English-only law and policy on the indigenous languages of Native cultures, see Larry Campbell, Dispatch Alaska: More Native Villages Reject English-only Rule, Anchorage Daily News, Jan. 24, 1999, at B7. See generally Allison M. Dussias, [Waging War with Words: Native Americans’ Continuing Struggle Against the Suppression of Their Languages](#), 60 Ohio St. L.J. 901, 991 (1999) (discussing history of English-only policy and current struggles against such policy).

[n.25.](#) The federal Civil Rights Acts, [42 U.S.C. § § 1981, 1982 \(1994\)](#), have been invoked in litigation seeking redress from enforcement of English-only policies by restaurants and taverns against Spanish-speaking patrons. See Bender, *supra* note 11, at 170-72. Similarly, the federal Fair Housing Act, [42 U.S.C. § 3601 \(1994\)](#), has been used to target similar policies by residential landlords. See Mintz, *supra* note 14.

[n.26.](#) For example, Equal Employment Opportunity Commission Guidelines create a presumption that employer English-only rules constitute national origin discrimination under Title VII. See EEOC Guidelines on Discrimination Because of National Origin, [29 C.F.R. § 1606.7\(a\) \(2000\)](#), rejected in [Garcia v. Spun Steak Co.](#), 998 F.2d 1480, 1489 (9th Cir. 1993) (refusing to presume that an English-only policy has a disparate impact on employees).

[n.27.](#) See generally [Ruiz v. Hull](#), 957 P.2d 984 (Ariz. 1998); [Guerrero v. Carleson](#), 512 P.2d 833 (Cal. 1973); [Flores v. State](#), 904 S.W.2d 129 (Tex. Crim. App. 1995). The federal constitutional doctrines of due process, equal protection, and free speech are employed routinely in challenges to government policies that target non-English-speaking persons.

[n.28.](#) See [Ramirez v. Plough, Inc.](#), 863 P.2d 167, 178 (Cal. 1993) (applying negligence law to conclude there was no duty to warn non-English-speaking consumers in Spanish of product dangers); Bender, *supra* note 17, at 1095-1103 (arguing that certain language policies of merchants in the consumer marketplace are subject to attack using common law doctrines such as fraud and unconscionability).

[n.29.](#) I use Santiago’s first name as a short-form reference in subsequent text so as not to elide his paternal or maternal surname in the discussion of his culture.

[n.30.](#) See Peter Carlin, What Becomes of the Resurrected?, L.A. Times, Mar. 8, 1992, (Magazine), at 20.

[n.31.](#) See *id.*; see also A Trial of Errors (KGW-TV Portland news documentary, Sept. 5, 1990) (reporting remarks of investigating police officer Tim Skipper that “[if they hesitate to look you in the eye... or they stutter when they speak to you [they are guilty.]”).

[n.32.](#) See Paul J. DeMuniz, Introduction to Immigrants in Court 3, 5 (Joanne I. Moore ed., 1999). The prosecutor in Hernandez explained his peremptory challenges against the Latino/a jurors as based in part on their lack of eye contact in responding to whether they could ignore deviations between the interpreter's translation and the testimony. See [Hernandez v. New York, 500 U.S. 352, 357 n.1 \(1991\)](#). Cf. Montoya, *supra* note 1, at 5 Mich. J. Race & L. at 874, 33 U. Mich. J.L. Reform at 290 ("Indeed, I think the prosecutor did not know enough about nonverbal communication, particularly cross-cultural communication, to understand that silence, pauses, and hesitations are encoded with meaning in relation to the words and the language being spoken."); Juan F. Perea, [Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish, 21 Hofstra L. Rev. 1, 60 \(1992\)](#) (suggesting that in the cultural context, looking away from the prosecutor may have been an expression of respect for him or of discomfort in the unfamiliar proceedings); see generally Richard W. Cole & Laura Maslow-Armand, [The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding, 19 W. New Eng. L. Rev. 193, 226 \(1997\)](#) (giving examples of cultural explanations for failing to express remorse verbally and non-verbally).

[n.33.](#) See DeMuniz, *supra* note 32, at 3-5.

[n.34.](#) See Carlin, *supra* note 30, at 20 (reporting that the investigating officer dismissed the distinction between languages because Spanish and indigenous languages "go hand-in-hand in Mexican country down there"); Barnes C. Ellis, Ventura Murder Case Dropped, *Oregonian*, Apr. 12, 1991, at A2, A18 (noting contention of anthropologist that Santiago understood only enough Spanish to buy vegetables in the marketplace); see also Sandra Sanchez, Misdiagnosed Patient Freed After 2 Years, *USA Today*, June 17, 1992, at 3A (describing release from Oregon mental hospital of Mexican migrant worker wrongly diagnosed two years previously as a paranoid schizophrenic for speaking in tongues when doctors assumed he spoke Spanish and patient in fact spoke the indigenous dialect of Trique).

Prompted by the experience in Santiago's case, Oregon ultimately passed legislation requiring interpreters to be tested and certified. See Oregon Mandates Testing for Court Interpreters, *Oregonian*, Dec. 26, 1995, at B4.

[n.35.](#) Carlin, *supra* note 30, at 20.

[n.36.](#) *Id.* As best as I can determine, the Santiago jury was all-white. Of course, under the outcome in [Hernandez v. New York, 500 U.S. 352 \(1991\)](#), the prosecutor could have validly used her peremptory challenges to exclude bilingual Latinos from this jury if she had perceived they would be unable to ignore the testimony of the witnesses in Spanish.

[n.37.](#) See A Trial of Errors, *supra* note 31 ("My attorney never told me that I had the right to testify.").

[n.38.](#) *Id.* (quoting juror Patty Lee).

[n.39.](#) *Id.*

[n.40.](#) *Id.* Without meaning to detract from the gravity of Santiago's experience and emotion upon being sentenced to life in prison, I wonder whether, when law students of color speak out in the classroom after a long silence, their white professors and classmates are similarly moved to realize their competency. Cf. Margaret E. Montoya, [Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse, 17 Harv. Women's L.J. 185 \(1994\)](#) (describing personal experience of breaking silence to question the socio-economic and cultural backdrop of a manslaughter case involving a Latina defendant).

[n.41.](#) See Carlin, *supra* note 30, at 20 (noting the ruling in Santiago's favor was based on the denial of his constitutional right to testify and on the failure of his defense counsel to call any expert witnesses in his defense); see also DeMuniz, *supra* note 32, at 5 (revealing that a private reinvestigation of the case established convincingly that another migrant laborer had committed the murder). Having learned English while imprisoned, Santiago obtained a college degree in social work and now works for the California Rural Legal Assistance Foundation.

[n.42.](#) See Spencer Heinz, Morales Enrolls in College, Takes Look at Career in Law, *Oregonian*, Jan. 21, 1992, at C8.

[n.43.](#) In the same vein, my presence in the undergraduate classroom as a law professor of color may give the deceptive impression that Latino/a law professors are plentiful in number. Not only am I the only Latino/a law professor at my school, but it is also likely that, given my German father's surname, few of my law students are aware that I identify myself as Latino. Generally, I find that my teaching areas of Real Estate Planning, Secured Land Transactions, Commercial Law, and Corporations are oriented toward the dominant culture and provide students with no clues as to my cultural identity. Thus far, I have had no opportunity to teach Chicanos/as and the Law in the law school curriculum. The irrelevance and eliding of race in the law school classroom, as documented by Professor Montoya, *supra* note 1, at 5 Mich. J. Race & L. at 891-904, 33 U. Mich. J.L. Reform at 307-20, helps mask my own identity as a Latino law professor from my law students.

[n.44.](#) See generally Kevin R. Johnson & George A. Martinez, [Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship](#), 53 U. Miami L. Rev. 1143 (1999) (examining the roots of Chicana/o Studies and its links to LatCrit theory). As part of our discussion of English-only laws, my students read amicus briefs filed with the Supreme Court in the Yniguez litigation, see discussion *supra* note 23, by the State of New Mexico, describing the history of government acceptance of Spanish there, and by the Hawaii Civil Rights Commission, detailing the role of early English language law and policy in the denigration of Hawaiian culture. Later, when we address ill-conceived laws aimed at immigrants, particularly those from Mexico, my students read about the history of the abuse of Mexican migrant laborers. See generally Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, in *Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in the United States* 190 (Juan F. Perea ed., 1997).

[n.45.](#) See Elizabeth M. Iglesias, Foreword: [Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community](#), 53 U. Miami L. Rev. 575, 655-56 (1999) (describing the professional and academic reward system for fluency in law and economics in contrast to critical frameworks of outsider jurisprudence such as LatCrit); Jean Stefancic, [Needles in the Haystack: Finding New Legal Movements in Casebooks](#), 73 Chi-Kent L. Rev. 755, 762 (1998) (stating that anecdotal evidence suggests that more law students today have backgrounds in economic theory than a grounding in ethnic or race studies).

[n.46.](#) See, e.g., Proposition 209, enacted as [Cal. Const. art I, § 31](#); [Hopwood v. Texas](#), 78 F.3d 932, 955 (5th Cir. 1996) (holding University of Texas School of Law may not use race as a factor in admissions).

[n.47.](#) See generally Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 Am. U. J. Gender & L. 121 (1993) (arguing that, despite recent efforts to make the Law School Admission Test (LSAT) more inclusive of diverse groups, the test perpetuates bias and disadvantages minority and women applicants to law schools).

[n.48.](#) Dean Rennard Strickland contributed to this Article the following account of the cultural inadequacy of most law school examinations from a Cherokee perspective:

The story is one that happened to me while I was working on the infamous Girl Scout Murder case in which a Cherokee had been charged with the murder. After the accused James Leroy Hart had been found not guilty, the state decided to charge the religious leader of the Keetoowah traditional Cherokee religious group with harboring a fugitive for having granted him sanctuary (which is a little bit like benefit of clergy in Anglo-Saxon jurisprudence). One of the young Indian men who was working with us was absolutely brilliant and seemed to know and understand every legal doctrine any of us would mention. I finally told him that I thought he ought to go to law school. He reported that he had and that he had flunked out. This didn't make sense to me because his analysis and knowledge were simply superb. It finally came to me that he was a very traditional Cherokee who had been raised in a family with strong tribal values. In such a society, the wise and good citizen does not make rapid decisions but reviews and re-reviews all issues. It is not thought "wise" or "smart" or "fair" to answer complex questions quickly. The good man and good woman gives the question the time it is worth. In law school (and on much of the bar), we too often test how quickly one can answer a question. We ask our Native students

(like all other students) to list the thirty-seven crimes in a fact situation in a fifteen minute question. The method of testing runs exactly counter to what is taught in most traditional American Indian cultures. This creates a very difficult situation in which even those students who survive are not showing on the tests what they have learned or how they can apply the knowledge.

E-mail from Dean Rennard Strickland, Dean and Philip H. Knight Professor, University of Oregon School of Law, to **Steven W. Bender**, Associate Professor of Law, University of Oregon School of Law (May 1, 2000) (on file with author).

[n.49.](#) See Michael A. Olivas, [Paying for a Law Degree: Trends in Student Borrowing and the Ability to Repay Debt](#), 49 *J. Legal Educ.* 333 (1999) (documenting a dramatic increase in the cost of legal education).

[n.50.](#) See Gerald P. Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* 38 (1992).

[n.51.](#) See, e.g., Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 *Or. L. Rev.* 1131, 1170-71 (1995) (identifying in recent contract law decisions a "judicial tilt away from underdogs, back toward the privileged beneficiaries of classical contract law.").

[n.52.](#) Cf. Troy L. Cady, Note, [Disadvantaging the Disadvantaged: The Discriminatory Effects of Punitive Damage Caps](#), 25 *Hofstra L. Rev.* 1005, 1038- 39 (1997) (suggesting the disproportionate impact of tort reform on the economically disadvantaged).

[n.53.](#) See [Garcia v. Spun Steak Co.](#), 998 F.2d 1480, 1490 (9th Cir. 1993) (rejecting EEOC Guidelines designed to facilitate challenges under Title VII to employer English-only rules).

[n.54.](#) See [Flores v. State](#), 904 S.W.2d 129, 130-31 (Tex. Crim. App. 1995) (rejecting contention that language discrimination amounts to discrimination based on race or national origin and affirming denial of probation to defendant because of his inability to speak English); see generally Juan F. Perea, [Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII](#), 35 *Wm. & Mary L. Rev.* 805 (1994) (calling for explicit statutory protection against discrimination on the basis of ethnic traits).

[n.55.](#) See Bender, *supra* note 11, at 171-72 (describing the successful defense of a Washington tavern owner whose English-only policy was upheld against a challenge under state civil rights law because the factfinder concluded the owner was acting to ensure safety of person and property).

[n.56.](#) See Mintz, *supra* note 14 (suggesting the basis for a jury's conclusion that the landlord's policy did not violate federal housing discrimination law).

[n.57.](#) See [Ramirez v. Plough, Inc.](#), 863 P.2d 167, 178 (Cal. 1993) (refusing to impose tort duty on aspirin manufacturer to disclose dangers in Spanish because court believed legislature is the appropriate institution to require such disclosures); [Commonwealth v. Olivo](#), 337 N.E.2d 904, 910 n.6 (Mass. 1975) (arguing that it was improper for court to require translation of notice to vacate public housing without legislative mandate); [Alfonso v. Board of Review](#), 444 A.2d 1075, 1077 (N.J. 1982) (leaving the decision of whether to require translation of unemployment appeal rights to legislature that can better assess the changing needs and demands of the non-English-speaking population and the government agency).

[n.58.](#) See [Hernandez v. New York](#), 500 U.S. 352, 369 (1991).

[n.59.](#) See, e.g., [Frontera v. Sindell](#), 522 F.2d 1215, 1219 (6th Cir. 1975) (stating that to require Civil Service exams in Spanish would entitle other groups to exams in their language to the detriment of city taxpayers); [Guerrero v. Carleson](#), 512 P.2d 833, 837-38 (Cal. 1973) (rejecting constitutional challenge to English-only notice in part because of concern that requiring Spanish translation would compel accommodation in other languages); [Flores v. State](#), 904 S.W.2d 129, 131 (Tex. Crim. App. 1995) (finding no violation of equal protection where defendant was denied probation because of lack of adequate Spanish language alcohol diversion program and stating that a different outcome would require cash-strapped governments to establish treatment programs in many languages); see also Bender, *supra* note 17, at 1061- 62 (questioning the assumption that requiring government to accommodate Spanish language necessarily compels accommodation in

every language, particularly given the enormous gap between the number of Spanish-speakers in America and speakers of other non-English languages). My point is that in gauging the detriment of denying language rights, a court should determine the extent of the population affected by an adverse decision. Particularly with regard to the provision of government translations in Spanish (e.g., when conducting examinations for licensed occupations), courts might well conclude that it is reasonable to accommodate only certain languages other than English. In contrast, when a liberty interest is at stake as in Flores, the detriment is so substantial that every language should be accommodated in lieu of imprisonment.

[n.60.](#) See [Ruiz v. Hull](#), 957 P.2d 984, 1002 (Ariz. 1998) (holding Arizona's constitutional amendment infringes free speech interests of the public, public officials, and elected officials).

[n.61.](#) See [California Teachers Ass'n. v. Davis](#), 64 F. Supp. 2d 945, 953- 54 (C.D. Cal. 1999) (upholding California's bilingual education initiative against challenge by public school teachers in part because of the state's ability to regulate teachers' speech in the classroom).

[n.62.](#) See generally Francisco Valdes, Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self Empowerment, 2 Harv. Latino L. Rev. 1 (1997) (describing the importance of praxis to LatCrit scholars).

[n.63.](#) See Kevin R. Johnson, [Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century](#), 8 La Raza L.J. 42, 47 (1995) (observing that litigation alone has not been very successful historically in promoting social change for Latinos); Kevin R. Johnson, [Lawyering for Social Change: What's A Lawyer To Do?](#), 5 Mich. J. Race & L. 201, 205 (1999)..

[n.64.](#) See Jim Wasserman, Little Town Notches Win Over Big Money, Fresno Bee, Sept. 9, 1993, at B1 available at LEXIS, News Library, Fresno Bee File.

[n.65.](#) See Judge Overturns Approval of Commercial Waste Incinerator, L.A. Times, Jan. 1, 1992, at A24 (noting that 40% of the local residents spoke only Spanish).

[n.66.](#) See Cole, *supra* note 20, at 77-79 (addressing the relationship between legal intervention and the larger political movement for environmental justice).

[n.67.](#) See Bender, *supra* note 11, for discussion of private language vigilantism; cf. Elizabeth Weise, Goal! Soccer Fans Force AOL To Accept Spanish, Ariz. Republic, July 26, 1996, at E1 (detailing how a mass e-mail protest led to an internet company's reversal of an English-only rule for its soccer chatroom).

[n.68.](#) See California Billboard Fans Illegal Immigrant Dispute, Houst. Chron., May 6, 1998, at 16A (reporting remarks of California Coalition for Immigration Reform spokesperson that the billboard serves as a warning about "the devastation that has occurred in California because of illegal immigration and bilingual education."). California has a long history of overt hostility, violence, and threats toward immigrants who are perceived as non-white. See generally Tomas Almaguer, Racial Fault Lines: The Historical Origins of White Supremacy in California (1994). For examples of this hostility towards Chinese laborers and Japanese agriculturalists in the late 19th and early 20th Centuries, see Keith Aoki, "Foreign-Ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes, 4 UCLA Asian Pac. Am. L.J. 1, 23-33 (1996); Keith Aoki, [No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment](#), 40 B.C. L. Rev. 37 (1998).

[n.69.](#) See Peter H. King, With Gusto, But No Inferno, Obledo Brought Down "Racist" Billboard, Fresno Bee, June 24, 1998, at B1, available at LEXIS, News Library, Fresno Bee File. Apparently the activist, Mario Obledo, had researched vandalism and trespassing laws and had anticipated his arrest. See *id.* In a subsequent [article](#), I will discuss whether property-based doctrines protecting against entry should give way to allow self-help to remove physical monuments of hate speech.

[n.70.](#) See Montoya, *supra* note 1, at 5 Mich. J. Race & L. at 906, 33 U. Mich. J.L. Reform at 322. ("[Hate speech ... can only be countered by being responded to. Silence in the face of hate speech makes us all complicit.]).

[n.71](#). See Dan Schnur, Liberals Don't Seem Ready for a Real Conversation on Race, San Jose Mercury News, July 12, 1998, at 5F.

[n.72](#). See e-mail from Frank Valdes, Professor of Law, University of Miami School of Law, to **Steven W. Bender**, Associate Professor of Law, University of Oregon School of Law (Mar. 29, 2000) (on file with author).

[n.73](#). Id.

5. Gema Perez-Sanchez, · *Franco's Spain, Queer Nation?*, 5 MICH J. RACE & L. 943 (2000)

This Article discusses how, through its juridical apparatus, the Spanish dictatorship of Francisco Franco sought to define and to contain homosexuality, followed by examples of how underground queer activism contested homophobic laws. The Article concludes by analyzing a literary work to illustrate the social impact of Francoism's homophobic law against homosexuality.

In the introduction to *¿Entiendes?: Queer Readings, Hispanic Writings*, [n.1](#) Paul Julian Smith and Emilie L. Bergmann regret the lack of historical studies about Spanish-speaking lesbians, gays, bisexuals, and transgendered people "comparable to those which exist for Britain and the United States." [n.2](#) Although they attempt minimally to fill this void by including at the end of their introduction "brief accounts of some aspects of lesbian and gay history in the Spanish-speaking world," [n.3](#) the picture of Spain's queer activism and cultural contributions remains incomplete. [n.4](#)

944 This Article, which focuses on the last years of Francisco Franco's fascist dictatorship and the early years of the young Spanish democracy (roughly

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from the late 1960s to the early 1980s), responds to Bergmann and Smith's observation. Specifically, it discusses how, through its juridical apparatus, Francoism sought to define and to contain what it considered dangerous social behavior, especially homosexuality. I am concerned, in particular, with tracing not only how the state apparatus exerted hegemonic control over definitions of gender and sexuality, but especially how non- hegemonic sexual minorities subverted that control. In other words, I want to privilege resistance to the state apparatus' seemingly absolute power from the perspective of grassroots, underground gay activism. Following Judith Butler's theories on gender performativity, [n.5](#) my analysis also assumes that an understanding of the materialization of gendered bodies cannot be separated from a study of the processes by which heterosexuality becomes legitimized. [n.6](#)

In this Article, I pose and attempt to answer the following questions: How did the Francoist state codify the homosexual? What mechanisms did it enforce to secure a strictly (hetero)sexist matrix? Given that the Franco regime was a particularly repressive state and that gays, lesbians, bisexuals, and transgendered people represent some of the most forgotten minorities in Spain, how and from what perspective can one recount the story of these minorities so as to accord them a modicum of agency? How and where can one find the cracks and fissures in the apparently hyper-normative state apparatus? And, finally, how might literature help ***945** to assess the cultural and psychological legacy of these struggles over insubordinate sexual practices?

In order to respond productively to these questions, I disengage my analysis from an over-simplified view of state power as exclusively producing repressive effects. I concentrate, instead, on the dialectical tensions between the law (both a repressive and ideological state apparatus) and culture (an ideological state apparatus). Specifically, I focus on the tensions between the legal persecution and criminalization of homosexual practices during the Franco regime—a regime whose homophobic laws were operational well into the new democracy—and grassroots queer activism. [n.7](#)

***946** The key to answering the two main questions of why Francoism was so concerned with containing and codifying homosexuality and what sort of threat homosexuality really posed to the regime lies in the fictional self- aggrandizing of Francoism. Although the Franco dictatorship was indeed normative, repressive, and violent toward its own citizens, and even though it strenuously worked to represent itself as a legitimate, widely endorsed, economically stable regime, Franco's Spain in fact occupied a marginalized ***947** position in relation to the rest of the Western world for the duration of the dictatorship. This marginalization was due to a combination of political and economic factors. The former are obvious: on the one hand, the Allies, the victors of World War II, would have been logically reluctant to recognize the only fascist dictatorship that survived in Europe; on the other hand, Franco actively imposed political self-absorption and separation from the rest of Western Europe. The economic factors that contributed to Spain's marginalization are more complex, and they merit a longer explanation,

which I undertake in Part I below. [n.8](#)

In summary, I argue that toward the end of the dictatorship homosexuality became a complex node of definitional power relations: a locus in which the repressive state apparatus (the law, the police) and the ideological state apparatuses (culture) sometimes gritted teeth over establishing a “harmonious” understanding of homosexual identity. To this end, Part I of this Article describes the historical context in which the laws regulating homosexual practices were implemented, and it discusses the economic factors that led to what I argue must have been Francoism’s sense of marginalization from the rest of the Western world—a sense directly related to a possible fear of the nation being symbolically feminized. Part II maps the main juridical sites of struggle for Spanish lesbian, gay, bisexual, and transgendered peoples during the difficult transitional political period that preceded the stabilization of the contemporary Spanish democracy. Part III illustrates the social and cultural legacy of queer activism against Francoist laws on homosexuality through an analysis of Eduardo Mendicutti’s novel *Una mala noche la tiene cualquiera* [Anyone Can Have A Bad Night [n.9](#) and the young, urban culture, post- Franco context of supposed historical amnesia in which it was produced. Finally, the conclusion establishes a relation between my research and the field of LatCrit.

***948 I. Historical Context and Economic Landmarks of the Franco Regime**

Following the bloody Spanish Civil War of 1936-1939, Generalísimo Francisco Franco, leader (or Caudillo, as he called himself) of the winning Nationalist forces that had rebelled against a democratically elected republican government, imposed a strict dictatorship that was to last until his death on November 20, 1975. The nature of the dictatorship was to change significantly throughout its existence, evolving from the iron-clad fascist regime of the 1940s and 1950s to the more open and modernized “dictablanda” [soft dictatorship [n.10](#) of the 1960s and early 1970s. [n.11](#) Because the political phases of the Francoist regime are intricately tied to its economic development, an overview of the economic landmarks of the dictatorship sheds light on its political development.

Spanish economist Jose Luis Garcia Delgado proposes a division of the economic development of the dictatorship into three distinct phases. [n.12](#) A first phase would run from 1939 until the end of the 1940s; a second would span from the early 1950s to the summer of 1959, when the plan de estabilizacion y liberalizacion [stabilization and liberalization plan was implemented; and a third would reach from the 1960s until the end of 1973, “cuando la muerte de Carrero Blanco . . . se combina con los primeros impactos de la crisis economica del ultimo largo decenio” [when the [assassination of [Prime Minister Carrero Blanco . . . is combined with the first impact of the previous decade’s economic crisis. [n.13](#) These three phases and their respective social implications help illuminate my discussion of Francoism’s preoccupation with criminalizing homosexuality and normativizing gender along binary lines.

***949** Until the early 1950s, Francoist Spain struggled to reconstruct a devastated country and a crashed economy through the imposition of an autarchic system, i.e. a “self-sufficient, self-capitalizing economy protected from outside competition by tariffs and administrative controls . . . regulated by state intervention.” [n.14](#) The results of this self-absorption were detrimental at all levels, but they were especially damaging at the economic level. Suffice it to say that this period is popularly known in Spain as los años del hambre [the years of hunger. As economists have argued, the decade of the 1940s represents a dramatic standstill for Spanish industrial and economic development:

El estancamiento posbelico que conoce la economía española en los años cuarenta no tendrá parangón en la historia contemporánea de Europa, donde el periodo de reconstrucción, a partir de devastaciones y daños mayores causados por la guerra, es mucho más rápido, sobre todo desde 1948, con la puesta en marcha del plan Marshall. [n.15](#)

This stagnation created a dramatic gap between Spain and the rest of Europe not only in terms of economics but also in terms of social and cultural behaviors. This gap did not close until the early 1980s. [n.16](#) Much of the difference between the quick recovery of the other European post-world war economies and Spain’s economy was that Spain “remained firmly excluded from the European Recovery Program (Marshall Aid)” [n.17](#) launched by the United States of America. Fascist Spain was therefore ostracized by the Western European democracies, and it remained isolated from the international money market. More than an economic plan, “autarky was a political choice.” [n.18](#) The only country that came to Spain’s aid ***950** between 1947 and 1949 was Perón’s Argentina, but that aid was soon cut when Argentina began to experience economic difficulties of its own. [n.19](#)

During the 1950s and due to a severe crisis, [n.20](#) the regime gradually abandoned its autarchic model and its interventionist internal economic policies. The following years witnessed a gradual climb to what the triunfalista [triumphalist propaganda of the period would call el milagro económico [the economic miracle of the 1960s. [n.21](#) Key among the factors that led to this “economic miracle” was the arrival of financial aid from America. The increase in Cold War tensions between 1951 and 1957 convinced the U.S. Congress to approve a number of loans to the dictatorship; these loans amounted to \$625 million in aid. [n.22](#) This aid was crucial to the maintenance of the regime; as it is now widely agreed, “America’s generosity, while small by Marshall Aid standards, offered a vital breathing space to the Franco regime which might otherwise have succumbed.” [n.23](#)

In spite of American aid, the 1950s were still marked by a certain economic instability. It was not until the 1960s that Spain experienced an economic growth matched only by Japan at the time. [n.24](#) This growth was due mostly to “three largely exogenous variables: a massive increase in the earnings from foreign tourism, emigrant remittances from over one million Spaniards forced to seek work abroad, and a renewal of foreign investment in the Spanish economy.” [n.25](#)

The social and political implications of this rapid economic growth and the massive exchange of peoples between Spain and the rest of Western Europe were crucial.

Many Spanish agricultural workers who had to seek jobs abroad served as vehicles of communication with the outside world. Emigrants brought news from abroad, including news from oppositional groups in exile. [n.26](#) Added to the migration of Spaniards to the rest of Europe, the “boom” in Western European tourism that started in the late 1950s was also a motor for change. As Edward Malefakis has amply documented:

***951** The number of tourists entering the country equaled one-third of the indigenous population by 1963, exceeded one-half of that population by 1966, and surpassed the entire population by 1972, a level at which it remained for most of the rest of the 1970s. . . . [Tourists’ impact on Spanish life . . . was overwhelming. Sexual mores were undoubtedly the first to be affected by their example, but other social attitudes soon followed. Secularism, consumerism, and all other aspects of the “modern” life-styles that were so quickly adopted in Spain during the 1960s derived in part from the tourist invasion.

Nor were the political ramifications unimportant. Because of tourism, Spain was flooded with many kinds of foreign newspapers and periodicals, which provided at least for the educated elite uncensored sources of information long before the Spanish press won its freedom. With so many millions crossing the borders, personal contact between the internal opposition and the exiles in France became easier and more systematic. [n.27](#)

Notwithstanding the undoubtedly successful economic development of the period, it is important to emphasize that “an ever increasing portion of the Spanish economy came to be controlled by foreign based firms after 1960.” [n.28](#) The sense that Spain was largely in the hands of foreign capital and that the country was still treated as a lesser relative must have weighed heavily in the imaginary [n.29](#) of the Francoist regime. Furthermore, the economic boom slowed down rapidly after 1971, when “Spanish authorities were presented with disturbing signs of rising inflation and a widening trade gap.” [n.30](#) To make things worse, Spain was deeply affected by the oil crisis of 1973 to 1974. [n.31](#) All of these troubling signs of economic crisis, compounded by increasing civil unrest brutally suppressed by the police, [n.32](#) made the decade of the 1970s a highly ***952** restless and uncertain period. The much anticipated death of the dictator opened up the country to the long process of transition to democracy, albeit amidst a serious economic crisis.

The precariously balanced period that followed is known as la transición democrática [the democratic transition.. It extended from Francisco Franco’s death on November 20, 1975 to the ratification via popular referendum of the new Democratic Constitution on November 6, 1978. While the transición democrática proper covers only this three year span, the political disintegration of the Franco regime had started much earlier, during the 1960s, when the economic factors described above forced the regime to exercise less brutality and to loosen its

censorship. Likewise, actual democratic stability and economic recovery did not come until after the coup attempt of February 23, 1981, and most significantly, with the electoral victory in 1982 of the Partido Socialista Obrero Español [The Spanish Socialist Workers' Party (PSOE)], which lost its power only in the 1996 elections.

The implications for my argument of Spain's economic lag behind the rest of Western Europe are important: in spite of the rapid development of the 1960s, since the 1940s Spain had already come to occupy an isolated and marginalized position with respect to the European democracies. I argue that, in the sexist imaginary of Franco's regime, Spain's marginality vis-a-vis Europe must have been perceived as a passive, feminized position—a position far from the self-aggrandizing version of the regime as a hyper-virile, legitimate government. Because the regime was not as normative and central as it wanted to be perceived as, the mere existence of non-heterosexual practices must have threatened Francoist legitimacy to its core. [n.33](#)

Following the Spanish Civil War, Franco's fascist regime confronted, at the practical level, the task of rebuilding a country devastated by war and, at the ideological level, the task of counteracting the social and institutional effects of the democratic republic it had just toppled. As Francoism saw it, the new regime would have to redefine the moral codes for Spain, a country "debased" by the "subversive," "perverted," and "immoral" dictates of the Republicans. Through the most diverse and effective institutional***953** means—especially with the help of the Catholic Church—the winners of the war soon implemented aggressive measures to "rectify" the moral trajectory of the country. For example, they imposed strict cultural censorship, united state and church, made the laws of the preceding democratic republic more repressive and punitive, and increased the reach of what became the most successful means of indoctrinating Spaniards in the ideology of the Movimiento [n.34](#) and of reducing women to a subservient position: the Seccion Femenina.

Karen Van Dyck's study of women's writing under dictatorship in Greece from 1967 to 1974 illuminates the conditions in Spain under Francoism. [n.35](#) Although the Greek dictatorship did not exactly parallel Franco's, it produced strikingly similar effects. [n.36](#) For example, as Van Dyck indicates: "According to many accounts the [Greek dictatorship was a time in which the general population was 'feminized'; for seven years the subaltern 'experiences' of women—claustrophobia, curfews, silencing and censorship, physical restraints—became those of both genders." [n.37](#) Similarly, the Francoist imposition of silence, its restriction of movement, and its exertion of control over the population via the church, the Seccion Femenina, and the state apparatus, could be said to have constrained Spaniards of both genders in a manner similar to the traditional repression of women by men. [n.38](#)

Francoist political, religious, social, and cultural institutions attempted to re-construct a dominant Spanish identity predicated on nineteenth century gender roles. Above all, they sought to undo the timidly feminist accomplishments of the

Republic. As Geraldine M. Scanlon bitterly complains, “la mujer de la nueva Espana iba a parecerse, sorprendentemente, a mujer de la vieja Espana” [women of the ‘New Spain’ would be surprisingly similar to those *954 of the old Spain; [n.39](#) and so would the men revert to the conservative ideas of masculinity from the previous century. As Maria Teresa Gallego Mendez demonstrates in *Mujer, Falange y Franquismo*, the success of the Seccion Femenina in indoctrinating several generations of Spanish women into a willing acceptance of a subservient position is astounding. [n.40](#) The fascist regime was particularly interested in defining women’s roles because “al fascismo no le interesaba tanto el concurso de las mujeres en si mismas como la labor que ellas realizaban en el seno de la familia, lugar privilegiado de la socializacion” [women represented a very useful tool for Fascism . . . [due to the role they performed in the family, a privileged site of socialization. [n.41](#) The complement to this fascist construction of femininity was a masculinity modeled on the Catholic, aggressively heterosexist macho, a stereotype reinforced through institutions such as the military service and upheld by compliant, conservative women. [n.42](#) Besides these official means of indoctrination, Francoism was aided in its task by less regularized vehicles, such as popular magazines for women, skillfully censored and dubbed Hollywood films, Spanish films, and newspapers sympathetic to the fascist ideology. [n.43](#)

As the power of Francoism and its institutions waned during the last years of the dictatorship, a proliferation of sites of resistance—such as the leftist opposition, underground and in exile (which never disappeared in the hard forty years of dictatorship but which experienced periods of increasingly severe weakness); the timid yet effective feminist challenges of the 1960s and 1970s; and the clandestine gay, lesbian, and transgendered movement of the 1970s and 1980s—attempted to subvert the dominant gendered identities and sexual practices.

During the 1970s, Francoism showed a strong concern with establishing a law that would contain homosexuality and other so-called “dangerous states.” This concern seems related to a two-fold sense of the threat of “feminization:” on the one hand, the general population must have felt as if it were located in a “passive,” “feminine” position, but on the other hand, the Francoist regime itself occupied a marginalized, subservient position with respect to *955 the rest of the Western world, as discussed at the beginning of this section. In a dictatorship so concerned with rigidly fixing “proper” gender roles and heterosexual practices, men who did not seem acceptably masculine, who allowed themselves to be sodomized, who, in the eyes of the dictatorship, willingly embraced what was considered the passive, “feminine” position in sexual intercourse, dangerously literalized both Francoism’s feminization of the population and the regime’s “position” vis-a-vis the rest of Europe. Furthermore, through their mere existence, homosexuals and lesbians alike challenged the heterosexual gender roles imposed by fascism. Thus, homosexuality became an issue over which a complex battle between hegemonic and anti-hegemonic discourses on homosexuality took place. To demonstrate this argument, I focus in Part II on the legal discourses that

criminalized homosexual practices, homophobic juridical commentaries on the law, and gay activists' perceptions of the implications of the law.

(0) A. Homophobic Jurisprudence versus Queer Activism

The psycho-medical constructions of homosexuality contained in Francoist Judge Antonio Sabater's homophobic *Gamberros, homosexuales, vagos y maleantes: estudio juridico-sociologico* [n.44](#) clearly codify homosexuals as transgressing gender roles and posing a threat to the heterosexual family, the foundation of Franco's regime. Partaking of homophobic medical and psychiatric discourses on homosexuality, Sabater sees homosexuality as a psychopathology "caracterizada por una desviacion, una anomalia del instinto sexual" [characterized by a deviation, an anomaly of the sexual instinct. [n.45](#)]. Furthermore, in order to justify stricter measures against homosexuals, Sabater carefully constructs them in his text as primitive beings, with "una intensa vida instintiva que no tiene cabida en la civilizacion" [an intense instinctual life that has no room in civilization and who must be domesticated because they are "altisimamente peligrosos" [highly dangerous to "barreras eticas, culturales y juridicas, y al progreso de la humanidad" *956 [ethical, cultural, and juridical barriers, and to the progress of humanity. [n.46](#)]. Sabater concludes that gay men possess a "naturaleza feminoide" [feminoid nature and establish a "fuerte vinculacion con la madre" [strong link with their mother; [n.47](#) they often work as "bailarines" [dancers and wear "vestidos de mujer" [women's clothes or are "imitadores de estas" [imitators of women. [n.48](#)

On the other hand, lesbians often don "calzado y vestidos de corte varonile" [virile shoes and clothes and display "modos viriles de desenvolverse" [virile ways of behavior. [n.49](#)]. Significantly, Sabater equates independent, economically self-sufficient women with lesbians, thus assuring the containment and repression of all women's desires for professional and economic power by threatening to identify them as lesbians. Hence, for the Judge, a sure way to tell a lesbian from a straight woman is "la forma descortes con que muchas mujeres empleadas o que ocupan cargos directivos de empresas o comercios tratan al personal masculino" [the impolite way in which many female employees or women in leadership positions at companies and businesses treat their male personnel. [n.50](#)]. Sabater's concern with typologizing and criminalizing lesbians and gay men betrays Francoism's investment in securing firm gender roles that legitimized the heterosexual model. Any deviation from the norm was perceived as a "dangerous" political challenge to the dictatorship; homosexuals suffered a fate similar to that of political prisoners.

Homosexuality became a site of crisis and disruption for the regime. Consequently, from the early 1970s to the mid-1980s, Spain witnessed a flurry of

publications on the subject of homosexuality. [n.51](#) This activity was most obviously prompted by the passing of La Ley de Peligrosidad y Rehabilitacion Social [the Law of Social Danger and Rehabilitation in 1970 and the ensuing debates for and against it until its derogation in 1978. [n.52](#) After a ten year lull, the victory of the *957 socialist party in 1982 increased gay activists' hopes of further liberalizing society's attitudes toward homosexuality, and it triggered a new wave of publications discussing homosexuality from a progressive point of view. [n.53](#) The most significant battle for Spanish gay activists, however, was the one fought around the passing of the Law of Social Danger and Rehabilitation.

In a desperate letter to U.S. gay activist Robert Roth [n.54](#) dated 16 November 1973, Armand de Fluvia, founder of the first underground homosexual organization in Spain, [n.55](#) urgently requested *958 Roth to take his name off the international list of gay contacts and organizations that Roth periodically mailed to queer activists and groups worldwide. As de Fluvia explained in painstaking detail, he feared police retaliation because:

En Espana [los homosexuales somos ilegales y peligrosos sociales. Si la policia [sic llegara a saber a lo que me dedico, me mandarian a la carcel de Huelva y me harian la terapia de la aversion para "curarme" y arruinarian mi vida en todos los aspectos y, ademas [sic, se perderia toda la labor que vengo haciendo en pro de la liberacion sexual y que tantos esfuerzos me cuesta. [n.56](#)

In spite of another U.S. gay activist's characterization of de Fluvia's letter as "slightly panicky," the Spanish activist's fears were well founded. [n.57](#) By codifying homosexuals as "peligrosos sociales" *959 [socially dangerous persons, Francoist laws were free to impose severe and arbitrary "medidas de seguridad." These security measures included:

- a) Internamiento en un establecimiento de reeducacion por tiempo no inferior a cuatro meses ni superior a tres anos.
- b) Prohibicion de residir en el lugar o territorio que se designe y sumision a la vigilancia de los delegados [por un tiempo maximo de cinco anos. [n.58](#)

These security measures, as a 1976 manifesto of the Front d'Alliberament Gai de Catalunya (FAGC) explains, "van dirigides cap a la privacio de llibertat (internament), la manipulacio de conductes (internament en un establiment de reeducacio), exercir un control (obligacio de residir en un determinat lloc, submissio a la vigilancia de delegats), etc." [are directed to the deprivation of freedom (confinement), the manipulation of behavior (confinement to a re-education institution), the exercise of control (obligation to reside in a particular place, submission to the surveillance of delegates), etc.. [n.59](#)

While the Francoist regime had paid little attention to homosexuality in the immediate post-Civil War years, beginning in the 1950s, it developed an inexplicable concern with codifying, pathologizing, and containing the activities of homosexuals. [n.60](#) In what follows, I consider the codification of the homosexual according to the discourse of the law and its juridical interpretations. I examine the text of the Law of Social Danger and Rehabilitation of August 4, 1970, its antecedents—Ley relativa a Vagos y Maleantes [the Law of *960 Vagrants and Thugs of August 4, 1933 (which did not include homosexuality as a

dangerous state), and its modifications of July 14, 1954--and its homophobic interpretations. [n.61](#)

(1) B. The Law of Social Danger and Rehabilitation
and Its Antecedents

The Law of July 14, 1954, “modificando los artículos 2. <<degrees>> y 6. << degrees>> de la ley de Vagos, declaro sujetos a medidas de seguridad a los homosexuales” [modifying articles 2nd and 6th of the [Law of Vagrants and Thugs of August 4, 1933, declared homosexuals subjected to security measures. [n.62](#) This was a measure that Sabater celebrates as “un acierto legislativo” [a legislative success. [n.63](#) In the early 1960s, jurists were apparently unhappy with the law enforcing inefficiency of the Spanish penal system. The jurists’ concern with tightening laws significantly coincides with the modifications in social mores brought about by the economic expansion of the 1960s. [n.64](#) Perhaps in the face of economic transformations, social modernization, and having to present a “new face” of the regime to the unprecedented large numbers of foreign visitors, jurists and legislators were particularly concerned with persecuting crime and presenting a “civilized” vision of Spain.

In accordance with this preoccupation with the effectiveness of laws, Octavio Perez-Vitoria Moreno, in his preface to Sabater’s book, complains that “[frequently, we trust too much in the excellence of the written word of the Law and we forget that putting it into practice . . . is what makes it possible to attain the end that the Law seeks.” [n.65](#) To this purpose he proclaims that es necesario vitalizar nuestra Ley de Vagos y Maleantes, cuyas posibilidades y limites de aplicacion magistralmente senala [Sabater, creando para las distintas categorias de sujetos en *961 estado peligroso establecimientos especialmente concebidos y realizados para la tarea de readaptarlos a la Sociedad. [n.66](#)

Perez-Vitoria’s call to mold these “dangerous subjects” to society—a society fashioned by fascist ideology—and his celebration of the building of special institutions designed to readapt these subjects to society, that is, to “cure” the “dangerous subjects,” recalls Michel Foucault’s genealogy of the penal system in France. [n.67](#)

Foucault observes how, from the eighteenth century on, the penal system in France moved away from “[the body as the major target of penal repression” [n.68](#) and toward a concern with punishment as “an economy of suspended rights.” [n.69](#) He notes the gradual concern of the modern judicial system with hiding the mechanisms of punishment in order to absolve the judge of the responsibility of punishing. Consequently, “[the expiation that once rained down upon the body must be replaced by a punishment that acts in depth on the heart, the thoughts, the will, the inclinations,” in other words, the “soul.” [n.70](#) Surrounding the judge’s job, then, a “corpus of knowledge, techniques, ‘scientific’ discourses is formed and becomes entangled with the practice of the power to punish.” [n.71](#) Underlying this role of justice is the drive to explain and define individuals according to

behaviorist discourses—a pathologizing of potential criminal states that leads to punishment through security measures.

As Mirabet i Mullol highlights, the first unified Spanish penal code of 1822 “is highly influenced by the French penal code of 1810, which reflected the new ideas of the French revolution.” [n.72](#) This code, therefore, reflects more liberal tendencies than previous laws and removes all references to homosexuality “except in the army and the navy military codes, later reworked into one.” [n.73](#) This liberal attitude is reflected in later reforms of the penal code *962 in the years 1848, 1850, and 1870. In 1928, during the dictatorship of Primo de Rivera (1923-1931), the penal code included a direct reference to homosexuality within the section on “crimes against honesty and public scandal.” [n.74](#) With the beginning of the democratically elected Second Republic (1931-1936), however, the penal code was yet again reformed in 1932, and homosexuality as a crime against “honesty” and “public scandal” was deleted from the code. [n.75](#)

In 1978, Miguel Lopez Muniz, a judge specializing in implementing the Law of Social Danger and Rehabilitation, protested that la ley [de Peligrosidad en absoluto es un producto del regimen franquista. Franco apenas cambio nada de la primitiva Ley de Vagos y Maleantes, presentada a las Cortes republicanas en 1933 y redactada por Jimenez de Asua. La actual lo que hizo es completarla anadiendo algunas figuras que por entonces la estructura social aun no habia originado, como los robos de coches, el gamberrismo y otros. [n.76](#)

What Lopez Muniz failed to indicate in this interview was that homosexuality was among those “otros” [others that Franco codified as “peligrosos” [dangerous in his revision of this Republican law. Hence, criminalization of homosexuality was a specific concern of the fascist regime.

As in France previously, Spanish judges gradually became concerned with “something other than crimes, namely, the ‘soul’ of the criminal.” [n.77](#) The judicial system shifted from the questions of “Has the act been established and is it punishable? Who committed it? What law punishes this offence?” to the questions of “What is this act? How can we assign the causal process that produced it? *963 What would be the most appropriate measures to take? How do we see the future development of the offender? What would be the best way of rehabilitating him?” [n.78](#) In the same manner, Sabater sought to prevent “futuros delitos actuando sobre el sujeto peligroso, ya directamente, modificando los elementos psicicos, morales o sociales de su personalidad (medidas educadoras o correccionales), ya segregandole del cuerpo social (medidas de proteccion en sentido estricto), y reservando a la pena la funcion retributiva.” [n.79](#)

Unlike law-makers in democratic European societies at the time, Sabater identified with “una corriente de opinion entre los penalistas, que piden que las penas que se pronuncian por los Tribunales contra los homosexuales sean mas largas, para poder influir sobre ellos” [a current of opinion among penalists [from Spain and other nations with totalitarian regimes who ask that the sentences dictated in court against homosexuals be longer, so that we may influence them.

[n.80](#) Certainly, his justification for these tighter measures—that is, to influence or “cure” homosexuals—worked as a mechanism of disavowal of the actual repression.

As Foucault has indicated, “what is odd about modern criminal justice is that, although it has taken on so many extra-juridical elements, it has done so . . . in order to exculpate the judge from being purely and simply he who punishes.”

[n.81](#) In other words, the modern practice of the law in Europe resorts to other disciplines (psychiatry, psychoanalysis, medicine) to “supervise the individual, to neutralize his dangerous state of mind, to alter his criminal tendencies.” [n.82](#) Modern law, in this view, masks punishment as rehabilitation, as the “cure” of the deviant criminal, and thus attempts to reinsert him or her into “normal” society. These security measures, “behind the pretext of explaining an action, are ways of defining an individual” and conforming him or her to the dominant society. [n.83](#)

As a direct consequence of Sabater’s and other judges’ requests for stricter measures against homosexuals, Franco issued the Law *964 of Social Danger and Rehabilitation of August 4, 1970, which was much dreaded by lesbians and gays but celebrated by reactionary jurists. [n.84](#) As indicated before, this law only reinforced and actualized its predecessor, the Law of Vagrants and Thugs, which was modified on July 14, 1954 to include homosexuals. The 1954 law already devised the following security measures:

A los homoxesuales [sic, rufianes y proxenetas, a los mendigos profesionales y a los que vivan de la mendicidad ajena, exploten menores de edad, enfermos mentales o lisiados, se les aplicaran, para que las cumplan todas sucesivamente, las medidas siguientes:

- a) Internado en un establecimiento de trabajo o colonia agricola. Los homoxesuales [sic sometidos a esta medida de seguridad deberan ser internados en instituciones especiales y, en todo caso, con absoluta separacion de los demas.
- b) Prohibicion de residir en determinado lugar o territorio, y obligacion de declarar su domicilio.
- c) Sumision a la vigilancia de delegados. [n.85](#)

The 1954 law’s equivocal categorization of dangerous subjects allows for a parallel series of solutions for homosexuals that are separate and different from those provided for the other dangerous subjects. This early Francoist law envisions a future for ruffians, pimps, and professional beggars as productive, content farmers. This measure would force them to become useful members of society, thus reforming their “evil” ways through hard labor -- *965 a measure that would serve the added function of benefiting capitalistic society at large. As if infected with a contagious disease, however, homosexuals require “absolute separation” from all other “dangerous” individuals and confinement in “special institutions.” Homosexuals were thus perceived as carrying a particularly infectious brand of dangerousness.

Interestingly, although the text of the Law of Social Danger and

Rehabilitation of 1970 does not modify substantially the contents of the 1933 and 1954 laws, it elicited a flurry of gay activism. [n.86](#) Homosexuals were perhaps afraid of the insidious way this new law hypocritically adapted “su contenido a las necesidades y realidades de hoy, en beneficio de los propios sujetos a quienes la Ley haya de aplicarse y de la sociedad que debe integrarlos” [its content to today’s needs and realities, for the benefit of the very subjects to whom the law must be applied and to the society that must integrate them. [n.87](#) Following the trend that Foucault historicizes for France, the main goal of the Law of Social Danger was “reeducar y rescatar al hombre para la mas plena vida social” [to reeducate and return man to a fuller social life [n.88](#)--that is, to mold dangerous subjects according to a dominant notion of normality. Furthermore, the law sought to acquire “un conocimiento lo mas perfecto posible de la personalidad biopsicopatologica del presunto peligroso y su probabilidad de delinquir” [the most perfect possible knowledge of the bio-psycho-pathological character of the presumed dangerous subject. [n.89](#) As Foucault reminds us, this knowledge is directed toward controlling “the heart, the thoughts, the will, the inclinations” [n.90](#) of the alleged dangerous subject. This desire for knowledge of the soul, as it were, is also aimed not so much toward judging criminal acts—since this law intended to prevent “diversos estados de peligrosidad anteriores al delito” [diverse states of danger prior to crime [n.91](#)--but toward controlling “the passions, instincts, anomalies, infirmities, maladjustments, effects of environment or heredity”. [n.92](#) Insofar as the law was concerned with the “anthropological, psychical, and pathological conditions” [n.93](#) that lead the individual to a state of social *966 dangerousness, it anticipated “la creacion de nuevos establecimientos especializados donde se cumplan las medida de seguridad, ampliando los de la anterior legislacion con los nuevos de reeducacion para quienes realicen actos de homosexualidad” [the creation of new, specialized institutions where security measures are carried out, thus expanding the [institutions from the previous legislation with those new institutions for the re-education of those who commit homosexual acts. [n.94](#) Therefore, while the 1954 law merely called for a separation of homosexuals from other socially dangerous subjects, the 1970 law implemented sophisticated centers, which, “dotados del personal idoneo necesario, garantizaran la reforma y rehabilitacion social del peligroso, con medios de la mas depurada tecnica” [staffed with the needed, ideal personnel, [would guarantee the social reform and rehabilitation of the dangerous subject through the most purified technique. [n.95](#) One cannot help noticing the blood-chilling connotations of the manner in which this reference to “purified technique” echoes the brutal repression Francoism had launched on its dissidents during the earlier years of the regime. [n.96](#)

On June 1, 1971, a new rule complemented the previous law by establishing “institutions for the incarceration of each type of ‘danger.’ The [institution for homosexuals [was ‘Huelva’s Center for Homosexuals,’ for the fulfillment of the reeducation measures imposed on dangerous, male homosexuals.” [n.97](#) The reeducation measures practiced in Huelva included

electro-shock and the aversion therapy that de Fluvia refers to in his “panicked” letter. [n.98](#) Thus, while the law was designed to protect society from subjects who were imagined to be “socially dangerous,” it ironically became a real danger for Spanish lesbians and gays who, like Armand de Fluvia and other activists, feared for their physical and psychological well-being.

Comically symptomatic of the homophobic attempt to erase homosexual sex is the penal code’s stubborn misspelling of homosexuals as “homoxesuales” (the word is misspelled every time the 1954 law mentions homosexuals or homosexuality and on many occasions in the 1970 law). Many Peninsular Spanish accents make little if no distinction between the pronunciation of the “x” and *967 the “s”: both are pronounced as /s/. Because the pronunciation of “homosexuales” and “homoxesuales” is virtually identical, this misspelling points to straight society’s anxiety in the face of same-sex relationships—relationships that are perceived as lacking the difference introduced by heterosexual sex. By substituting the “x” for the “s” so that the word “sexo” appears to be inverted, the penal code’s misspelling figuratively crosses sexuality itself out of same-sex relationships, while the law simultaneously seeks to erase homosexuals from society. In a gesture reminiscent of the actual incarceration of homosexuals, the law denies even graphic presence to the word “homosexuals,” while it also denies homosexuals access to the word—that is, to a written law that would specifically protect them from hate crimes. It would take until December 26, 1978 for a law directly derived from the new Spanish democratic constitution to eliminate homosexuality as a category of social danger subject to security measures. De Fluvia’s retort to Roth’s complaint that in the U.S. of the 1960s and early 1970s gay activists were still in the ghetto stage underscores Francoism’s active silencing of homosexuality:

Vosotros os quejais porque estais [sic en la etapa del “ghetto” pero nosotros aqui en Espana estamos en la etapa de las catacumbas. Desde la etapa del “ghetto” podeis [sic alcanzar la etapa de la liberacion porque podeis [sic manifestaros en la calle y a traves de los mass media [sic. En Espana, en cambio, no existen, de hecho, la libertad de asociacion, ni la de reunion, ni la de expresion. No lo olvideis! [sic.. Por lo tanto, nuestra tarea es muchisimo mas [sic dificil y arriesgada pues nos lo jugamos todo. [n.99](#)

De Fluvia’s characterization of Spanish gay activists as being in “the catacombs stage” is quite accurate; because of the strict censorship Francoism had imposed on Spanish society, any contestatory group or person had to operate underground, much *968 as early Christians in Rome had to hide and fear for their lives. [n.100](#) Doubly marginalized—as sexual and political dissidents—queer activists clearly delineated their course of action. In his letter to Roth, de Fluvia indicated a sharp awareness of the mechanisms of oppression and of the grassroots actions needed to counteract them:

Nuestra tarea cara a nuestros camaradas homofilos es la de formar grupos de concienciacion para que esten [sic preparados para el dia [sic que pueda haber una accion hacia el exterior. Nuestra tarea cara a los heterosexuales es la de

incidir y dialogar con las personas de mentalidad abierta del mundo de la iglesia, las artes, la medicina, la ley, la sociología [sic, la prensa, etc. para informarles dentro de lo que podemos, de lo que realmente somos y procurar que la ideología [sic que tienen sobre la homosexualidad—totalmente estereotipada—y que el sistema les ha imbuido, la vayan cambiando poco a poco.

En Espana no existen mas [sic grupos que los que hemos formado alrededor de “Aghois” y nuestra tarea es inmensa y muy desagradecida. [n.101](#)

Faced with the triple task of having to raise consciousness among closeted gays and lesbians and beginning a productive dialogue with progressive heterosexuals while out-maneuvering censorship, queer activists felt dismay at such a “huge and very unrewarding” task.

***969** The lesbian is significantly neglected in the above discussion. Judge Sabater lamented in his homophobic work that “los criminalistas hasta hoy no le han prestado gran atencion” [criminologists, so far, have not paid enough attention [to lesbianism. [n.102](#) The reason, he believes, “se deba a la situacion de desamparo amoroso por parte del hombre, de que son victimas determinadas mujeres, que ven asi insatisfechos sus naturales instintos eroticos” [might be due to the manner in which specific women are victimized by being abandoned by men and are thus left with their natural erotic instincts unsatisfied. [n.103](#) Beyond the fact that his commentary falls into the essentializing characterization of women as lustful, insatiable beings who would turn to anyone available, male or female, for sexual solace, Sabater clearly misses the point. In a highly machista society, where only men and heterosexuality are valorized and where women are trained to be passive, compliant, subservient mothers, [n.104](#) women’s independent sexuality was difficult to conceptualize. As Carmen Alcalde explained to U.S. feminists in the early 1970s, in Spain,

no hay una penalizacion de lesbianismo, no esta en ningun articulo. El lesbianismo no lo consideran, creen que no es nada, que son juegos, no se lo toman en serio. Si cogen a dos mujeres en lesbianismo, te aseguro que no les pasara nada porque lo primero que se les ocurre es decir que les faltaba un senor. No tienen identidad de lesbianismo aqui. Verdaderamente tu puedes ir abrazada por la calle con una mujer y, maximo, algun mal pensado te insultara, pero si te denuncian a la policia, la policia no sabra que hacer. No entienden, no entienden que una mujer guste a otra mujer. No cabe dentro de su yo, de su narcisismo. [n.105](#)

***970** Although some extremely homophobic, paranoid legislators thought that “esta pasion lesbiana debe ser objeto de especial preocupacion” [this lesbian passion must be an object of special concern, [n.106](#) and although lesbianism was assumed to be included in the Law of Social Danger—subsumed under the general category “homosexual”—lesbianism in the Spain of the 1960s and 1970s was hard for homophobes to conceptualize. Unable to think female sexual pleasure independent of male heterosexual pleasure, lesbianism was erased from the sexual horizon of late Francoism. For all practical purposes, this sexual option did not exist. [n.107](#) And it was not only fascist law that sought to silence homosexuals by literally removing them from sight and confining them in special

institutions and by seeking to “cure” them of their perversion. The whole cultural apparatus of the Francoist period was carefully designed to perpetuate gender dichotomies and traditional heterosexism. [n.108](#)

Fortunately, underground queer activists left a legacy of political, social, and cultural alternatives that flourished during the years of the transition into a fully democratic regime. In the next part of this Article, I analyze a literary work from 1982 that effectively dramatizes the dreadful possibilities for queers of returning to the days of Francoist persecution and that privileges gender and sexuality as the building blocks on which to erect an inclusive, truly egalitarian, Spanish democracy.

***971** III. Allegorical Cross-Dressings in Eduardo Mendicutti’s *Una mala noche la tiene cualquiera*

Although the Law of Social Danger and Rehabilitation ceased to be operational with the ratification of the democratic constitution of 1978, the memory of its effect and the cultural conditions that made it possible in the first place were still felt in 1982, [n.109](#) when Eduardo Mendicutti published his novel *Una mala noche la tiene cualquiera* [Anyone Can Have a Bad Night. [n.110](#) Although in 1968 he won the first of many prestigious literary prizes (the Sesamo and the Cafe Gijon, for instance), Mendicutti, born in 1948, received little critical attention until his novel *Siete Contra Georgia* [Seven Against Georgia became one of the finalists in the 1987 edition of Tusquets’s prestigious erotic fiction prize “La Sonrisa Vertical” [The Vertical Smile. [n.111](#)

After the success of *Siete contra Georgia*, [n.112](#) Mendicutti proceeded not only to make a bestseller out of every book he subsequently ***972** published, but he also gained the much-needed validation of Spanish literary critics who, with the publication of his next novel, *Una mala noche la tiene cualquiera*, claimed that he “consiguio librarse de la molesta pero efectiva etiqueta de autor erotico heterodoxo” [managed to break free from the bothersome yet effective label of heterodox, erotic writer. [n.113](#) Mendicutti’s literary success also opened the world of journalism to him. [n.114](#) The popularity and success of such an unabashedly out gay man are quite surprising and new within the Spanish context, [n.115](#) and they attest to the rapid changes in sexual mores brought about by the stabilization of the democracy in the 1980s. Nevertheless, Mendicutti has yet to receive the academic attention he deserves. [n.116](#)

The first person narrator of *Una mala noche tiene cualquiera* [n.117](#) is la Madelon, a male-to-female, hormone-taking transvestite who, in a long monologue that constitutes the whole novel, tells her historia (i.e. her story and history) of the most disturbing night of her life (and of most Spaniards): February 23, 1981. This was the night that Teniente Coronel [Lieutenant Coronel Antonio Tejero’s failed coup d’etat threatened to reverse the fragile process of democratic transition that had started after the death of Francisco Franco in 1975. It is my

contention that *Una mala noche* subversively intervenes in Spanish historiography by privileging gender and sexuality as the central issues through which to understand contemporary Spanish history. In addition, and of more importance for my argument, the novel provides an excellent fictionalized account of the real consequences a queer person could have *973 endured had the fragile process of transition from Franco's dictatorship to King Juan Carlos I's monarchic democracy failed—a very real possibility for all Spaniards had Tejero been successful. [n.118](#)

Mendicutti's choice of a transvestite as the first person narrator of historical events so critical to the future of Spain's democracy is extremely significant and has been interpreted in a number of ways. According to critic Antonio Hernandez, through Madelon's personal story, Mendicutti "consigue un fresco trepidante de los sotanos de un periodo historico o, lo que es lo mismo, una cronica viva y delirante de la llamada transicion, desde la optica de una sociedad marginada con un solo objetivo: el gozo de la libertad, se considere o no su aspiracion libertinaje." [n.119](#)

A closer look at Hernandez's opinion exposes the contradictory levels at which Mendicutti's project has been read. On the one hand, the critic appropriately hails this novel not only as a great work of fiction, but also as "una cronica viva" [a real life chronicle a bona fide chronicle or eye-witness account of important political events. [n.120](#) The qualifier "cronica" lends historical legitimacy to Mendicutti's project, a project that subversively privileges the perspective of La Madelon—to some an unlikely witness perhaps—through whose eyes the reader has access to a revisioning of the crucial coup.

On the other hand, Hernandez reveals a subtle, yet generalized, bias against the transgendered—and, by extension, the queer—world that might invalidate La Madelon as a reliable witness. For this critic, La Madelon is a denizen from a "sociedad marginada" [a marginalized society, whose only object is "el gozo de la libertad" [the enjoyment of liberty. [n.121](#) However, Hernandez perceives this interest in freedom as a desire for "libertinaje" [libertinism or debauchery. [n.122](#) Hence, this critic constructs the figure of the transvestite as only having an investment in democracy because it gives her the freedom to do as she pleases sexually. Her political commitment to the left comes only as a "producto de una persecucion mas que consecuencia de una conciencia analizadora" [product of *974 persecution rather than as the consequence of an analytical consciousness. [n.123](#) In fact, with this latter commentary, the critic belittles the gruelling persecution that queers suffered under Franco. Nonetheless, as Hernandez must concede, La Madelon's "inclinacion al cachondeo y la practica de ejercicios sexuales poco ortodoxos no la apartan de una vision responsable de la vida ni de una etica personal abocada alas solidaridades" [leanings toward banter and toward the practice of unorthodox sexual exercises do not prevent her from having a responsible vision of life and a personal ethics of solidarity. [n.124](#) Although Hernandez recognizes La Madelon's sense of ethic, he unfortunately characterizes her as a libertine. This construction locks the

narrator/historiographer into a marginal position, making her account interesting yet subject to judgmental condescension; ultimately, Hernandez denies the historical legitimacy of La Madelon's perspective.

As the novel underscores, however, La Madelon is painfully aware of such homophobic interpretations and resists being made into a side-show freak. This is illustrated in an incident in which a "mocito divino" [a divine lad [n.125](#) convinces her and her roommate La Begum to take a personality test. Leading them to a dark apartment nearby, full of psychology students, he presents them to his classmates by offensively asking, "'Os sirve esto?" [Is this of any use to you. [n.126](#) The students' reply not only echoes the tone of Hernandez's review but may also explain the dubious reasons why this novel was a success among straight audiences: "Claro que si; interesantisimo" [Of course, very interesting. [n.127](#) Refusing to become a spectacle, La Madelon reverses her, and La Begum's guinea-pig status first by recognizing the implication of the boys' exclamation—"Lene, ni que fuéramos bichos raros" [Damn, as if we were freaks [n.128](#)--and by referring to the students as "abortitos llenos de gafas" [little abortions with glasses. [n.129](#) Hence, she turns them—and any similarly condescending, homophobic readers—into the actual freaks.

Furthermore, in spite of Hernandez's interpretation of La Madelon as lacking depth in her political analysis, Mendicutti succeeds in validating her as a responsible, democracy-loving citizen. *975 As La Madelon triumphantly claims at the end of the novel: "Servidora es asi: independiente, liberada, moderna. Y mas democrata que nadie" [Your humble servant is thus: an independent, liberated, modern woman. And more of a democrat than anybody else. [n.130](#) La Madelon's strong solidarity with the political causes of women, sexual minorities, and the working class, and her firm understanding of democratic principles derive both from an informed militancy in the Spanish Communist Party (PCE) and, especially, from her past experiences as a working-class, Andalusian gay man who, prior to his transgenderism, had suffered fascist, homophobic persecution. Thus, in her narrative of the events of the night of February 23, 1981, La Madelon reminisces about how she spent most of the night wondering what would happen to her and others like her should Spain revert to a fascist dictatorship:

?Que seria de nosotras? Lo mismo les daba por volver a lo de antes. Que sofoco. . .?Y que iba a pasar ahora con la libertad. . . . Que espanto. Seguro que al final acabarian matando a La Madelon—ataud forrado de raso granate, corona de nardos, habito de las Arrepentidas—y habria que resucitar a Manolito Garcia Rebollo, natural de Sanlucar de Barrameda—tierra de los langostinos y de la manzanilla --, hijo de Manuel y de Caridad, soltero, de profesion artista. 'O sea, maricon,' se vio que pensaba el de la ventanilla de la Comisaria, la ultima vez que fui a renovar el carne de identidad. . . . Pues seguro que habia que resucitarlo—a Manolito, quiero decir --, que horror, con lo mal que lo pasaba el pobre. No lo queria ni pensar.

. . . [Seguro que aquellos salian de alli como los nazis . . . organizando cacerias de maricas y unas orgias fenomenales, regando los geranios y los jazmines hasta

achicharrarlos con la sangrehirviendo de los judios, los gitanos y las reinas de toda Espana. [n.131](#) *976 Despite La Madelon's colorful and comic speculation about what might have happened if Tejero had been successful—we must remember that the first person narrator tells her story already with the knowledge that the coup was unsuccessful, thus allowing her to mock her own fears and to spice up her narrative for comic relief—the above passage conveys the sense of fear and urgency that queers must have experienced at that historical juncture. La Madelon would have had to stop cross-dressing and taking hormones: “al final seguro que tendria . . . que tirar a la alcantarilla todos los trajes y pamelas, y no habria mas remedio que volver a ir por la vida de incognito” [I would surely have . . . to throw to the sewer all my dresses and my broad-brimmed hats, and there would be no other choice but to go through life incognito. [n.132](#) Furthermore, she would have to erase her sense of identity, bury herself in life. Over any sort of detached, elitist theorization, Mendicutti prioritizes and legitimizes the political effectiveness and validity of those “marginal denizens” experiences of oppression. In this seemingly superficial novel, Mendicutti vocally denounces sexual oppression; successfully vindicates gender and sexual freedom; and firmly validates the truly democratic respect of differences by counterpointing the gains of democracy with the potential losses for queers that a return to a Francoist-style dictatorship would bring. Moreover, despite Hernandez's and other critics' characterization of the queer world as marginal, [n.133](#) Mendicutti's depiction of a transvestite as the most reliable witness of crucial historical events allows him to fulfill other subversive tasks: 1) he brings the supposed “sotanos de un periodo historico” [netherworld of a historical period [n.134](#) to the center of History (i.e. he privileges the margins over the center); 2) he effectively intervenes in the retelling of History; [n.135](#) and 3) he makes a creative *977 critique of heterosexism and dualistic gender mores. [n.136](#) To qualify Una mala noche's construction of the transvestite further and to gauge its intervention in contemporary Spanish historiographic discourse appropriately, it is necessary first to discuss the cultural and political context in which Mendicutti wrote this novel.

In her brilliant essay, *Los monos del desencanto espanol*, [The Withdrawal Syndrome of Spanish Disenchantment, Teresa Vilaros attempts to explicate the circumstances that affected the political and literary development of the generation of intellectuals who, like herself and Mendicutti, were born approximately between 1950 and 1960. [n.137](#) For her, the death of Franco and the end of the dictatorship “enfrenta a los intelectuales con el problema de tener que reconocer que su antiguo papel historico de conciencia critica del pais tiene que ser radicalmente revisado” [confronts intellectuals with the problem of having to recognize that their old historical role as the country's critical consciousness must be radically revised. [n.138](#) She claims that the death of the dictator coincided with and allowed the beginning of postmodernism in Spain, mostly because it ended the utopian dream that had inspired previous generations of leftist intellectuals. “El Desencanto” [the disenchantment is the term given to the particular political and cultural effect caused by the end of the dictatorship. Comparing the anti-

Francoist, utopian dream of the leftist intellectuals who lived, theorized, and wrote under the dictatorship to a hard drug that creates co-dependency, Vilaros labels the cultural explosion of postmodernist, frantic, yet apparently barren, cultural creativity as “el mono del desencanto,” where “mono” is the slang word for withdrawal syndrome. [n.139](#)

The cultural reaction to the death of the dictator, then, was not to follow the path of the older, politically engage intellectuals, but to reject absolutely “las metanarrativas globalizadoras” [globalizing metanarratives [n.140](#) and to embrace a decentering postmodernism. Hence

[en literatura los generos desbordan. Las novelas de serie negra, eroticas, de ciencia ficcion y la literatura de comic inundan los kioskos y las librerias. Escritoras consideradas ‘serias’ . . . se pasan a la narracion erotica y escritores y *978 escritoras noveles deslumbran con primeros libros y novelas, a caballo entre el subgenero popular y la ‘gran literatura’. [n.141](#)

The most visible avant-garde movements associated with this postmodern culture emerge in the main cities: first in Barcelona and later, but more strongly, in Madrid. Formed by what Vilaros (reminiscent of Hernandez) calls “minorias subterranas, marginales, compuestas de gente joven que no estaba abrumada por ningun compromiso intelectual contraido previamente a la muerte de Franco” [underground, marginal minorities, composed of young people who weren’t overwhelmed by any kind of intellectual compromise contracted prior to the death of Franco, [n.142](#) these movements coalesced around many gay artists, such as sado-masochistic comic-book draftsman Nazario in Barcelona, artistic team and partners Costus and filmmaker Pedro Almodovar in Madrid, and many others. In the latter city, these young artists and intellectuals propelled what was later to be known as la movida madrileña [the Madrilenian movement. Interpretations of the scope and aims of this urban, cultural movement vary drastically: from the most celebratory ones (Almodovar), to nostalgic, pessimistic ones (Vilaros), to the most critical, condescending ones (those launched by older, leftist intellectuals like Jose Carlos Mainer).

For Almodovar, la movida, which, strictly speaking, happened during the first half of the 1980’s, “era una epoca alocada, ludica, creativa, plena de noches febriles, donde Madrid supuso una explosion que dejo al mundo boquiabierto” [was a crazy, playful, creative time, full of feverish nights, where Madrid became an explosion that left the world with its jaw dropped. [n.143](#) He concedes that, in their relation to the immediate, Francoist past, the participants in la movida “had no memory. . . . There wasn’t the slightest sense of solidarity, nor any political, social or generational feelings *979 Drugs only showed their playful side and sex was something hygienic.” [n.144](#)

Vilaros’s retrospective analysis of la movida, although attempting to recuperate a traditional cultural value for it and wanting to echo Almodovar’s enthusiasm, betrays the sense of “desencanto” (“disenchantment”) and failed utopia that permeates her essay:

La movida en el Madrid y la Barcelona de los anos inmediatamente

posteriores al franquismo, la movida del “mono,” no tenía que ver con “construcción.” Tenía que ver con el exceso, con la ruina, con la alucinación y con la muerte, con el espasmo del éxtasis y con la alegría del reconocimiento. El mono, naturalmente, no construye. La movida tampoco produce obras en el sentido tradicional. . . . Es un ‘happening’ que, como tal, no ofrece obras artísticas tradicionalmente identificables como tales. . . . [No han quedado tras [la movida “grandes obras.” [n.145](#)

The Spanish critic echoes here the older generation’s complaint about the lack of “great works” during this period, but as she incisively indicates, the absence of traditional “works of art” during this period responds to an interpretation of la movida as a “fenómeno insertado en la posmodernidad, el cual, si se aferraba a algún principio, era precisamente el de huir de un corpus teórico, de toda ‘teorización’” [phenomenon inserted in postmodernity, which, if it clung to any sort of principle, it was precisely to that of fleeing from a theoretical corpus, from all ‘theorization’]. [n.146](#) Surprised by what they saw as a hedonistic indulgence in apolitical excess, the older generation of liberal intellectuals irately criticized Spanish postmodernism.

***980** Spanish literary critic Jose Carlos Mainer summarizes the opinions of this older generation. He identifies two artistic responses to the trauma of the democratic transition in Spain. The first response is that of an “identity crisis” resulting from the dismantling of the traditional oppositional role of the left in Spain under the dictatorship, what Mainer calls “the bankruptcy of the ‘leftist tradition’” [n.147](#) or “el desencanto” mentioned by Vilaros. [n.148](#) The second response to the death of Franco and the downfall of the dictatorial apparatus is what the critic calls “the search for lost vitality.” [n.149](#) His attitude toward the intellectuals and artists who responded in the second way is contemptuous at best. Launching what Vilaros would call “[un ataque furibundo a la posmodernidad española]” [an irate attack on Spanish postmodernity, [n.150](#) Mainer’s diatribe exposes the mis-recognition that separated the old, liberal intellectuals from the younger, postmodern generation:

[There are other forms of hedonism that are almost deliberately cynical when they talk about their historical innocence. I am referring to the movida, a vague and yet significant term for a phenomenon that has caused great excitement . . . [but has also been a refuge for a number of disappointed, loose, and lost individuals who, in spite of their [age, have put a lot of imagination into this effort. They are the belated hangover of a 1968, which Spain did not experience directly, and they have a rare talent for commercializing their fantasies. They have managed to change Madrid and Barcelona—especially the former—into ‘fun’ cities. They continually generate musical groups with eccentric names and improvised yet sometimes aggressive, intelligent songs; they design useless objects, impossible decorations, and unlikely clothes that, nevertheless are sold all over Europe. The films of Pedro Almodóvar—which through their comic make-up exude a disquieting lack of morale—could serve as an emblem of this vitality that takes delight in the debasement of an urban subculture but deep down is a

desperate search for lost innocence . . . the nostalgia for this innocence and the rejection of history; the selfish longing for beauty and emotion *981 rather than reason; apparently all symptoms of postmodernism. [n.151](#)

Mainer's worried response betrays, among other things, his fear of la movida's questioning of the elitist boundaries between "high" art and popular culture—a distinction that Spain's upper classes and intellectuals have always been at pains to legitimate.. [n.152](#) Furthermore, Mainer's perception of a "disquieting lack of morale" in Almodovar's films illustrates how Mendicutti's privileging of the stories of queer people might have similarly shaken older critics. The accusation of a "lack of morale," however, is the homophobic imposition of a generation of liberal critics who, because they are too entrenched in a modernist project, cannot appreciate the subversion couched beneath these apparent "forms of hedonism." What Mainer saw as "disappointed, loose, and lost individuals" were, for the most part, a group of queer artists, many from the working classes, who, because they had grown up under La ley de Peligrosidad [Law of Social Danger and Rehabilitation and the complex Francoist apparatus of heterosexual normativity, were now more invested than anybody in the consolidation of a free, democratic society that would guarantee every citizen's right to difference. Appropriately contesting Mainer's complaints about la movida's lack of political commitment, Vilaros claims that "la antipolitica de la movida no se pretendia apolitica, sino que tenia un obvio sentido de respuesta a la vision de lo politico entregada por la tradicion" [the anti-politics of la movida did not pretend to be apolitical. Instead, it had an obvious sense that it was contesting the vision of what is political that has been traditionally handed down. [n.153](#)

When Mendicutti wrote *Una mala noche la tiene cualquiera* in 1982, he lived and experienced the Madrid of la movida. The novel fully participates in the postmodern projects of fragmenting and decentralizing the subject and rewriting history. Mendicutti, like Almodovar in his medium of film, brings gender and sexuality to the center and makes them the legitimate grounds on which to build a larger political program. Because the older generation of *982 leftist intellectuals cannot accept gender and sexuality as "political" issues, they claim that the program is "apolitical." Despite facile, superficial interpretations of la movida, Almodovar's included, many of its artists were engaged politically, as Mendicutti's works illustrate. [n.154](#) Despite Mainer's perception that the artists of la movida were "almost deliberately cynical when they talk[ed about their historical innocence," [n.155](#) Mendicutti's intervention in history through La Madelon's retelling of the moment that threatened to end democracy, to rob Spaniards of their newly acquired freedom, and to throw queers back to the judicial persecution of the last years of the dictatorship demonstrates a clear engagement with the political world and an awareness of the dangers of repeating past history.

Using the trope of cross-dressing to refer to contemporary political processes in Spain was not new to Mendicutti. During the late 1970s, prior to the coup, many perceived the incipient Spanish democracy as negotiating a

precarious balance between the legacy of the dictatorship and the pull of europeanizing, democratic, economically expansionist forces. [n.156](#) In a critical editorial, a cultural and political publication called *Ajoblanco*, which traditionally serves as an intellectual forum for marxist, queer and feminist intellectuals, characterized the new democracy as a “dictadura que se traviste de democracia” [dictatorship that cross-dresses as a democracy. [n.157](#) In a later issue of *Ajoblanco* dedicated to transvestism, another writer claims that “[en el fondo todos somos travestis. Todos representamos” [deep inside, we are all transvestites. We all perform, [n.158](#) while he also makes the distinction that there is a kind of transvestism which, far from being playful and subversive, represents oppressive forces—the cross-dressing practiced by those who “encubiertos por el ropaje del nefasto travestismo del poder, nos encauzan hasta destruirnos. Hasta la impotencia” [covered up by the clothing of power’s nefarious transvestism, lead us to destruction. *983 To impotence. [n.159](#) Una mala noche disrobes this conservative, cross- dressed, democracy from its “nefasto travestismo del poder” [power’s nefarious transvestism by vindicating instead a subversive, liberating transgenderism and mobilizing issues of gender and sexuality as the keys to a responsible democratic enterprise. [n.160](#)

Leopoldo Azancot celebrates Mendicutti’s choice of a transvestite “como portavoz de todos aquellos a los que les iba mucho en que el golpe fracasara” [as a spokesperson for all those who had much to win if the coup failed. [n.161](#) For him, the choice of La Madelon as witness to history, permite distanciarse al lector de la, por así decir, version oficial e ideologica de los hechos, forzandole a tomar contacto con el verdadero sentido de los mismos desde el punto de vista no comunitario, sino personal e individual—lo que estaba en juego, de manera prioritaria, era el derecho a ser distinto, de los mas o de un pequeno grupo con poder, y en todos los ambitos: sexual, politico, etcetera --; le obliga a reconocer que la sociedad, por encima de toda otra consideracion se divide primordialmente entre quienes afirman el derecho a la diferencia y quienes lo niegan, y que un travestido y un democrata, por ejemplo, no difieren en nada de este punto de vista; y, en fin, le mueve . . . a desdramatizar lo ocurrido, viendolo y viendose con humor. [n.162](#)

Although this critic is right in his validation of the role of La Madelon, he inevitably makes the same objectifying gesture as Hernandez: La Madelon’s story is humorous, endearing, but also laughable. This gesture strips of its seriousness Madelon’s personal *984 account of the coup. Furthermore, by comparing “un travestido y un democrata” [a transvestite and a democrat, he implies that a person cannot be both.

However, Una mala noche intelligently undoes Azancot’s excluding dichotomy (a transvestite or a democrat) and “blends” (just as a transvestite supposedly blends genders) [n.163](#) democracy with queerness. In other words, Mendicutti queers democracy. Furthermore, Una mala noche emphasizes that the “derecho a la diferencia” [the right to difference was not equally important for all those opposed to Francoism. As demonstrated in Part II of this Article and emphasized by La

Madelon's testimony of her fears during the night of the coup, it was queer Spaniards who had more to lose if Tejero was successful.

Finally, Mendicutti brilliantly turns transvestism into a metaphor for the newly democratic Spain. Unlike the editorial in *Ajoblanco*, *Una mala noche* does not claim that the regime that followed the death of Franco was a "dictadura que se traviste de democracia" [a dictatorship that cross-dresses as a democracy. [n.164](#) On the contrary, transvestism is the true condition of Spanish democracy. This is exemplified by La Madelon's self-characterization of her and La Begum's transgenderism. Having confronted the real, life-threatening implications of the potential success of the coup, which would mean a reversal to a fascist dictatorship, Madelon explains how it helped them realize "como somos todas. Del pasado tan chiquitísimo que tenemos, y de lo espantoso que eso es. De lo mal que nos encaja el medio cuerpo de cintura para arriba, con el medio cuerpo de cintura para abajo" [how we [transvestites all are. Of the very small past that we have, and of how frightening it is. Of how the half- body from waist up fits badly with the half-body from waist down. [n.165](#) This representation of the transvestite functions as an allegorical representation of the incipient democracy of the late 1970s, a regime that had to negotiate the opposing forces of the old, modernist, conservative Spain ("el medio cuerpo de cintura para abajo" [the half-body from waist down, and the new, postmodern, progressive Spain ("el medio cuerpo de cintura para *985 arriba" [the half-body from waist up. [n.166](#) These contending forces "encajan mal" [fit badly yet must coexist within the same body politic. The "pasado tan chiquitísimo" [the very small past of the transvestites echoes the very short and precarious past or history of the emergent democracy. This negotiation of contending political/sexual forces is often painful, jarring, and confusing. Yet, "cuando [La Madelon/Spain todo lo ve muy negro, lo que se dice fatal, perdido del todo" [when [La Madelon/Spain sees everything very dark, truly bad, completely lost, [n.167](#) she deals with her contradictions, assumes them, and festively (in the true spirit of *la movida*) concludes that "mejor pintarse el ojo, plantarse un clavel reventon en el canalillo de los pechos, hacerse la sorda y salir corriendo para los toros, que se hace tarde" [it's better to put on makeup, place a bursting carnation between your breasts, play dumb, and run to the bullfight, cause it's getting late. [n.168](#) Through the transvestite, Mendicutti thus delivers a brilliant lesson in peaceful, democratic coexistence. Just as "[el destino de [La Madelon . . . es ser mitad y mitad; pero no en orden . . . a la rebujina" [it's [La Madelon's destiny . . . to be half and half; but not in order . . . all jumbled up, [n.169](#) the goal of democratic Spain should be to accept and to live with its differences—be they political, sexual, socio- economic, or otherwise. Mendicutti's negotiation of gender and sexuality in *Una mala noche* goes beyond his male predecessors' symbolic, misogynist construction of Spain as a castrating mother. [n.170](#) Subversively literalizing the concept of *La madre patria* [the mother nation/ fatherland—which etymologically mixes femininity and masculinity, mother and father in the symbolic construction of the nation, and thus reinscribes heterosexuality—Mendicutti makes democratic Spain into a

“gender blender”: [n.171](#) both female and male, madre and padre. The new Spain is no longer the “castrating bitch” that other Spanish writers had constructed, [n.172](#) but a glorious transvestite or, as La Madelon would say, a “mujer divina” [a divine woman. [n.173](#)

***986 Conclusion**

Commenting on what she considers to be an embarrassing display of tastelessness, La Madelon characterizes Tejeros’s takeover of Congress thus: “Que numero, por Dios, como en Sudamerica: hala, a tiro limpio, todas al suelo, se acabo lo que se daba, guapos. Que cosa mas ordinaria” [What a number, for God’s sake, like in South America: come on, shooting all over, everybody to the floor, no more of the good stuff, my pretty ones. What a rude thing. [n.174](#) I find this quotation very telling for the purpose of this Article and its connections with LatCrit concerns. To La Madelon (possibly speaking for a generalized Spanish popular opinion), the fact that the young Spanish democracy was undergoing a military coup brought the country closer not to the much desired civility of Europe, but to the perceived barbarism of Latin America. The quotation implies that only in South America would one witness such “rude” displays of force and anti-democratic sentiment. This problematic commentary neatly illustrates the anti-Latin American biases still underlying the Spanish imaginary. These biases relate to Spain’s feelings of insecurity regarding its location vis-a-vis the Western world (U.S.A. and Europe) and its ambivalence toward its former colonies.

Elizabeth Iglesias has recently argued that “it should never be forgotten that today’s Latina/o communities were spawned during Spain’s colonial supremacy and through the physical and cultural impact of the Hispanic conquest on indigenous communities in Latin America and throughout much of the southwestern United States.” [n.175](#) For this reason, she claims:

as LatCrit scholars continue to confront the consequences and to explore the implications of increasing globalization, Spain, its legal system, history, culture and current-day projects offer a relatively unexplored avenue through which to engage the critical insights of post-colonial theory and cultural studies, to grapple with the meaning and significance of Europe and Africa in the articulation of LatCrit theory and its social justice agendas, and to excavate these new insights in tandem with, and in relationship to, our critical analysis of international *987 and comparative law, legal institutions and procedures. From this future oriented perspective, Spain offers a valuable point of reference for examining a host of pending issues that are especially germane to Latinas/os and to other political identity groups committed to the articulation of an expansive anti- subordination agenda without borders or boundaries. These issues include such matters as the continuing repercussions of Spanish colonialism and the future of democracy in Latin America, the configuration of interstate power relations within the European Union, and Spain’s role in current-day projects to promote sustainable economic development, social justice and democratic freedom in the countries of Africa and

Latin America. [n.176](#)

Following these recommendations, this Article offers a perspective of the Spanish legal system at a particular historical point—the late years of Franco’s dictatorship and the transition into democracy. Also, it offers a perspective of the Spanish legal system regarding a specific set of issues—the competing discourses around homosexuality. I hope that the points of view of the fields of cultural studies and literary criticism from which I have spoken in this Article will be of use to legal scholars in general, and LatCrit scholars in particular.

I have argued for the need to focus on how homosexuality becomes a contested locus in which hegemonic and anti-hegemonic discourses converge at a time of historical crisis. Also, I would like to add, literature merits study in conjunction with the law because the former constitutes an important measurement of possible cultural subversion against a repressive regime at the same time that it may intervene to revise the faulty re-telling of history. Furthermore, literature constitutes an excellent example of a cultural product that resists and can ultimately help to change hegemonic ideology, even if such change only comes in the form of a vocal vindication of democracy and a citizen’s right to difference.

NOTES:

[n.1.](#) Paul Julian Smith & Emilie L. Bergmann, Introduction to “¿Entiendes?: Queer Readings, *Hispanic Writings* 1, 1-14 (Emilie L. Bergmann & Paul Julian Smith eds., 1995).

[n.2.](#) Id. at 1.

[n.3.](#) Id.

[n.4.](#) However, the past few years have witnessed an increasing academic interest (especially in the fields of literary and cultural studies) in researching the lives and cultures of lesbians, gays, bisexuals, and transgendered peoples from Spain and Latin America. This interest is demonstrated by the publication of several groundbreaking works in the field of Spanish and Latin American Queer Studies, such as (in chronological order) David W. Foster, *Gay and Lesbian Themes in Latin American Writing* (1991); *Latin American Writers on Gay and Lesbian Themes: A Bio-Critical Sourcebook* (David William Foster ed., 1994); “¿Entiendes?: Queer Readings, *Hispanic Writings* (Emilie L. Bergmann & Paul Julian Smith eds., 1995); *Bodies and Biases: Sexualities in Hispanic Cultures and Literature* (David W. Foster & Roberto Reis eds., 1996); David W. Foster, *Sexual Textualities: Essays on Queer/ing Latin American Writing; Hispanisms and Homosexualities* (Sylvia Molloy & Robert Irwin eds., 1998); *Spanish Writers on Gay and Lesbian Themes: A Bio-Critical Sourcebook* (David W. Foster ed., 1999). In spite of the crucial contributions of these works to the field of Spanish and Latin American queer studies, the field still lacks a monographic, book-length study specifically on Spain that would respond to Smith and Bergmann’s request.

[n.5.](#) See generally Judith Butler, *Bodies That Matter: On the Discursive Limits of “Sex”* (1993)[hereinafter Butler, *Bodies That Matter*; Judith Butler, *Gender Trouble: Feminism and The Subversion of Identity* (1990).

[n.6.](#) See generally Butler, *Bodies That Matter*, *supra* note 5.

[n.7.](#) My concern with how power and ideology operate in a dictatorial regime and how they can be contested is informed by Althusserian and Gramscian notions of the modern state and its power operations. For Althusser, the state “has no meaning except as a function of State

power,” by which he means “the possession, i.e. the seizure and conservation of State power.” Louis Althusser, *Lenin and Philosophy and Other Essays* 134 (Ben Brewster trans., 1971). He further distinguishes between state power and the state apparatus. The latter is often unaffected by struggles to seize or maintain state power. See *id.* at 140. This particular characteristic of the state apparatus is exemplified in Spain’s transition into democracy (1975-1982), during which a democratic parliamentary structure coexisted with the old, full-fledged Francoist repressive and ideological state apparatuses. In fact, during the first years of democracy state power remained completely in the hands of persons intimately involved with Francoism. Its legacy was liquidated not by outsiders but by some of the very persons entrusted with its preservation. [The absence of a clean break permitted the much longer coexistence of democratic and undemocratic forms of government in Spain.... The new constitution did not take effect until December 1978, three years after Franco’s death. Local officials appointed or elected under Franco governed Spain’s municipalities until March 1979. The army was never systematically purged, continued occasionally to exercise judicial power over civilian critics even during the peak periods of democratic euphoria, and almost brought the democratic experiment to an abrupt end with the coup attempt of February 23, 1981.... Indeed, the only part of the Francoist state structure that was dismantled relatively quickly was the syndical organization, precisely the most moribund of the Francoist institutions. Edward Malefakis, *Spain and its Francoist Heritage*, in *From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism* 215, 216 (John H. Herz ed., 1982). One of the Francoist arms of the repressive state apparatus that was effective well into the democracy was, significantly, the police: “The police were still capable of savage repression: At a March 1976 demonstration in Vitoria they killed five workers, more than in any single labor conflict during the Franco years.” *Id.* at 225. To this theory of the state, Althusser adds the distinction between the repressive state apparatus and the ideological state apparatuses. See Althusser, *supra*, at 142. The former includes institutions such as the government, the administration, the army, the police, the judicial and penal systems. The latter includes educational, religious, and familial institutions; political parties; and communications and cultural systems and the like. The repressive state apparatus operates mostly, but not exclusively, by direct, explicit, at times even physically violent control over the population, while the ideological state apparatuses function mostly, but not exclusively, by more abstract, psychic coercion. See *id.* at 142-43. The ideological state apparatuses largely secure the reproduction specifically of the relations of production, behind a “shield” provided by the repressive State apparatus. It is here that the role of the ruling ideology is heavily concentrated, the ideology of the ruling class, which holds State power. It is the intermediation of the ruling ideology that ensures a (sometimes teeth-gritting) “harmony” between the repressive State apparatus and the Ideological State Apparatuses, and between the different State Ideological Apparatuses. *Id.* at 142. Closely following the work of Antonio Gramsci, Althusser systematizes the Italian thinker’s theory of the state by articulating more precisely his terminology. The Gramscian concepts of “political” and “civil society” correspond respectively to Althusser’s “repressive State apparatus” and “ideological State apparatuses.” Gramsci defines civil society as “the ensemble of organisms commonly called ‘private,’” and political society as “the State.” Antonio Gramsci, *Selections from the Prison Notebooks* 12 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1995). For Gramsci, “[these two levels correspond on the one hand to the function of ‘hegemony’ which the dominant group exercises throughout society and on the other hand to that of ‘direct domination’ or command exercised through the state and ‘juridical’ government.” *Id.* Unfortunately, the Gramscian/Althusserian theory of power is not devoid of problems. Although it provides a productive model for understanding the logic of a dictatorial regime and its ideological program, Althusser’s theory of the state conceives of power as monolithic; even though the ideological state Apparatuses are diverse, they have a single, if shared, role: “the reproduction of the relations of production.” Althusser, *supra*, at 142. In Althusser’s vision, power is largely univocal; it emerges from a single source (the state apparatus) and it shares a common goal (maintaining state power). But, as Foucault has extensively argued, relations of power “are not univocal; they define innumerable points of confrontation, focuses of instability, each of which has its own risks of

conflict, of struggles, and of an at least temporary inversion of the power relations.” Michel Foucault, *Discipline and Punish: The Birth of the Prison* 27 (Alan Sheridan trans., 1979).

We might find, nevertheless, a productive locus for agency in one of Althusser’s significant parenthetical commentaries. Althusser employs a promising metaphor when he assigns to “the ruling ideology” an intermediary role between the repressive state apparatus and the ideological state apparatuses; the relationship attained between these two he calls “a (sometimes teeth-gritting) ‘harmony.’” Althusser, *supra*, at 142. We might focus on this strained “harmony” as the place where power can be contested. It is within some of the ideological state apparatuses (the Church, education, culture in general) that contradictions arise, where a battle over attaining the power to signify differently from hegemonic semantics emerges.

[n.8.](#) See discussion *infra* Part I.

[n.9.](#) Eduardo Mendicutti, *Una mala noche la tiene cualquiera* (1982). All translations of Spanish and Catalan texts are the author’s unless indicated otherwise.

[n.10.](#) See Malefakis, *supra* note 7, at 223.

[n.11.](#) For detailed accounts of the history and background of the Franco regime and the transition into democracy, see generally Raymond Carr & Juan P. Aizpurua, *Spain: Dictatorship to Democracy* (1979); Jose R. Diaz Gijon et al., *Historia de la Espana actual: 1936-1996 Autoritarismo y democracia* (1998); *Historia de Espana* (Javier Tusell ed., 1998); Stanley G. Payne, *Fascism in Spain: 1923-1977* (1999); Malefakis, *supra* note 7, at 215-30.

[n.12.](#) See Jose Luis Garcia Delgado, *Estancamiento industrial e intervencionismo economico durante el primer franquismo*, in *Espana bajo el franquismo* [Spain Under Franco 170, 170-91 (Josep Fontana ed., 1986).

[n.13.](#) *Id.* at 171.

[n.14.](#) Carr & Aizpurua, *supra* note 11, at 52.

[n.15.](#) Garcia Delgado, *supra* note 12, at 173-74 [Spain’s 1940s, post-war, economic stagnation will remain unparalleled in contemporary European history, where the period of reconstruction following the devastation and major damage of the war is much faster, especially after 1948 with the beginning of the Marshall Plan..

[n.16.](#) For more detailed analyses of the consequences of the autarchy, see Carr & Aizpurua, *supra* note 11, at 49-78, and Garcia Delgado, *supra* note 12. For other illuminating studies of the development of the Spanish economy from the early years of Francoism to the modern democracy, see generally Joseph Harrison, *The Spanish Economy: From the Civil War to the European Community* (1993); Francisco Mochon Morcillo et al., *Economia espanola 1964-1987: Introduccion al analisis economico* (1988); and Ubaldo Nieto de Alba, *De la dictadura al socialismo democratico: Analisis sobre el cambio de modelo socioeconomico en Espana* (1984).

[n.17.](#) Harrison, *supra* note 16, at 19.

[n.18.](#) Carr & Aizpurua, *supra* note 11, at 52.

[n.19.](#) See Harrison, *supra* note 16, at 19.

[n.20.](#) “[Inflation was running at 16 percent and Spain’s supply of foreign exchange was exhausted.” Carr & Aizpurua, *supra* note 11, at 53.

[n.21.](#) See Harrison, *supra* note 16, at 23.

[n.29.](#) I use the term “imaginary” in its psychoanalytic sense. See J. Laplanche & J.B. Pontalis, *The Language of Psycho-Analysis* 210 (Donald Nicholson-Smith trans., 1973).

[n.30.](#) Harrison, *supra* note 16, at 26.

[n.31.](#) See *id.*

[n.32.](#) See Malefakis, *supra* note 7, at 223-25. The civil unrest during the period was demonstrated, for example, by student demonstrations and Basque nationalist terrorism. See *id.*

[n.33.](#) As Zillah Eisenstein indicates, “Constructions of masculinity and femininity build nations, and masculinity depends a great deal on silencing and excluding women.... Gender borders are fragile and cannot take too much shaking up. This fragility is why masculinity has to be continually positioned against homosexuality in the military, on the job, wherever.” Zillah Eisenstein, *Hatreds: Racialized and Sexualized Conflicts in the 21st Century* 133 (1996).

[n.34.](#) Francoism referred to its military insurrection against the democratically elected Republic as El Glorioso Movimiento Nacional [The Glorious National Movement].

[n.35.](#) See Karen Van Dyck, *Reading between Worlds: Contemporary Greek Women's Writing and Censorship*, PMLA, Jan. 1994, at 45, 48-50.

[n.36.](#) See generally *The New Mediterranean Democracies: Regime Transition in Spain, Greece and Portugal* (Geoffrey Pridham ed., 1984) (providing a comparative study of the dictatorships of Spain and Greece).

[n.37.](#) Van Dyke, *supra* note 35, at 46.

[n.38.](#) This perception of being generally feminized becomes a crucial aspect of several canonical post civil war male novelists' reworkings of masculinity. For a thorough analysis of this topic within the discipline of literary studies, see Gema Perez-Sanchez, *Gender and Sexuality in Transition: The Novel in Spain from the Early 1960s to the Late 1980s* 45-97 (1998) (unpublished Ph.D. dissertation, Cornell University) (on file with the Cornell University Library).

[n.39.](#) Geraldine M. Scanlon, *La polemica feminista en la Espana contemporanea (1868-1974)* 320 (1976).

[n.40.](#) See Maria Teresa Gallego Mendez, *Mujer, Falange y Franquismo* 201 (1983).

[n.43.](#) See *Spanish Cultural Studies: An Introduction: The Struggle for Modernity* 169-313 (Helen Graham & Jo Labanyi eds., 1995).

[n.44.](#) Antonio Sabater, *Gamberros, homosexuales, vagos y maleantes: Estudio juridico-sociologico* 176 (1962).

[n.52.](#) For works sympathetic in varying degrees to homosexuality during that period, see Hector Anabitarte Rivas & Ricardo Lorenzo Sanz, *Homosexualidad: el asunto esta caliente* (1979); Victoriano Domingo Loren, *Los homosexuales frente a la ley: los juristas opinan* (1977); Frente Homosexual de Accion Revolucionaria, *Documentos contra la normalidad* (1979); Miguel Gamez Quintana, *Apuntes sobre el homosexual* (1976); Alfonso Garcia Perez, *La rebelion de los homosexuales* (1976); Alberto Garcia Valdes, *Historia y presente de la homosexualidad: analisis critico de un fenomeno conflictivo* (1981); *El homosexual ante la sociedad enferma* (Jose Ramon Enriquez ed., 1978); *Los marginados en Espana: gitanos, homosexuales, toxicomanos, enfermos mentales* (Francisco Torres Gonzalez ed., 1978); and Manuel Soriano Gil, *Homosexualidad y represion: iniciacion al estudio de la homofilia* (1978). The only "domestic" text written on lesbianism during those years is Victoria Sau, *Mujeres lesbianas* (Anabel Gonzalez ed., 1979), but there were several translations of foreign works on the subject. See e.g., Bertha Harris, *La alegria del amor lesbiano* (Alicia Gimeno trans., 1979); Ursula Linnhoff, *La homosexualidad femenina* (Nuria Petit trans., 1978); Monique Wittig, *Borrador para un diccionario de las amantes* (Cristina Peri Rossi trans., 1981). To observe the increase in essays about homosexuality toward the end of Franco's regime and the period of the democratic transition, see also the magazines *Ajoblanco* (Barcelona) and *El Viejo Topo* (Barcelona).

[n.53.](#) See Oscar Guasch, *La sociedad rosa* (1991); Antoni Mirabet i Mullol, *Homosexualidad hoy: ¿Aceptada o todavia condenada?* (Luisa Medrano trans., 1985); Nicolas Perez Canovas, *Homosexualidad: homosexuales y uniones homosexuales en el Derecho espanol* (Miguel Angel del Arco Torres ed., 1996). Perez Canovas's work responded to contemporary debates about the possibility of passing a so-called Ley de Parejas de Hecho [Law of de facto couples, which would legalize same-sex unions].

[n.54.](#) A Cornell University alumnus (Class of 1971), Roth was the co-founder of the Cornell Student Homophile League in the late 1960s. Out of personal interest, he collected invaluable materials on international gay activist organizations that are now housed at the Human Sexuality Collection in the Kroch Library at Cornell University.

[n.55.](#) Agrupacion Homofila para la Igualdad Social (AGHOIS)--whose name was soon changed to Movimiento Espanol de Liberacion Homosexual (MELH), and in 1976 to Frente de Liberacion Gay de Cataluna (FAGC)--published a clandestine newsletter in Paris and introduced it to Spain through the mail between January 1972 and November 1973. As de Fluvia explained in

Appendices

the same letter to Roth, however, “solo [sic llegan a sus destinatarios un 40% de los ejemplares]” [only 40% of the issues reach their destination, because the police managed to confiscate the remaining sixty percent. Letter from Armand de Fluvia to Robert Roth (Nov. 16, 1973) (Robert Roth Collection, Rare and Manuscript Collection, Kroch Library, Cornell University, Ithaca, New York). The Spanish government protested to the French government, “por permitir la edicion de un boletin [sic de homosexuales en espanol]” [for allowing the publication of a Spanish newsletter for homosexuals and, as a consequence, from November 1973 on, AGHOIS no longer published its clandestine newsletter. See id.

Armand de Fluvia, a.k.a. Roger de Gaimon and C. Benages de Escarsa, is a Catalanian lawyer and expert in genealogy, a member of the Societat Catalana d'Estudis Historics and of the Societat Catalana de Sexologia. During the dictatorship he participated actively in the opposition to the Franco regime, first on the liberal right within the liberal monarchic movement, and after the death of the dictator as a radical leftist Catalanian nationalist. See Front d'Alliberament Gai de Catalunya, Especial elecciones al Parlament de Catalunya, Infogai, Mar. 30, 1982, at 1. Together with other members of FAGC, he founded the important Instituto Lambda of Barcelona in 1976.

For the most accurate account of early gay activism in Spain, see Armand de Fluvia's *El movimiento homosexual en el estado espanol*, in *El homosexual ante la sociedad enferma*, 149-67 (Jose Ramon Enriquez ed., 1978). See also Antoni Mirabet i Mullol, *supra* note 53, at 244-55.

[n.56.](#) Letter from Armand de Fluvia to Robert Roth, *supra* note 55. As translated, the quotation reads:

In Spain, we [homosexuals are illegal and considered socially dangerous. If the police were to find out what I do, they would send me to the prison at Huelva, and they would subject me to aversion therapy to “cure” me, and they would ruin my life in every aspect, and, besides, all the work I have been doing to support sexual liberation would be lost.

[n.57.](#) The same folder of the Robert Roth collection that contains several of de Fluvia's letters includes a December 18, 1973 letter from “Tom” of the New Jersey Gay Switchboard and Information Center, presumably accompanying de Fluvia's letter:

Dear Bob,

This is in regard to a listing in the Gay Directory published last spring:

We got in touch with a Armando de Fluvia in Barcelona (p.24, 1st col. of list #3) and received a slightly panicky letter back from them urgently requesting that we please not write to Armando de Fluvia, but rather to C. Benages de Escasa [a code name at the same address. They also asked us to pass this information on to whomever we got the address and name from.

Incidentally, that's all we found out about them.

Letter from Tom to Bob (Dec. 18, 1973) (on file with the Robert Roth Collection, Rare and Manuscript Collection, Kroch Library, Cornell University, Ithaca, New York).

Later on, however, the correspondence between Robert Roth and Armand de Fluvia became quite abundant, and the activists seem to have met in person after Franco's death. Thanks to this copious correspondence, the Robert Roth Collection now contains vital documents about the underground operations of de Fluvia's activist group.

[n.58.](#) Francisco Franco, Ley de Peligrosidad y Rehabilitacion Social, in *Boletin Oficial del Estado* 12551, 12553 (Aug. 6, 1970). As translated, the quotation reads:

- a) Confinement in a re-education institution for a period no less than four months and no longer than three years.
- b) Prohibition from residing in a place or territory designated [by the court and submission to the surveillance of the delegates [for a maximum of five years.

[n.59.](#) Front d'Alliberament Gai de Catalunya, *Manifesto* 22 (1976).

[n.60.](#) According to Judge Sabater, the first law to consider homosexuality as a dangerous state, that of 1954, was passed “as a consequence of the increase in homosexuality.” Domingo Loren, *supra* note 52, at 123-24. This fear of the “spread” of homosexuality betrays Francoism's characterization of it as a contagious disease.

[n.61.](#) I have found a discrepancy in the actual date of the 1954 law. While Sabater gives

14 July 1954 as the issue date, the Codigo Penal of 1963 indicates in a footnote that the law was revised by the “ley de 15 julio 1954” [15 July 1954. Codigo Penal: Texto revisado 1963 y Leyes Penales especiales 705 (Eugenio Cuello Calón ed., 1963). Perhaps the law was issued on July 14 but did not go into effect until the following day.

[n.62.](#) Sabater, supra note 44, at 216.

[n.63.](#) Id.

[n.64.](#) See supra Part I.

[n.65.](#) Sabater, supra note 44, at 8.

[n.66.](#) Id. As translated, the quotation reads:

[It is necessary to revitalize our Law of Vagrants and Thugs, the possibilities and limits of application of which [Sabater has so skillfully indicated, thus creating for each of the categories of subjects in dangerous states institutions that are especially conceived and carried out for the task of readapting those subjects to society.

[n.67.](#) See Foucault, supra note 7, at 73-194, 231-56.

[n.68.](#) Id. at 8.

[n.69.](#) Id. at 11.

[n.70.](#) Id. at 16.

[n.71.](#) Id. at 23.

[n.72.](#) Mirabet i Mullol, supra note 53, at 163.

[n.73.](#) Id.

[n.74.](#) Id. at 164.

[n.75.](#) See id.

[n.76.](#) Un juez habla sobre la Peligrosidad Social, Ajoblanco, Dec. 1978, at 11-13. As translated, the quotation reads:

[The Law [of Social Danger is not a product of the Francoist regime at all. Franco hardly changed anything of the old Law of Vagrants and Thugs presented to the Republican Cortes [the Senate and the House of Representatives in 1933 and written by Jimenez de Asua. The current law just completed it by adding a few figures that had not yet been originated by the social structure of that time, such as car thefts, vandalism, and others.

[n.77.](#) Foucault, supra note 7, at 19.

[n.78.](#) Id.

[n.79.](#) Sabater, supra note 44, at 18 [[Future crimes by acting upon the dangerous subject, whether directly, by modifying psychical, moral, or social elements of his personality (educational or correctional measures), or [indirectly, by segregating him from the social body (protection measures in a strict sense), and by deferring punishment to the moment of sentencing..

[n.80.](#) Id. at 216-17.

[n.81.](#) Foucault, supra note 7, at 22.

[n.82.](#) Id. at 18.

[n.83.](#) Id.

[n.84.](#) Antonio Sabater Tomas was “Juez de Vagos y Maleantes” [Judge of Vagrants and Thugs in Barcelona for many years and was one of the authors of the Ley de Peligrosidad y Rehabilitacion Social. As he himself proudly explains in an interview with Victoriano Domingo, “In fact, I was the proponent of the Law; I wrote the articles, I discussed with the panel, and I was in charge of shaping its text.” Domingo Loren, supra note 52, at 122.

[n.85.](#) Codigo Penal, supra note 61, at 704-05. Translated, the quotation reads:

Appendices

To homosexuals [sic, ruffians, pimps, and professional beggars, and to those who live by the begging of others, exploit minors, or are mentally ill or handicapped, the following measures will be applied so that they fulfill them in succession:

a) Confinement to a work camp or an agricultural colony. Homosexuals [sic who are subject to this security measure must be confined to special institutions and, at all costs, with absolute separation from the rest.

b) Prohibition from residing in certain designated places, and obligation to declare their domicile.

c) Submission to the surveillance of delegates.

[n.86.](#) See supra notes 52, 55.

[n.87.](#) Franco, supra note 58, at 12552.

[n.88.](#) Id.

[n.89.](#) Id.

[n.90.](#) Foucault, supra note 7, at 16.

[n.91.](#) Franco, supra note 58, at 12551.

[n.92.](#) Foucault, supra note 7, at 17.

[n.93.](#) Franco, supra note 58, at 12552

[n.94.](#) Id.

[n.95.](#) Id.

[n.96.](#) See Diaz Gijon et al., supra note 11, at 44-49.

[n.97.](#) Mirabet i Mullol, supra note 53, at 165.

[n.98.](#) See Letter from Armand de Fluvia to Robert Roth, supra note 55.

[n.99.](#) Id. As translated, the quotation reads:

You complain because you are in the ghetto stage, but here in Spain we are in the catacombs stage. From the ghetto stage you can reach the liberation stage, because you can demonstrate on the streets and through the mass media. In Spain, on the other hand, freedom of association, of gathering, and of expression do not exist de facto. Don't forget that! Consequently, our job is much more difficult and risky, for we gamble all.

[n.100.](#) In Spain: Dictatorship to Democracy, Raymond Carr and Juan Pablo Aizpurua indicate that "[a censorship set up under wartime directives (1938) continued functioning for nearly thirty years of peace." Carr & Aizpurua, supra note 11, at 113.

[n.101.](#) Letter from Armand de Fluvia to Robert Roth, supra note 55, at 2. As translated, the quotation reads:

Our job with respect to our homophile comrades is to form consciousness-raising groups so that they are prepared for the day in which we can act publicly. Our job with respect to heterosexuals is to influence them and to establish a dialogue with open-minded people in the Church, the arts, medicine, law, sociology, the press, etc. to inform them, as far as we are able, of what we really are, and to attempt to change, little by little, the ideology they have about homosexuality—which is totally stereotyped—and into which the system has indoctrinated them.

In Spain, there are no other groups but the ones we have formed around "Aghois" and our task is huge and very unrewarding.

[n.102.](#) Sabater, supra note 44, at 207.

[n.103.](#) Id. at 177.

[n.104.](#) For an extensive discussion on the construction of women's roles under Francoism, see generally Gallego Mendez, supra note 40.

[n.105.](#) Linda Gould Levine & Gloria Feiman Waldman, *Feminismo ante el Franquismo: entrevistas con feministas de España* 36 (1980). As translated, the quotation reads:

[There is no criminalization of lesbianism; it's not contained in any article [of the Penal Code. They don't consider lesbianism, they think it's nothing, that it's a game, they don't take it seriously. If they catch two women in lesbianism [sic, I assure you that nothing will happen to

them, because the first thing they'll think of is that a man was missing. They don't have a sense of identity for lesbianism here. In truth, you can walk arm-in-arm on the street with a woman and, at a maximum, some ill-thinking man will insult you, but if he denounces you to the police, the police won't know what to do. They don't understand, they don't understand that a woman would like another woman. There is no room for this in their ego, in their narcissism.

[n.106](#).. Sabater, *supra* note 44, at 208.

[n.107](#).. This process of erasure comes to the fore in, for example, lesbian writer Ana Maria Moix's work *Julia*. To maneuver this homophobic erasure, Moix subversively redeploys silence, the ultimate Francoist censoring tool, to give voice to lesbian desire. For an extensive discussion of this work, see **Gema Perez-Sanchez**, *Reading, Writing, and the Love that Dares Not Speak Its Name: Eloquent Silences*, in Ana Maria Moix's *Julia* (Lourdes Torres & Inmaculada Pertusa eds., 2001).

[n.108](#).. For an analysis of the effects on canonical Spanish literature that the imposition of dominant notions of gender and sexuality had on constructions of masculine identity, and the effects that these constructions had on representations of women in the works of Camilo Jose Cela, Luis Martin-Santos, and Juan Goytisolo see Perez-Sanchez, *supra* note 38.

[n.109](#).. See Malefakis, *supra* note 7, at 221-30 (discussing the endurance of Francoist institutions and practices well into the early years of the democracy).

[n.110](#).. Mendicutti, *supra* note 9.

[n.111](#).. Eduardo Mendicutti's *Siete contra Georgia* tells the story of seven Spanish men—five gays, one transvestite, and one transsexual—who, in response to the passing of anti-sodomy laws in parts of the South in the United States during the Reagan-Bush years, decide to record seven audio tapes with each of their erotic life stories and to send them to Georgia's Chief of Police. They hope that their erotic autobiographies will educate the Chief of Police in the pleasures of man-to-man oral and anal sex and that, consequently, he will not enforce the new sodomy laws.

Written in a hilariously fast-paced prose that uncannily imitates everyday speech, the novel became an instant success, putting Mendicutti at long last on the best-selling book lists. According to one critic, "[la obra de Mendicutti se singulariza sobre todo por la habil trasposicion que hace del habla coloquial andaluza en la escritura]" [Mendicutti's work is characterized especially by its skillful transcription of the spoken colloquial Andalusian dialect into writing. Fernando Valls, *El lugar del lenguaje*, *El Mundo*, Nov. 19, 1995, at 17. His faithful, well-crafted transcription of Andalusian speech patterns and his relentless sense of humor have earned Mendicutti comparisons with Chekhov, see Fernando Valls, *supra*, at 17, Cervantes, see Leopoldo Azancot, *Los aires del 23 de febrero: La larga noche de La Madelon*, *El Pais*, Nov. 6 1988, at 16, and "la mas genuina tradicion literaria espanola" [the most genuine literary Spanish tradition, see Fernando Iwasaki, *Lo rosa siempre llama dos veces*, *Eduardo Medicutti Diario*, Sept. 23, 1995, at 38. One critic has even claimed that Mendicutti "[se trata de uno de los escritores innegablemente mas importantes de los ultimos 15 anos]" [is undoubtedly one of the most important writers of the last fifteen years. Leopoldo Azancot, *Los aires del 23 de febrero: La larga noche de La Madelon*, *El Pais*, Nov. 6 1988, at 16.

[n.112](#).. Prior to 1987, Mendicutti wrote *Tatuaje* (1973), forbidden by the Francoist censors and unpublished to date; *Cenizas* (1974); *Una mala noche la tiene cualquiera* (1982); *Ultima conversacion* (1984); and *El salto del angel* (1985). After 1987, and excluding *Siete contra Georgia* (1987) and the reissued *Una mala noche la tiene cualquiera* (1988), he has published *Tiempos mejores* (1989); *El palomo cojo* (1991) (recently made into an eponymous film); *Los novios bulgaros* (1993); the collection of short stories *Fuego de marzo* (1995); and the novel *Yo no tengo la culpa de haber nacido tan sexy* (1998).

[n.113](#).. Francisco J. Satue, *Triunfo de la ternura*, *El Siglo de Europa*, Dec. 18, 1995, at Libros section.

[n.114](#).. He often writes an opinion column in the editorial pages of the daily newspaper *El Mundo* in which he comments, with a very "queer" sense of humor, on current events.

[n.115](#).. The other exception is, of course, world-renowned filmmaker Pedro Almodovar, a contemporary of Mendicutti.

Appendices

[n.116.](#).. So far in the United States, only Yolanda Molina-Gavilan's *Poeticas regionales ante la postmodernidad*, Lucero, Spring 1994, at 106, 106-13, discusses Mendicutti, albeit not as a gay writer but within the context of regional, Andalusian literature. In Spain, in spite of the flurry of newspaper reviews and interviews Mendicutti has received, no scholarly publication has dedicated a full-fledged essay to his works. I thank Antonio Monegal for introducing me to this novel.

[n.117.](#).. She is one of the characters/narrators in *Siete contra Georgia*. See Mendicutti, *supra* note 9. Although originally published in 1982, *Una mala noche la tiene cualquiera* was reissued in 1988 to capitalize on the success of *Siete*'s use of queer first-person narrators. In fact, *Siete* could be read as a spin-off of *Una mala noche*. However, the original composition and publication date of 1982 is crucial for an understanding of the cultural and political climate in which Mendicutti wrote, as I argue below.

[n.118.](#).. See Diaz Gijon, *supra* note 11, at 256-57 (providing a detailed account of the historical events of the night of February 23, 1981).

[n.119.](#).. Antonio Hernandez, *Monologo de un travesti*, *Nueva Estafeta*, Nov.- Dec. 1982, at 111 [[Provides a vibrant fresco of the netherworld of a historical period or, rather, a real life and delirious chronicle of the so- called transition, from the perspective of a marinalized society whose sole objective is the enjoyment of liberty, even if its aspiration might be considered to be libertinism..

[n.120.](#) Id.

[n.121.](#) Id.

[n.122.](#) Id.

[n.123.](#) Id. at 110.

[n.124.](#) Id.

[n.125.](#).. Mendicutti, *supra* note 9, at 142.

[n.126.](#).. Id. at 143 (emphasis added).

[n.127.](#) Id.

[n.128.](#) Id.

[n.129.](#) Id.

[n.130.](#) Id. at 162-63.

[n.131.](#) Id. at 16-17. As translated, the quotation reads:

What would happen to us? They might revert to the way it was before. How vexing.... And what would happen to liberty now? ... How scary. They'll sure end up killing La Madelon—a coffin layered in garnet satin, a wreath of nards, [dressed in the habit of the Repentant [nuns—and one would have to resurrect Manolito Garcia Rebollo, born in Sanlucar de Barrameda—land of prawns and manzanilla-sherry --, son of Manuel and Caridad, single, profession: artist. 'That is, faggot,' one could see that the guy at the Police Station window was thinking this the last time I went to renew my I.D.... Most likely he would have to be resurrected—Manolito, I mean --, how horrible, considering what a bad time he had. I didn't even want to think about it.

... [They [the people performing the coup would surely come out of there [Congress like the Nazis ..., organizing faggot hunts and phenomenal orgies, watering the geraniums and the jasmines until they were burnt down with the boiling blood of Jews, gypsies, and all the queens of Spain.

[n.132.](#) Id. at 79.

[n.133.](#).. See Teresa Vilaros, *Los monos del desencanto espanol* [*The Withdrawal Syndrome of Spanish Disenchantment*, *MLN*, March 1994, at 217.

[n.134.](#).. Mendicutti, *supra* note 9.

[n.135.](#) Id.

[n.136.](#) Id.

[n.137.](#) Vilaros, supra note 133, at 217-35.

[n.138.](#) Id. at 218.

[n.139.](#) Id. at 221.

[n.140.](#) Id. at 219.

[n.141.](#) Id. As translated, the quotation reads:

In literature, genres overflow. Mystery, erotic, and science fiction novels and comic book literature inundate newsstands and bookstores. Women writers who are considered ‘serious’ move to erotic narrative, and young male and female writers dazzle with their first books and novels, halfway between the popular sub-genre and ‘great literature.’

[n.142.](#) Id. at 220.

[n.143.](#) Pedro Almodovar, *Vuelve entre tinieblas*, El Pais, Aug. 8, 1996.

[n.144.](#) Pedro Almodovar, *Patty Diphusa and Other Writings* ix (Kirk Anderson trans., 1992).

[n.145.](#) Vilaros, supra note 133, at 226. As translated, the quotation reads:

La movida in the Madrid and Barcelona of the years immediately following Francoism, la movida of the withdrawal syndrome had nothing to do with “construction.” It had to do with excess, ruin, hallucinations, and death, with the spasm of ecstasy and the happiness of recognition. The withdrawal syndrome, naturally, is not constructive. Neither does la movida produce works in the traditional sense of the word.... It’s a happening that, as such, does not offer artistic works traditionally identifiable as such..... [After [la movida no “great works” were left.

[n.146.](#) Id. at 227.

[n.147.](#) Jose Carlos Mainer, 1975-1985: The Powers of The Past, in *Literature, the Arts, and Democracy: Spain in the Eighties* 16, 31 (Alma Amell trans. & Samuel Amell ed., 1990).

[n.148.](#) Vilaros, supra note 133, at 218.

[n.149.](#) Mainer, supra note 147, at 31.

[n.150.](#) Id. at 231.

[n.151.](#) Id.

[n.152.](#) Many Spanish writers, for example, past and present, have deliberately fluctuated between “high” art and popular culture. See, e.g., Stephanie Sieburth, *Inventing High and Low: Literature, Mass Culture, and Uneven Modernity in Spain* (1994) (providing a book-length study of the ambivalent blending of “high” and “low” elements in some Spanish canonical authors).

[n.153.](#) Vilaros, supra note 133, at 233.

[n.154.](#) Another queer writer of significance whose most important novel was published during la movida is Cristina Peri Rossi. Although not active participants in la movida, both writers were surrounded by it: Mendicutti in Madrid and Peri Rossi in Barcelona. Taking part in the night life of either of these cities during the late 1970s and early 1980s meant that one was immersed in la movida. For a thorough discussion of Cristina Peri Rossi’s explorations of gender and sexuality in her novels, see Perez-Sanchez, supra note 38, at 160-93.

[n.155.](#) Mainer, supra note 147, at 16.

[n.156.](#) See generally Carr & Aizpurua, supra note 11, at 135-67; Diaz Gijon, supra note 11; Malefakis, supra note 7.

[n.157.](#) Ajoblanco, July 15, 1976, at 1.

[n.158.](#) Toni Puig, *Yo tambien soy travesti*, Ajoblanco, Feb. 19, 1977, at 13.

[n.159.](#) Id.

[n.160.](#) Mendicutti, supra note 9.

[n.161.](#) Azancot, supra note 111, at 16.

[n.162.](#) Id. As translated, the quotation reads:

[It allows the reader to distance himself from the, so to speak, official and ideological version of the facts, forcing him to get in touch with the true meaning of the facts not from the

non-communitarian point of view, but from the personal and individual one—the priority at stake was the right to be different from the majority or from a small group with power, in all areas: sexual, political, etc. --; it forces the reader to recognize that society, above any other consideration, is divided primordially between those who affirm the right to difference and those who deny it, and that, from this point of view, a transvestite and a democrat, for example, do not differ at all; and, finally, it moves [the reader ... to de-dramatize what happened, seeing it and himself with humor.

[n.163](#).. Ekins and King use “gender blending” as “an umbrella term ... to include cross-dressing and sex-changing and the various ways that such phenomena have been conceptualised.” *Blending Genders: Social Aspects of Cross- Dressing and Sex-Changing 1* (Richard Ekins & Dave King eds., 1996). Their anthology thoroughly discusses the term, presenting the political pros and cons of using such a term.

[n.164](#).. Editorial, *Ajoblanco*, supra note 157.

[n.165](#).. Mendicutti, supra note 9, at 102.

[n.166](#). Id.

[n.167](#). Id. at 103.

[n.168](#). Id.

[n.169](#). Id. at 25.

[n.170](#).. For a thorough discussion of how several male canonical Spanish writers allegorically figure Spain as a castrating mother that must be killed, see Perez-Sanchez, supra note 38, at 45-97.

[n.171](#). See id. at 1.

[n.172](#). See id.

[n.173](#).. Mendicutti, supra note 9, at 12.

[n.174](#). Id. at 10.

[n.175](#). Elizabeth M. Iglesias, *LatCrit Theory: Notes Toward a Transatlantic Dialogue*, U. Miami Int'l & Comp. L. Rev. (forthcoming 2001).

[n.176](#). Id. at 5.

6. Ratna Kapur · & Tayyab Mahmud, · *Hegemony, Coercion, and Their Teeth-Gritting Harmony: A Commentary on Power, Culture, and Sexuality in Franco's Spain*, 5 MICH J. RACE & L. 995 (2000)

Professor Gema Perez-Sanchez's article, *Franco's Spain, Queer Nation?* [n.1](#)

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focuses on the last years of Francisco Franco's fascist dictatorship and the early years of the young Spanish democracy, roughly from the late 1960's to the early 1980's. [n.2](#) The centerpiece of her article looks at how, through law, Franco's regime sought to define and contain what it considered dangerous social behavior, particularly homosexuality. She traces how the state not only exercised hegemonic control over definitions of gender and sexuality, but also established well-defined roles for women and drew clear lines between what constituted legitimate and illegitimate sexualities, namely, the line between heterosexuality and homosexuality. She discusses how non- hegemonic sexual minorities subverted this line of control, especially during the 1970's, when they mobilized and resisted the law against socially dangerous behavior. [n.3](#) The period that followed this resistance witnessed the gradual transition to democracy in Spain and a heyday of gay cultural and literary activism. [n.4](#) Professor Perez-Sanchez's bold and innovative legal scholarship, exploring the relationships between law, literature, and politics, is a good representation of the critical project in legal scholarship that aims to uncover the role of law in the intersections of power and resistance.

***996 I. Theories of State and Locations of Power**

In the first part of her article, Professor Perez-Sanchez examines the ways in which power is understood and used by a fascist state in contrast with one that has transitioned into democracy. She reviews Althusser's notion of the modern state, where a distinction is made between state power and apparatus, the apparatus behaving much as a catalyst and remaining unaffected even when state power is seized and altered. [n.5](#) A comparative example would be the post-colonial states of South Asia, where the apparatuses of the state, in particular its laws and bureaucracy, remained largely unaffected through the transition to self-rule. [n.6](#) As a result, colonial forms and practices remain alive in and through the state apparatuses even after formal independence.

In his analysis of the state, Althusser draws a distinction between the repressive state and the ideological state apparatuses. [n.7](#) The former includes the army, police, judiciary, and the penal system. The latter includes education, religion, family, political parties, communications, and cultural systems. This is a crucial distinction, which enables conservative, even fascistic forces, to continue to advance their agendas in formally liberal democratic settings. The Christian Coalition in the United States, the Hindu Right in India, and the Islamic reaction in Pakistan are different examples of the way in which ideological state apparatuses can and are being used and used effectively in pursuit of hegemonic and anti-minority agendas within the framework of liberal democracy. [n.8](#)

Professor Perez-Sanchez critiques what she characterizes as the monolithic understanding of state power that informs Althusser's theory. [n.9](#) She adopts instead Foucault's position that relations of power "are not univocal; they define innumerable points of confrontation, *997 focuses of instability, each of which

has its own risks of conflict, of struggles, and of an at least temporary inversion of the power relations.” [n.10](#) By way of example, Professor Perez-Sanchez points out how the repressive mechanisms of Franco’s rule, namely the police and the law, met the issue of homosexuality with cultural resistance. The repressive law dealing with socially dangerous behavior, directed primarily against homosexuals and enacted during Franco’s rule, provoked a resistance that led to the ultimate demise of the law and witnessed a post-modern cultural explosion. [n.11](#) This cultural movement secured sexuality, more specifically, sexual difference, as an example of what could be regarded as a political issue.

The article aims to disengage from “an over-simplified view of state power as exclusively producing repressive effects.” [n.12](#) Important theoretical interventions that enable innovative thinking about the state implicitly inform her article. Professor Perez-Sanchez refers to Althusser’s idea of a “teeth- gritting harmony” [n.13](#) between coercive and ideological apparatuses, between law and culture, between Gramsci’s conception of hegemony and Foucault’s notion of diffuse and unstable operations of power. Picking up her thread, we believe an exploration into the substance of repression, state power, and social orders, imagined as a “teeth-gritting harmony,” is warranted. In this Commentary we focus on these interrelationships in order to obtain a sharper picture of how power functions in modern societies. We aim squarely at the question fundamental to Professor Perez-Sanchez’s project, namely the role of law in the incessant struggle between power and resistance.

Professor Perez-Sanchez takes the position that Althusser’s theory of the state “conceives power as monolithic,” because even though ideological apparatuses are presumed to be diverse they have a shared role in “the reproduction of the relations of production.” [n.14](#) While the term “relations of production” has a particular paradigmatic lineage currently out of academic favor, most social theorists would agree that the primary role of the dominant ***998** coercive and ideological practices in any social structure is to perpetuate that structure. This assertion does not, in and of itself, render Althusser’s theory of power monolithic. His most important contribution to social theory was his refutation that institutions are autonomous from state and cultural practice. [n.15](#) By seeing coercion and ideology along the same continuum rather than as completely separate practices, Althusser opened the door for post-structuralist views about operations of power. Thus, Althusser and Foucault may not be so far apart as Professor Perez-Sanchez’s brief comments may suggest.

Nicos Poulantzas attempts to reconcile Althusser and Foucault, and his work aids greatly in appreciating how the two theorists complement one another. [n.16](#) In order to clarify the issue, we must first briefly sketch the theories of Gramsci, Althusser, and Foucault as they relate to Professor Perez-Sanchez’s project. We focus here on the relationship between coercion and ideology and the demarcation between the public and the private. Here the notion of hegemony, as used by Gramsci, furnishes the point of departure. Gramsci, rather than identify the state with government or with the repressive- coercive apparatus, forwards a

broader notion of the state so that it includes “the state proper and civil society . . . the entire complex of practical and theoretical activities with which the ruling class not only justifies and maintains its domination, but manages to win the active consent of those over whom it rules.” [n.17](#) The concept of the state here assumes a “wider and more organic sense, including elements which need to be referred back to the notion of civil society (in the sense that one might say that state = political + civil society, in other words hegemony protected by the armour of coercion.)” [n.18](#) The very notion of the state is modified by Gramsci to include the entire complex of institutions and practices through which power relations are mediated in a social formation to ensure the “political and cultural hegemony of a social group *999 over the entire society, as the ethical content of the state.” [n.19](#) The most striking aspect of Gramsci’s formulation is his abolition of a strict distinction between state and civil society. According to him, “by ‘State’ should be understood not only the apparatus of government, but also the ‘private’ apparatus of ‘hegemony’ or civil society.” [n.20](#) For Gramsci, ideas and values do not simply justify an existing power structure. Ideas and values are also formative forces capable of disrupting and redistributing power itself. In this sense, civil society is the quintessential ideological realm and thus is potentially the source of either hegemonic or counter-hegemonic ideas. The public/private contradiction dissolves and civil society is primarily defined by how it is structured.

As Professor Perez-Sanchez’s project focuses on Spain between 1960 and 1980, it is very important to note that Gramsci recognized that his notion of civil society is limited to contexts where capitalism and a liberal legal order had opportunity to take root. In Czarist Russia, for example, he noted that “the State was everything, civil society was primordial and gelatinous; in the West, there was a proper relation between State and civil society, and when the state trembled a sturdy structure of civil society was at once revealed.” [n.21](#) Gramsci’s analysis of the relative underdevelopment of the southern region of Italy as compared to the state as a whole demonstrated that even within a single state, unequal development of productive forces and attendant relations might effect the viability of a civil society. [n.22](#)

Althusser carried Gramsci’s notions of hegemony and the fusion of state and civil society into an analysis of concrete practices of ideological institutions, yielding the concept of ideological state apparatuses. In defining such apparatuses as the church, the school, the family, and so forth, Althusser notes that whereas the coercive state apparatuses belong to the public domain, the ideological state apparatuses thrive in the private domain. The distinction between public and private is unimportant, as he contends that:

the State, which is the State of the ruling class, is neither public nor private; on the contrary, it is the precondition for any *1000 distinction between public and private It is unimportant whether the institutions in which they [ideological state apparatuses] are realized are ‘public’ or ‘private.’ What matters is how they function. [n.23](#)

The difference between coercive and ideological apparatuses, according to

Althusser, is that every state apparatus functions both by repression and by ideology, the difference being that the repressive state apparatus functions predominantly by repression, whereas the ideological state apparatuses function predominantly by ideology. [n.24](#)

The important thing to note in the formulations of Gramsci and Althusser is that hegemony is not taken as something that comes about merely as a mechanical derivative of economic predominance of ruling classes. Rather, it is posited as work, resulting from permanent and pervasive efforts of the dominant classes, secured through their control of the state, to create solidarity among the powerful and supra-party consensus. Viewed in this light one can see important threads that run from Gramsci to Althusser to Foucault.

Foucault carries forward Gramsci's model of seeing the state as constituted by both the political and civil society, and argues that we can make no analytical distinction between the state and civil society. For him, "relations of power are not in a position of exteriority with respect to other types of relations (economic processes, knowledge relationships, sexual relations), but are immanent to the latter . . . [and they have a directly productive role, whenever they come into play]." [n.25](#) Institutions beyond the juridical state create the model for the disciplinary use of power in modern societies, which aim to and do yield normalized subjects and thus exert hegemony. In the modern disciplinary society the lines of power extend throughout social spaces in the channels created by institutions traditionally located in the civil society. The exertion of power is organized through deployments, which are simultaneously ideological, institutional, and corporeal. The argument is not that there is no state, but rather that it cannot effectively be isolated and contested at a level separate from society. The state is not properly understood as the transcendent source of power relations *1001 in society, but as the consolidation of forces of "statization" existing within social power relations. [n.26](#)

In the final analysis, however, for Foucault it is the nature of power, equally dispersed and localized, that is important in the study of everyday practices. Even when these different sites of power come together in a global strategy of domination, the links between these sites remain incoherent, disconnected, unstable, and discontinuous. Foucault therefore denied any general pattern of domination, coherence of macro-structures of power, presence of an ultimate cause of power, or any static binary encompassing opposition between the rulers and the ruled. [n.27](#) In his determination to shift the terms of discourse away from the state to micro sites of power, Foucault denied to the state blanket mastery of the discourse of power. [n.28](#)

Foucault extended the analysis of power equations that were traditionally thought of as belonging to the state and its institutions to cover all locations of social interaction. [n.29](#) Rejecting a top-down analysis of power beginning with the state, sovereignty, and law, he adopts an ascending analysis of power. The state emerges in his formulation as built on the power relations already present in society. The state is in a manner of speaking secondary to these sites of power.

Directing attention away from visible and formalized codes of power, Foucault concentrates on the way in which individuals experience power at all sites of human relations. He focuses on the way in which the individual is constituted by these relations, the micro- physics of power, and the forms it acquires in specific contexts, the articulation of that power through discourses, and the fact that power is ubiquitous, immanent, and lacks both a beginning and an end. Foucault asserts that:

What we need, however, is a political philosophy that isn't erected around the problem of sovereignty, nor therefore the problems of law and prohibition. We need to cut off the kings' head, in political theory that still has to be done. . . . To pose the problem in terms of the state means to continue ***1002** posing it in terms of sovereignty and sovereignty, that is to say, in terms of law. If one describes all these phenomena of power as dependent on the state apart, this means grasping them as essentially repressive. [n.30](#)

Foucault, however, accepts that linkages between power relations are consolidated into a global strategy of bourgeois domination, and that this crystallizes in the state. [n.31](#)

It is essential for Professor Perez-Sanchez's project that, in light of Gramsci, Althusser, and Foucault, any fundamental distinction between coercive and ideological apparatuses be rejected. This can be imagined as a rejection of any fundamental division between mind and body. If the state is inherently a relationship of domination and coercion, the notion of coercion implies violence exercised on living human beings. But as humans are not simply non- conscious biological entities, domination requires more than physical violence to the flesh. Domination must extend to a process of subjugation. The practice of rendering the normal goes beyond the mind/body and material/ideological distinctions because social order makes demands on human action, not simply on human act. [n.32](#) A graphic description by Foucault helps us appreciate this process:

[The body is also directly involved in a political field; power relations have immediate hold upon it; they invest it, mark it, train it, torture it, force it to carry out tasks, to perform ceremonies, to emit signs. The political investment of the body is ***1003** bound up, in accordance with complex reciprocal relations, with its economic uses; it is largely as a force of production that the body is invested with relations of power and domination; but, on the other hand, its constitution as labor power is possible only if it is caught up in a system of subjection (in which need is also a political instrument meticulously prepared, calculated and used); the body becomes a useful force only if it is both a productive body and a subjected body. [n.33](#)

The interplay of coercion and ideology, and of force and persuasion, is the vital insight that the works of Gramsci, Althusser, and Foucault introduced into social theory. One could summarize this insight by saying that ideology is the velvet glove that encases the iron fist of coercion. This perspective opens a unique vantage point to the study of law, in particular, as law always combines coercion and ideology by its very structure and operation. And it is in this sense that

Professor Perez-Sanchez's article is a very welcome contribution—not only in advancing the project of multi-disciplinary research about the law, but more specifically to see how far-flung structures form one another.

One other line of inquiry that links Althusser and Foucault may be fruitful to Professor Perez-Sanchez's project. We refer here to Althusser's doctrine of interpellation and Foucault's concept of governmentality. Althusser's understanding of interpellation stages a social scene in which the subject is hailed by an officer of the law, the subject turns around, and in this turning the subject accepts the terms by which she is hailed. This turning around, as Judith Butler explains, "is an act that is, as it were, conditioned both by the 'voice' of the law and by the responsiveness of the one hailed by the law. The 'turning around' is a strange sort of middle ground . . . which is determined both by the law and the addressee, but by neither unilaterally or exhaustively." [n.34](#) This idea suggests a terrain beyond the coercion/ideology overlap, where determining whether subjection is complete requires accounting for the addressee's willingness to be subjected: while "there would be no turning around without first having been hailed, neither would there be a turning around without some readiness to turn." [n.35](#)

***1004** Foucault's notion of governmentality as a new method of power is concerned with the ordering and management of whole populations. [n.36](#) But the managing of a population does not apply only to the collective mass of phenomena and aggregate effects, but also the management of people in depth and detail. Foucault was troubled by the trend in modern governance toward impossible forms of political sovereignty whereby government is of all and of each, whereby the goal is both to conglomerate and to individualize. Foucault argues that for "modern political rationality" there is an integral relation between "the reinforcement of . . . [the political totality]" and "increasing individualization." Here the individual increasingly comes to be self-determining, but in a context that she is supposed to monitor and discipline herself. [n.37](#) The willingness of Althusser's subject to turn when hailed and the self-discipline of Foucault's subject both raise interesting lines of inquiry for projects like Professor Perez-Sanchez's. To what extent is the homosexual or any other sexual subject itself an effect of power relations? To what extent is subjectification as a homosexual or any other sexual subject partly contingent on the subject's willingness to be part of the process? To what extent is she implicated in her own subjection to technologies of power?

A word of caution is warranted, however, when one deploys social theory born in Europe's northern heartland, i.e., Britain, France, and Germany, to study social formations located outside it. While claiming universal application, Eurocentric social theory is often conditioned by the specifics of its spatial and temporal origin. Social formations whose reception of modernity are not the same as that of the North European heartland may well be inappropriate sites for application of North European theory. When we ***1005** do not heed this we wittingly or unwittingly adopt a unilinear evolutionist perspective whereby a

historical process unfolding under concrete conditions—Seventeenth to Twentieth century Northern Europe—is presented as a universal path that all subsequent social developments are fated to tread. The outcome is history by analogy rather than history as process. This imperialism of categories born of “final vocabularies” [n.38](#) and grand narratives of modernity ensures that particular reality has meaning only to the extent that it can be seen to reflect a particular stage of development of the history of Northern Europe. Northern Europe’s experience of modernity is taken as universal history, and it is assumed that “it is only the concepts of European social philosophy that contain within them the possibility of universalization.” [n.39](#) Ignoring differences within Europe, Eurocentricism presents European historical experience in an idealized, mythologised, and non- contradictory form. European social theory is taken too literally, as a description of European history rather than as a prescription for its development. Just as it holds up modern North European history as a mirror in which to gauge the significance of all human development, Eurocentricism also has a tendency to view its objects as lacking in the capacity to comprehend their own history as a step toward the initiative to (re)making it.

Let us reconsider the three theorists we embraced above in this cautionary light. As previously mentioned, Gramsci himself limited existence of civil society to formations where capitalism and a liberal legal order were entrenched. He explicitly excluded Czarist Russia and Southern Italy from application of his theory. Althusser has been criticized for being too preoccupied with theoretical battles within Western Marxism and for taking the history of the Catholic Church in France as prototypical of all social formations. [n.40](#) Much of Foucault’s work is often faulted for being imprisoned in the history of modern France and for marginalizing the colonial *1006 question. [n.41](#) Any uncritical adoption of the Gramscian concept of hegemony has been abundantly refuted by studies of colonialism, which find that while “the metropolitan state was hegemonic in character with its claim of dominance based on a power relation in which the moment of persuasion outweighed that of coercion . . . the colonial state was non-hegemonic with persuasion outweighed by coercion in its structure of domination.” [n.42](#) This, in turn, has a direct bearing on the relationship between law and both the state and the social formation at large. In the colony “law was a department of the executive,” [n.43](#) never achieving the autonomy envisaged by liberal designs of governance. Given its relatively backward economy combined with a fascist political order, Spain may well have been closer to a colonized formation than a metropolitan one.. The role of the Catholic Church in Franco’s Spain further bolsters this argument. Althusser takes the position, for example, that whereas the dominant ideological state apparatus in the pre- capitalist period was the church, “the ideological State apparatus which has been installed in the dominant position in mature capitalist social formation . . . is the educational ideological apparatus.” [n.44](#) Professor Perez-Sanchez affirms the dominant ideological position of the Catholic Church in Franco’s Spain and that it was used as an effective institutional means to “rectify the moral trajectory of the country.”

[n.45](#) All of this suggests that when we are analyzing social phenomena in settings other than Northern Europe it may be useful to seek theoretical guidance from Europe's Others; fortunately there is no dearth of such guidance now. [n.46](#) In the case of fascist rule in Spain, a focus of Professor Perez-Sanchez, particularly useful are studies that recognize the particularity of this phenomenon, *1007 both with regard to its historical lineage and its disjunction from contemporaneous Europe. [n.47](#)

Armed with a nuanced theory of the state, Professor Perez-Sanchez proceeds to examine the historical context in which laws regulating homosexuality were implemented. She argues that throughout the period of Franco's rule, Spain occupied a very marginalized position in relation to other European democracies, except during the brief period in the 1960's, and that this accounts for the adoption of an autarchic economic system. [n.48](#)

Professor Perez-Sanchez's claim that fascist Spain was "ostracized" by the West is well founded. The trajectory of this ostracization was incomplete, however. While Spain was excluded from the largess of the Marshall Plan, the onset of the Cold War led the United States to cement security relationships with Western European nations with varied political systems. Suddenly, the only criterion a state faced for inclusion was its willingness to play the containment of communism game. Turkey, Greece, Portugal, and Spain, along with "Western democracies," were quickly incorporated into the American strategic arrangements. As Professor Perez-Sanchez acknowledges, even American economic aid started flowing by the early 1950's. [n.49](#) Besides, Europe's economic recovery also directly benefited Spain by furnishing it an expanding trading market. The better argument, one that Professor Perez-Sanchez adopts, is that "more than an economic plan, 'autarky was a political choice.'" [n.50](#) A very productive inquiry would be the extent to which autarky was a building bloc to establish fascist corporatism, whereby the state, capital, and labor are institutionally and hierarchically integrated in the name of unity, stability, and order. [n.51](#)

Professor Perez-Sanchez identifies foreign tourism, emigrant remittance, and foreign investment as the driving forces behind *1008 Spain's economic recovery in the 1960s. [n.52](#) This is undisputed. Professor Perez-Sanchez adopts the position advanced by Edward Malefakis that the influx of tourism triggered changes in "sexual mores," "social attitudes," "life-styles," and "uncensored sources of information." [n.53](#) While this certainly was one of the impacts of tourism in Spain, when combined with other factors, one may identify less gleaming phenomena left in the wake of global tourism. The Caribbean, South Pacific, and Asian "tourist heavens," like Thailand, are cases where burgeoning tourist industries led not to political liberalization, but rather to distorted dependent economies and degradation of the "natives" who "service" the tourists. [n.54](#)

Professor Perez-Sanchez argues that the economic marginality of Spain “in the sexist imaginary . . . must have been perceived as a passive, feminized position,” [n.55](#) and that it “must have weighed heavily in the imaginary of the Francoist regime.” [n.56](#) Here she deploys the term “imaginary” in its psychoanalytic sense. [n.57](#) While incorporation of interdisciplinary constructs in analysis of the law is laudatory, some caution is warranted. When theoretical constructs travel between disciplines, mistranslations and displacements are common. This is even more likely when concepts designed to facilitate analysis of individual behavior are applied to collective behavior, or the other way around. Without going into the career of the Laconian construct of the imaginary, it appears that Professor Perez-Sanchez deploys it in the sense of the collective imagination or self-conception of a political order. To put the concept to such use, without doing violence to its original place in psychoanalytic theory, one would have to reconceptualize it, as Cornelius Castoriadis has done. [n.58](#)

***1009** Professor Perez-Sanchez goes on to state, “[because the regime was not as normative and central as it wanted itself to be perceived as, the mere existence of non-heterosexual practices must have threatened Francoist legitimacy to its core.” [n.59](#) We would like to further complicate the immediate connection Professor Perez-Sanchez draws between the representation of the Spanish state as feminine and the targeting of homosexuals. Further research is in order to explore the connection between feminization of a state and the targeting of homosexuality. Questions that should be addressed include, how does the feminization of a state get altered through the elimination of homosexuality? Also, why is homosexuality singled out for legal regulation in these contexts and not the whole spectrum of “non-normative sexual practices” ? Sexually transgressive practices can be perceived as threatening to a highly regulated, fascist state. Yet even in contemporary liberal democracies the struggle for equal rights by sexual minorities has been met at times with opposition that takes the form of censorship, defense of marriage, and social and cultural exclusion. [n.60](#) It may not be fascist ideology per se that targets homosexuals. After all, this ideology operates in tandem with a dominant sexual ideology that remains fearful of practices that fall outside what is regarded as the sexual norm.

The idea of sex and sexuality as a dangerous and corrupting force, to be carefully contained at all costs within the family and marriage, is hoary and has been reinforced with renewed vigor since Victorian times. [n.61](#) Today there exists a naturalized and universalized set of ideas about sex. The features of this dominant understanding of sexuality have been explicated very well in the work of Gayle Rubin. [n.62](#) In her understanding, sex is a natural force and is also sinful and dangerous. [n.63](#) And sex is subjected to unduly harsh penalties, unless it happens to occur within the slender parameters of normative sexuality, which in its most pure form is heterosexual, marital, monogamous, reproductive, and non-commercial. Normative sexuality is accorded the maximum legal ***1010** and social benefits, while practices that fall outside of this dominant sexual ideology, such as sodomy or commercial sex work, bear the greatest social and legal stigma.

[n.64](#) Border crossings between what is described as good sex and bad sex take place from time to time; but the crossing of really ‘bad’ erotic practices into moral and legal acceptability is feared and resisted. [n.65](#)

Professor Perez-Sanchez focuses her arguments on the targeting of homosexuals in Francoist Spain. We locate this argument within a broader understanding of the relationship between sexual normativity and nation-state identity, which becomes particularly intense at moments of political and social rupture. The criminalization of homosexuality was not the work only of fascist states. We believe that the elimination, incarceration, and/or rehabilitation of the “deviant” sexual subject has been and continues to be integral to the operation of sexual normativity in the broader project of the nation-state. Re-education, rehabilitation, and reintegration are directed at reform into the mainstreams into dominant sexual normativity more specifically, heteronormativity. [n.66](#) It is a strategy that has been used frequently to deal with sexual difference. This response has been and continues to be the dominant way in which many contemporary states deal with sex workers and prostitution. [n.67](#) In the case of sex work, re-education involves learning the skills of domesticity, rehabilitation involves stripping the worker (generally female) of her whore identity, and re-integration involves the process of converting her into a “good,” socially acceptable woman. [n.68](#)

Sexual normativity is integral to a nation-state’s identity. Re- integration or containment of ‘deviant’ sexual actors remains particularly acute at moments of profound social change and political disorientation. As Jeffrey Weeks states, [moral panic occurs in complex societies when deep rooted and difficult to resolve issues become focused on symbolic *1011 agents which can be easily targeted. Over the past century sexuality has become a potent focus of such moral panics . . . Whilst the concept of moral panic does not explain why transfers of anxiety like these occur—this has to be a matter of historical analysis—it nevertheless offers a valuable framework for describing the course of events. [n.69](#) The rise of right-wing politics, the decline in nuclear family forms, and the globalization of national economies are all examples of disruptions that have triggered social-purity movements and fears that the sexual order will crumble and lead to social chaos. At such moments of instability or transition, social anxieties focus on persons or groups of people who are identified as threats to accepted social norms and values.

() *III. Containing the Homosexual ‘Contagion’*

Professor Perez-Sanchez focuses on the specific relationship between the new “queer law” and the containment of the homosexual “contagion.” As she points out, the 1970 Spanish law against “dangerous social behavior” replicated in most ways an older law enacted in 1954, which dealt with “thugs and vagrants,” and permitted incarcerating the deviant subject. [n.70](#) Professor Perez- Sanchez states that an important addition in the new law was the inclusion of provisions also directed towards “rehabilitating” and “curing” the homosexual subject. [n.71](#)

She discusses the various provisions of the law that related to homosexuals. It contained security and incarceration measures as well as rehabilitative measures for dealing with the homosexual. The security measures included confinement for four months to three years in a reeducation institution and a provision prohibiting homosexuals from residing in certain designated areas. [n.72](#) In addition they were subjected to State surveillance. [n.73](#) It also established an entire institutional *1012 apparatus directed at the social reform and rehabilitation of the dangerous subject. [n.74](#)

Analyzing the Spanish legislation, which mandated that homosexuals “be confined to special institutions and, at all costs, with absolute separation from the rest,” [n.75](#) Professor Perez-Sanchez observes that homosexuals were treated “[as if infected with a contagious disease perceived as carrying a particularly infectious brand of dangerousness.” [n.76](#) She also quotes the 1970 law that provided for “rehabilitation of the dangerous subject through the most purified technique” [n.77](#) and notes its “blood-chilling connotations.” [n.78](#) We believe this ensemble of notions of disease, infection, contagiousness, danger, and purification furnishes an opening to locate sexual repression and racism at the very heart of modernity in general and nation-building in particular.

Modernity posits as universal ideas reason, autonomy, equality, citizenship, representation, and the rule of law. [n.79](#) Colonialism and the age of empire, coterminous with modernity, however, brought into sharp relief the exclusions built into these supposedly universal concepts. While Europe was developing ideas of political freedom, particularly in France, Britain, and Holland, it simultaneously pursued and held vast empires where such freedoms were either absent or severely attenuated for the majority of native inhabitants. [n.80](#) Liberalism, and the rights and freedoms that it nurtured, co-existed with the Empire. [n.81](#) There were at least two ways in which to reconcile the freedoms associated with liberalism with notions of the Empire. This reconciliation included linking the capacity to reason with adherence to some notion of a universal natural law, applicable to all. [n.82](#) These universally applicable *1013 norms were premised on European practices, to which the colonial subjects had to conform if they were to avoid sanctions and achieve full membership.

A second way in which to reconcile colonial domination with ideals of freedom and equality was through the discourse of difference, whereby the eligibility and capacity for freedom and progress were deemed biologically determined, and colonial subjugation was legitimized as the natural subordination of lesser races to higher ones. [n.83](#) The purportedly universal rights of man could be denied to those not considered to be men or human. Liberal discourses of rights, inclusion, and equality could be reconciled with colonial policies of exclusion and discrimination only by presuming differences between different types of individuals. To lay a claim to modernity a discourse must include capacities it identifies with human nature—inherent freedom, equality and rationality. This anthropological premise anchors the concept of consent, which in turn is the foundation of institutions of contract, rule of law, and representation.

[n.84](#) Those designated as being unable to exercise reason are deemed incapable of consent, and thus can be excluded from political constituency and governed without consent. The capacity to reason, far from being universal, was posited to be a matter of education and “breeding,” whereby one is initiated into a time, place, and social norm, with the White, male, heterosexual, propertied adult furnishing the standard. [n.85](#) Simultaneously, the emphasis on difference, by constructing the Other as unfathomable, and inscrutable, as distant and removed, was partly achieved by demonstrating that the “other” was civilizationally backward or infantile. [n.86](#) Colonial subjugation was one way in which to rectify the deficiencies of the past—what has frequently been described as the civilizing mission of empire, in societies that purportedly were stagnant and mired in the chokehold of custom. Colonialism was posited as “an engine that tows societies stalled in their past into contemporary time and history.” [n.87](#) Achievement of *1014 this version of civilization was regarded as a necessary pre-condition for progress, and the stage of civilization was the marker to determine whether progressive possibilities were in reach of a given community at any point of time. The universal claims of liberalism were able to justify political exclusions, and this logic continues to operate in the post-colonial moment. It serves as a basis for distinguishing Others, whether they be women, gays and lesbians, or ethnic and religious minorities. When confronted with difference, liberalism spawns strategies of exclusion based on class, gender, sexuality, ethnicity, religion, and race.

Universality is always accompanied by, and indeed rests on, what Denise da Silva evocatively terms “the other side of universality.” [n.88](#) This “moral and legal no man’s land, where universality finds its physical limit,” [n.89](#) is built upon the foundation of difference. The Enlightenment project, which claims universality, could relate to those excluded from the project by positing them as qualitatively different and not quite human. The very identity of modern Europe was then constituted by differentiating it from this not-quite-human Other. It is this identity rooted in a posited essential difference, particularly with the figure of the dark-skinned savage, that furnished the grounds to constitute the White, civilized, disciplined European; in other words, the universal subject. In this sense, then, we can say with Peter Fitzpatrick that race produces universality. [n.90](#) When the Spanish law considers homosexuals as diseased, contagious, dangerous, and warranting purification, it situates them in this dark side of universality. By this gesture the Spanish law raced the homosexual. By racing we mean the technology of power whereby domination is exercised and legitimated on grounds of the professed biological, natural, and immutable deficiencies of the subordinated. Conventional understanding posits race as a pre-conceptual, pre-political signifier. This understanding ignores the fact that race as we know it today is a modern category, which shares in the distinctive features of modern power: that as a strategy of power/knowledge, race produces modern subjects available for appropriation into modern narratives of being. As Da Silva has *1015 demonstrated, by furnishing the connection between history and science,

the temporal and spatial, nation and the modern subject, race emerges as a global category to define the territory of modernity and thus to configure the modern global space. [n.91](#) Modern power and knowledge constituted race as a category that connects body, place of origin, and consciousness. We designate racing as the modern power and knowledge maneuver to connect the body with consciousness in order to create a subject available for subjection and marginalizing. It is not essential that racing anchor the connection between the body and the mind in the color of the skin. Any production of a subjected being that rests on any attribute of the body, then, can be seen as racing.

To appreciate the concept of racing, it may be helpful to refer to Foucault's concept of "bio-power" as a link between microphysics and macrophysics of power. [n.92](#) Bio-power, for Foucault, designates forms of power exercised over persons specifically to the extent that they are thought of as living beings: a politics concerned with subjects as members of a population, in which issues of individual sexual and reproductive conduct interconnect with issues of national policy. This is in line with Foucault's position that modernity renders life a discrete object of perception and regulation, both protected and eliminated by operations of power. [n.93](#) Examination and designation of the body is indispensable for its regulation by and subjection to power. It is to bring into sharper relief this interdependency between designation and subjection, that Foucault, instead of speaking about the law, speaks of a "scientifico-legal complex" or of an "epistemologico-juridical formation." [n.94](#) In a similar vein Giorgio Agamben holds that "the production of a biopolitical body is the original activity of sovereign power." [n.95](#)

Racing shares with bio-politics the feature of making the body available as the site of inscription of modern power. Racing, however, is a maneuver whereby as the body is made available to power it is already placed outside the zone of normalcy on grounds of some posited biological feature. The raced body comes to have a particular location in the population: a part that is yet apart. *1016 Racing, then, is a power and knowledge technology of the insertion of a body into the population in a subordinate position with the subordination attributed to essential and pre-conceptual deficiencies.

The Spanish anti-homosexual legal regime, with its attendant material and discursive structures, teaches us that if we want to see racism, we should look for racing, not race. Those engaged in the critical project of anti-essentialism and anti-subordination would do well to remember this.

Modernity has also seen the consolidation of History—the unilinear, progressive Eurocentric, teleological history—as the dominant mode of experiencing time and being. [n.96](#) In History, time overcomes space—a process whereby the distant Other is supposed to, in time, become like oneself; Europe's present becomes the future for all Others. Embodying the agenda of modernity, History constitutes a closure that destroys or domesticates the Other. History, as a mode of being, becomes the condition that makes modernity possible, with the nation-state posited as the subject of History that will realize modernity.

The very birth of nationalism was “coeval with the birth of universal history.” [n.97](#) But the nation, an anomaly in the age of universality, is Janus-faced: it claims to be universal, unbound, and uncontained, but in order to exist and be stable, that same nation must situate itself in particular spaces. The ground of the nation is homogeneity of population within a bounded territory. It is not surprising, then, that the process of nation-building is a process of exclusion; coherence is sought in a nation through the exclusion of what is “Other” to it. In the final analysis, production of the Other is raced: purportedly biological, immutable differences, anchored in blood, are posited as the natural markers of lines of exclusion. [n.98](#) Membership in the nation—citizenship—entitles one to representation and protections of the law. A quick route to denial of representation and protection, then, is denial or revocation of citizenship—excision from the body of the nation. The Spanish law constituted homosexuals as diseased and dangerous, warranting ***1017** purification. Through this construction, it rehearsed the classical nation-building gesture. Spain constituted the Other in a discourse of blood and body, facilitating exclusion from the politically franchised body of the nation. The modern Spanish nation was inaugurated by the expulsion of the Moors and the Jews in 1492; the raced homosexual becomes the Moor or the Jew of Franco’s Spain. Again, it is racing, not race, that constitutes racism.

It is intriguing to note that there is no direct reference to lesbianism in the legal and cultural complex examined by Professor Perez- Sanchez, although she does state that lesbians were assumed to be included in the 1970 law. [n.99](#) The absence of any reference to lesbianism, according to Professor Perez-Sanchez was due to the fact that in “a highly machista society, where only men and heterosexuality are valorized and where women are trained to be passive, compliant, subservient mothers, women’s independent sexuality was difficult to conceptualize.” [n.100](#) This position warrants further exploration. Purportedly, in a “highly machista,” heterosexual context, the feminized, submissive, gay man would also be difficult to conceptualize. Yet he was precisely the one targeted by the state as a security risk. In fact, it is quite likely that there were also laws that targeted prostitution, which would provide evidence that in fact the state and legislators were aware of and fully comprehended the existence of female sexual autonomy. Could the absence of lesbianism have more to do with the absence of women from the public and political arena, whether as resisters or even as perpetrators?

Professor Perez-Sanchez’s comments also raise a second issue that is perhaps more relevant to the contemporary moment. If lesbianism or female sexual autonomy was incomprehensible to the legislators, and presumably to both gay and straight men, it leads us to question political strategies that suture gay and lesbian sexuality together. The comparison between gay and straight men along the spectrum of “machista” culture has little relevance to either the straight woman or lesbian woman. There are also a whole range of sexual practices that are illicit and stigmatize women that may be permissible for men, or at least, not

invite stigma, depending, of course, on the class and race of the male. These include extramarital sex, oral and anal sex with women, sex before marriage, sex outside of marriage, sex as a divorced or widowed man, and sex for money. The legal, cultural, and moral ***1018** stigma against women who participate in these practices is far heavier than that placed on men. Professor Perez-Sanchez's article in many ways illustrates what happens to lesbian sexuality when it is considered in tandem with gay sexuality—it remains largely unaddressed and invisible. The broader political battles continue to operate predominantly along the gay and straight male dichotomy, which leaves female sexuality unexplored and uninterrogated.

(a) IV. Liberation, Popular Culture and the Subversive Sexual Subject

In the final section of her article, Professor Perez-Sanchez examines the flurry of writing and activism on the subject of homosexuality that was triggered by the 1970 law, which continued until its derogation in 1978. [n.101](#) She then discusses the cultural and sexual changes that took place with the stabilization of democracy in the 1980's. She looks specifically at how sexual identity came to be foregrounded in popular culture. Professor Perez-Sanchez focuses on the short story of Eduardo Mendicutti entitled *Una mala noche la tiene cualquiera* [Anyone Can Have a Bad Night]. [n.102](#) The story is told from the perspective of La Madelon, the main protagonist, a hormone taking transgender. La Madelon reflects on what might have happened had Antonio Tejero's failed coup attempt in February 1983 been successful, and reversed the delicate process of democracy that had begun after the death of Franco in 1975. The story is a fictionalized account of the consequences a queer could have encountered had democracy failed. In highlighting the identity of a transgendered person and making it a critical part of the narrative about the future of Spain's democracy, the author brings marginalized members of society onto the center stage of modern Spanish history. Professor Perez-Sanchez reads the novel as one in which the "queer" is a "responsible, democracy-loving citizen," whose interest in democracy does not reside in the sexual license and liberty it will accord her. [n.103](#) La Madelon's interest is aligned with her commitment to the political causes of women, sexual minorities, and the working class, and it is informed by the experiences of persecution she suffered as a working-class, Andalusian ***1019** gay man under the fascist regime. She expresses her fears on the night the coup takes place—the loss of liberty and sexual identity she would experience and the possibility that she would have to return to a life incognito. The story represents an overpowering fear and a powerful denunciation by Mendicutti of sexual oppression, a vindication of gender and sexual freedom, and a validation of the "truly democratic respect of differences by counterpointing the gains of democracy with the potential losses of queers that a return to a Francoist-style dictatorship would bring." [n.104](#)

The uniqueness of the novel lies in the fact that the narrator is a sexual other as well as the fact that through this protagonist's hidden history, the netherworld of gay life is brought to the surface through the telling of this story. [n.105](#) The novel is representative of a shift that took place in the cultural expression of the 1980's that rejected the meta- narratives of nation and democracy that were promoted by the leftist resistance to Franco. [n.106](#) Instead, there was a de-centering of the main narrative and an embracing of post-modernism in the cultural effusion that subsequently developed, mostly through the work of young, underground marginal minorities who were not contracted into any kind of intellectual compromise prior to the death of Franco. This movement is symbolized in the work of the celebrated filmmaker Pedro Almodovar. [n.107](#) They constituted a movement called la movida madrileña [the Madrilenian movement, which represented a collapse of the elitist distinction between high culture and low culture. [n.108](#) The disparaging response of those who constituted the core of the leftist resistance to Franco's regime to la movida reflects an inability to deal with popular culture and a frank discussion of sexuality and sexual identity as a serious political topic. [n.109](#) But for Professor Perez-Sanchez, this cultural explosion is a method for attributing gays and lesbians with agency, given that they are forgotten minorities. This attainment of agency is partly accomplished through retrieving literature to help assess the cultural and psychological legacy of the struggles over insubordinate sexual practices. What Professor ***1020** Perez-Sanchez's article brings out is that attempts at controlling sexual conduct cannot be viewed exclusively in terms of the repressive impact. Beyond repression, resistance in the Foucauldian sense must be examined, such as was demonstrated by the surge in gay-rights activism that resulted after the enactment of the law.

This last section of Professor Perez-Sanchez's article is the most powerful in its analysis of the role of popular culture as an important political and subversive space. [n.110](#) The analysis of the relationship of popular culture to the past as represented by Franco's regime, and the possibilities open to marginalized groups in the newly emerging democracy, is the most engaging part of the article. The role of popular culture has been a critical space of subversion and expression, particularly in repressive environments. The cross-dressed woman in Chinese and Japanese stage traditions, where the transvestite figure creates a crisis in gender categorization, [n.111](#) or the daring song and dance sequences in Hindi commercial cinema that challenges both cultural and sexual normativity in an increasingly reactionary political and cultural environment, keep the possibilities of a subversive politics and liberation of the sexual subject alive. Most of the references to popular culture and the cultural explosion in the article, however, are to works that emerged after democracy had been established. There is little that is said about the cultural resistance that took place during the period between 1970-78. What was going on during this period of the Franco repression? What was the "flurry of writing" that took place then?

The discussion about the literary and cultural explosion that took place in

the 1980's represent not only the unleashing of subaltern sexual identities into the public arena, but also the importance of parody and performance as a form of expression for sexual sub-groups and other marginalized subjects. Popular culture provides an alternative site of resistance and is a vital force, especially in non-democratic repressive regimes, where the spaces of resistance in the legal domain become stilted and non-dynamic.

Even in democratic regimes, popular culture provides an important arena for resistance to neo-conservative and nationalist forces. In the United States, for example, films such as *Dogma* (which poses a critical challenge to religion made by fallen angels who are *1021 aiming to find a way back into heaven) challenge the over-inflated influence of the Christian Right on cultural and political life. At a time when right-wing forces are bent on opposing the extension of hate crimes legislation to cover sexual orientation, the celluloid representation of Teena Brandon, the transgendered teenager from Nebraska, in *Boys Don't Cry*, becomes a vital expression of the violence and brutality that sexual minorities experience as a result of unfettered hatred.

In the 1991 film *Paris is Burning*, Jeenie Livingston documents the challenge posed by miming at transvestite balls in Harlem. The film looks at how the young gay men of Harlem, who created "voguing," turned these stylized dance competitions into dazzling expressions of personal pride. Through their constant re-enactment of high fashion, sexual normativity, and status, they challenge the stability of gender categories and dominant culture. [n.112](#)

By way of comparison, Indian commercial cinema has provided popular and subversive spaces within post-colonial South Asia, South-East Asia, and the Middle East, as well as in the Asian diaspora. The sexualised song and dance sequences have been of particular relevance to women in a cultural context where sexual expression is highly curtailed and restricted. Even the legal challenges to these sequences involve a contest between the hegemonic and counter-hegemonic representations of sexuality, what constitutes culture, and the limits of censorship and free speech. [n.113](#) The new generation of film heroines are now "vamping" it out on screen, occupying the dominant narrative, prompting the possibility of a re-signification and re-reading of the script by the spectator. [n.114](#) The recuperation of the agency of sexually stigmatized communities through popular culture places the activity beyond the charge that such cultural products are simply hedonistic. Such works challenge hegemonic definitions of the "political" and assist in de-centering the authority of law.

*1022 Professor Perez-Sanchez's discussion also raises important questions regarding difference and the ultimate goal of *la movida*. For Professor Perez-Sanchez the role of the transvestite in Menducutti's novel is symbolic of the right to be different and the goal of Spanish democracy to accept and live with difference so that the traumas of the past are not repeated. But what does the right to be different entail in a democracy? How is it to be accommodated within the egalitarian objectives of a democracy? And by recognizing the right to be different, do we not end up re-creating the difference and reinforcing the

prejudices, stigmas, and other social pejoratives that are associated with that same difference?

A broader question about difference is whether the objective of a subordinated sub-group is merely one of resistance and then assimilation once the process of democracy is achieved. What is the statement, “Your humble servant is thus: an independent, liberated, modern woman. And more of a democrat than anybody else,” intended to convey? [n.115](#) What is the ultimate aspiration of the “queer nation” ? Is it to assimilate or to disrupt? Or is there a third possibility, to disrupt through the process of assimilation—that is, by occupying the norm, may the queer destabilize and reconfigure the norm?

In the United States, queers have lobbied for the right to marry, [n.116](#) and as well as for parental rights, in order to be treated the same as heterosexual couples. Is engagement with such issues truly liberating for the sexual subaltern subject? And does such engagement modify these structures and institutions in a way that ***1023** does not reinforce dominant social and sexual norms, but rather transforms those institutions?

(b) V. *Subaltern Resistance*

Professor Perez-Sanchez captures well the resistance by sexual minorities to anti-queer legal and ideological strategies. Her analysis of the unified Spanish penal code of 1822, and the subsequent changes prompted by shifts in the political and cultural mores is very useful. It demonstrates that the law itself, even when incorporated into codes, is always a contested site. Law always lies along the fault lines between operations of power and practices of resistance. Exploring this dynamic nature of the law and the centrality of subalterns’ resistance in this dynamic must be a primary agenda of critical legal scholarship.

A critical question is to explore the sources of subaltern resistance. It cannot emanate only from identity politics, which can reify the subject location of the subaltern. An example of this is the manner in which words intended to insult gay men and women, such as “fruit”, “dyke,” and “fag,” have been appropriated by the gay community as words denoting pride, self-awareness, and self-acceptance. Identity is generally understood as self-perception and expression based on structures of affinity and processes of affiliation. In other words, when a person identifies herself as homosexual or heterosexual, Black or Brown, progressive or reactionary, her assumption and expression of any identity involves agency and choice on her part.

The terrain where agency is realized is not limitless, however. Technologies of power define the territories where individuals may assume their chosen identity. The apparent free choice of an identity is thus always already saturated with related contextual conventions. It may be useful, therefore, to locate identity formation along the fault lines of effects of power and modes of resistance, with identity always partaking of both. The project of progressive transformative politics demands that when engaged in strategic assertion of any identity, we accentuate and develop those facets of the identity that augment

resistance and contain and impede the facets that are in symphony with technologies of power. Only fidelity to this guideline ensures that assumption and assertions of subaltern sexual identities remain in step with the struggle for peace, justice, and dignity.

***1024** We continue the turn toward complicating the subject by challenging liberalism's notion of a free and autonomous agent. As Professor Perez-Sanchez's recounting of resistance demonstrates, we must not reduce the subject to be a mere property and effect of discourse or to equate consciousness with hegemony. We must not posit hegemony as an order that cannot be escaped. Yet we cannot bypass the subject of hegemony, as such avoidance precludes a realistic analysis of freedom. Such a conceptual straight-jacket leads to the impasse of, "[Can the subaltern speak?" [n.117](#) How may we articulate concepts of freedom and subjectivity in a way that does not take the form of a recovery of the authentic self? [n.118](#)

Rajeswari Sunder Rajan has attempted to break through this impasse in the context of debates about the sati and the free will/coercion dichotomy. [n.119](#) Some feminists have argued that sati is a coercive practice and that women who commit sati are victims, while those who support sati contend that it is a voluntary act and that the woman who undergoes it feels no pain. [n.120](#) Sunder Rajan, drawing on the work of Elaine Scarry and her focus on the "radical subjectivity of pain," argues that the focus on the pain of the dying woman reminds us of the woman's subjectivity, as well as the fact that the pain impels the suffering subject towards freedom. [n.121](#) Her reformulation avoids the complete erasure of the woman's subjectivity through her experience of pain, while at the same time ***1025** recognizes that the experience of pain actuates the woman's desire to escape from it, to be free from it. [n.122](#)

Lata Mani also concedes that there is no such thing as voluntary sati but tries to avoid the traps of the position that leads to the complete erasure of the woman as a speaking subject. [n.123](#) Rather than ask the question, "can the subaltern speak?," Mani rephrases the query by posing a series of questions, such as, Which groups constitute the subaltern in any text? What is their relationship to each other? How can they be heard to be speaking or not speaking in a given set of materials? With what effect? [n.124](#) Altering the questions in this way enables us to retain the insight regarding the positioning of the subject, which in the context of sati is the woman in colonial discourse, and, in the context of Professor Perez-Sanchez's essay, is the homosexual who exists within the discursive space of Franco's fascism. Such a strategy refuses to concede to colonial discourse something that it did not achieve—the erasure of women—or to the Franco regime the annihilation of the homosexual through the law against dangerous social behavior.

In our search for the sources of subaltern resistance, we may find useful Gramsci's model of a fragmented composite subject that is constituted as an "inventory of traces" of multiple and fragmented hegemonies. [n.125](#) A similar becoming point of departure is to imagine a desiring subject who avoids

becoming fully determined by the symbolic order because there is always a surplus of the subject's "real" substance over any symbolization. [n.126](#) The focus of these models is on the ongoing tension between specific structures of domination and desires that escape hegemonic formations and bear the seeds of change. [n.127](#)

It is along the fault lines between domination and desire that "the individual repeatedly passes from language to language." [n.128](#) Within this framework, one may analogize a sexual subaltern subject to an agency that operates on multiple fronts, as the individual *1026 is him or herself a site of conflicting desires and subjective modalities. [n.129](#) Beneath the dominant technologies of modernity there may well survive a "polytheism of scattered practices' . . . dominated but not erased by the triumphal success of one of their number." [n.130](#) It is in this context that we should turn to a "jurisprudence of reconstruction," [n.131](#) and counter-hegemonic "stories from the bottom." [n.132](#) Nothing less than to stage an "insurrection of subjugated knowledges," [n.133](#) will suffice as a strategy to "bring hegemonic historiography to crisis." [n.134](#) Introducing law to the life beneath things as presented by the social order provides the best countervailing force to hegemony.

Edward Said, who alerted us to the constitutive and dominating power of Orientalism, also reminds us that "in human history there is always something beyond the reach of dominating systems, no matter how deeply they saturate society, and this is obviously what makes change possible." [n.135](#) Even as dictatorships cross-dress as democracies, critical scholars must aim to identify, explore and expand spaces for resistance in the midst of the teeth-gritting harmony that exists between hegemony and coercion.

NOTES:

[n.1.](#) Gema Perez-Sanchez, [Franco's Spain, Queer Nation?](#), 5 Mich. J. Race & L. 943 (2000), [33 U. Mich. J.L. Reform 359 \(2000\)](#).

[n.2.](#) See generally id.

[n.3.](#) See id. at 5 Mich. J. Race & L. at 956-59, 33 U. Mich. J.L. Reform at 372-75.

[n.4.](#) See id. at [5 Mich. J. Race & L. at 970-85](#), [330 U. Mich. J.L. Reform at 386-401](#).

[n.5.](#) See id. at [5 Mich. J. Race & L. at 945-47](#), [330 U. Mich. J.L. Reform at 361-63](#).

[n.6.](#) See generally Ayesha Jalal, *Democracy And Authoritarianism In South Asia: A Comparative And Historical Perspective* (1995); Tayyab Mahmud, [Pretorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan](#), 1993 Utah L. Rev. 1225.

[n.7.](#) See Louis Althusser, *Ideology and Ideological State Apparatuses* (Notes Towards an Investigation), in *Lenin And Philosophy And Other Essays* 121, 141 (Ben Brewster trans., Monthly Rev. Press, 1971).

[n.8.](#) See, e.g., Brenda Cossman & **Ratna Kapur**, *Secularism's Last Sigh? Hindutva and the (Mis)Rule of Law* (1999); Tayyab Mahmud, [Freedom of Religion and Religious Minorities: A Study of Judicial Practice](#), 19 *Fordham Int'l L.J.* 40 (1995).

[n.9.](#) See Perez-Sanchez, *supra* note 1, at 5 Mich. J. Race & L. at 946 n.7, 33 U. Mich. J.L. Reform at 362 n.7.

[n.10.](#) Michel Foucault, *Discipline & Punish: The Birth of the Prison* 27 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978). See Perez-Sanchez, *supra* note 1, at 5 Mich. J. Race & L. at 946 n.7, 33 U. Mich. J.L. Reform at 362 n.7.

[n.11.](#) See Perez-Sanchez, *supra* note 1, at 5 Mich. J. Race & L. at 954- 58, 970, 33 U. Mich. J.L. Reform at 370-74, 386.

[n.12.](#) Id. at 5 Mich. J. Race & L. at 945, 33 U. Mich. J.L. Reform at 361.

[n.13.](#) Althusser, *supra* note 7, at 150. See Perez-Sanchez, *supra* note 1, at 5 Mich. J. Race & L. at 946 n.7, 33 U. Mich. J.L. Reform at 362 n.7.

[n.14.](#) Perez-Sanchez, *supra* note 1, at 5 Mich. J. Race & L. at 946 n.7, 33 U. Mich. J.L. Reform at 362 n.7.

[n.15.](#) For a succinct assessment of Althusser's work, see Norman Geras, *Althusser's Marxism: An Assessment*, in *Western Marxism: A Critical Reader* 232 (New Left Review ed., 1978).

[n.16.](#) See Nicos Poulantzas, *State, Power, Socialism* (Patrick Camiller trans., 1979). For the cordial personal relationship between Althusser and Foucault, see Louis Althusser, *The Future Lasts a Long Time* 271-73 (Richard Veasy trans., Olivier Corpet & Yann Moulier Boutang eds., 1993).

[n.17.](#) Antonio Gramsci, *Selections From the Prison Notebooks of Antonio Gramsci* 244 (Hoare and Nowell Smith eds., 1971).

[n.18.](#) Id. at 263.

[n.19.](#) John Merrington, *Theory and Practice in Gramsci's Marxism*, in *Western Marxism: A Critical Reader* 140, 151 (New Left Rev. ed., 1977) (quoting Antonio Gramsci, *Passato e Presente* 164-65 (1975)).

[n.20.](#) Gramsci, *supra* note 17, at 261.

[n.21.](#) Id. at 238.

[n.22.](#) See Antonio Gramsci, *The Southern Question* (Pasquale Vericchio trans., ed., 1995).

[n.23.](#) Althusser, *supra* note 7, at 149.

[n.24.](#) See id. at 138.

[n.25.](#) Michel Foucault, *The History of Sexuality* 94 (1978).

[n.26.](#) See Gilles Deleuze, *Foucault* 84 (1986).

[n.27.](#) See Michel Foucault, *Governmentality*, in *The Foucault Effect: Studies in Governmentality* (Graham Burchell et al. eds., 1991).

[n.28.](#) As Jessop puts it: "Foucault faced difficulties in moving from the amorphous dispersion of micro-powers to their class-relevant overdetermination in and through the central role of the state." B. Jessop, *State Theory: Putting Capitalist States In Their Place* 238 (1990).

[n.29.](#) See generally Foucault, *supra* note 27.

[n.30.](#) Foucault explains his position:

I don't want to say that the state isn't important, what I want to say is that relations of power, and hence the analysis that must be made of them, necessarily extends beyond the limits of the state. In two senses: first of all because the state, for all the omnipotence of its apparatuses, is far from being able to occupy the whole field of actual power relations, and further because the state can only operate on the basis of other, already existing power relations.... This meta power with its prohibitions can only take hold and secure its footing where it is rooted in a whole series of multiple and infinite power relations that supply the necessary basis for the great negative forms of power.

Michel Foucault, *Truth and Power*, in *The Foucault Reader* 63 (P. Rabinow ed., 1987).

[n.31.](#) See id. at 64.

[n.32.](#) While "act" refers simply to observable behavior, "action" refers to the "act" nestled in the meaning and purposefulness attached to it by the actor. For a discussion of the distinction between "act," "behavior," and "action," see Richard Bernstein, *Praxis And Action* (1971); Tayyab Mahmud, *Epistemology of Social Inquiry: A Contribution to the Critique of Logical Positivism / Empiricism*, 5 *Scrutiny* 29 (1980).

[n.33.](#) Michel Foucault, *Discipline And Punish: The Birth of the Prison* 25- 26 (1979).

[n.34.](#) Judith Butler, *The Psychic Life of Power: Theories In Subjection* 107 (1997).

[n.35.](#) Id.

[n.36.](#) The concept of governmentality, which he uses interchangeably with governmental rationality and the art of government, emerges from Foucault's interest in seeing government as an activity or practice, rather than as an institution having some essential purpose. For Foucault, government may be defined as "the conduct of conduct:" a form of activity aiming to shape, guide or affect the conduct of some person or persons. This activity operates through certain techniques of power, or power/knowledge, designed to observe, monitor, shape, and control the behavior of individuals situated within a range of social and economic institutions. For Foucault, this does not mean that power has an almost absolute capability to tame and subject individuals. In his model, power is only power, in distinction from physical force or violence, when addressed to individuals who retain some freedom of action. Power, for him, is "action on others' actions": it presupposes rather than annuls their capacity as agents. See Foucault, *supra* note 27; Colin Gordon, *Governmental Rationality: An Introduction*, in *The Foucault Effect*, *supra* note 27; Colin Gordon, *Afterword*, in Michel Foucault, *Power/Knowledge* 245 (1980).

[n.37.](#) See generally Peter Fitzpatrick, *The Mythology of Modern Law* 118-41 (1992) (explaining Foucault's theories of disciplinary power and self-sufficient subjectivity).

[n.38.](#) Homi Bhabha, *The Location of Culture* 125 (1994) (discussing the imperialistic nature of colonial languages). This refers to the imprisonment of modern thought in ontological and epistemological conceptual categories born in post-Enlightenment Europe. Examples include the modern categories of universality, history, man, reason, nation, and rights. See Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (2000).

[n.39.](#) Partha Chatterjee, *A Response to Taylor's "Modes of Civil Society,"* 3 *Public Culture* 119 (1990).

[n.40.](#) See, e.g., Mladen Dolar, *Beyond Interpellation*, 6 *Qui Parle* 75 (1993); Judith Butler, *The Psychic Life of Power: Theories In Subjection* 106- 31 (1997).

[n.41.](#) See, e.g., Ann Laura Stoler, *Race And the Education of Desire: Foucault's History of Sexuality And the Colonial Order of Things* (1995).

[n.42.](#) Ranajit Guha, *Dominance Without Hegemony: History And Power In Colonial India* xii (1997).

[n.43.](#) David A. Washbrook, *Law, State and Agrarian Society in Colonial India*, 15 *Modern Asian Studies* 649, 714 (1981).

[n.44.](#) Althusser, *supra* note 7, at 152.

[n.45.](#) Perez-Sanchez, *supra* note 1, at 5 Mich. J. Race & L. at 953, 33 U. Mich. J.L. Reform at 369 (internal quotation omitted).

[n.46.](#) See, e.g., Guha, *supra* note 45; Mahmood Mamdani, *Citizen And Subject: Contemporary Africa and the Legacy of Late Colonialism* (1997); Mahmood Mamdani, *Imperialism And Fascism In Uganda* (1984); Samir Amin, *Imperialism And Unequal Development* (1978); Andre Gunder Frank, *Dependent Accumulation And Underdevelopment* (1978); Paulo Freire, *Pedagogy of the Oppressed* (1970); *The Post-Development Reader* (Majid Rahnema & Victoria Bawtree eds., 1997).

[n.47.](#) See, e.g., Nicos Poulantzas, *Fascism And Dictatorship* (1974); Perry Anderson, *Lineages of the Absolutist State* (1974).

[n.48.](#) See Perez-Sanchez, *supra* note 1, at 5 Mich. J. Race & L. at 949- 52, 33 U. Mich. J.L. Reform at 365-68.

[n.49.](#) See id. at 5 Mich. J. Race & L. at 950, 33 U. Mich. J.L. Reform at 366.

[n.50.](#) Id. at 5 Mich. J. Race & L. at 949, 33 U. Mich. J.L. Reform at 365 (quoting Raymond Carr & Juan P. Aizpura, *Spain: Dictatorship to Democracy* 52 (1979)).

[n.51.](#) For a useful introduction to corporatism, see Howard J. Wiarda, *Corporatism And Comparative Politics: The Other Great "Ism"* (1997).

[n.52.](#) See Perez-Sanchez, *supra* note 1, at 5 Mich. J. Race & L. at 950- 51, 33 U. Mich. J.L. Reform at 366-67.

[n.53](#).. Id. at 5 Mich. J. Race & L. at 951, 33 U. Mich. J.L. Reform at 367.

[n.54](#).. See, e.g., Sex, Sun And Gold: Tourism And Sex Work In The Caribbean (Kamala Kempadoo ed., 1999).

[n.55](#).. Perez-Sanchez, supra note 1, at 5 Mich. J. Race & L. at 952, 33 U. Mich. J.L. Reform at 368.

[n.56](#).. Id. at 5 Mich. J. Race & L. at 951, 33 U. Mich. J.L. Reform at 367.

[n.57](#).. Id. at 5 Mich. J. Race & L. at 951 n.29, 33 U. Mich. J.L. Reform at 367 n.29.

[n.58](#).. See Cornelius Castoriadis, *The Imaginary Institution of Society* (Kathleen Blamey trans., Polity Press 1987). Laconian concept of the imaginary may be summed up as sexual and culturally-specific images, symbols, metaphors, and representations that help constitute various forms of subjectivity. See Jacqueline Rose, *The Imaginary*, in *The Talking Cure* (Colin MacCabe ed., 1981); *Supposing The Subject* (Joan Copjec ed., 1994). For very useful deployments of psychoanalytical approaches to examine race, see *The Psychoanalysis of Race* (Christopher Lane ed., 1998).

[n.59](#).. Perez-Sanchez, supra note 1, at 5 Mich. J. Race & L. at 952, 33 U. Mich. J.L. Reform at 368.

[n.60](#).. See, e.g., Lise Gottell, *The New Politics of Anti-Pornography*, in Brenda Cossman, et al., *Bad Attitudes On Trial: Pornography, Feminism, and the Bulter Decision* 48 (1997).

[n.61](#).. Some argue that the very foundation of “civilization” is rooted in the control of sexuality. See, e.g., Sigmund Freud, *Civilization and Its Discontents* (1929).

[n.62](#).. See Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *Pleasure And Danger: Exploring Female Sexuality* 267 (Carol Vance, ed., 1992).

[n.63](#).. See generally id.

[n.64](#).. See Indian Pen. Code 377 (1987); Pakistan Pen. Code 377 (1985) (providing a minimum penalty of ten years imprisonment for sodomy).

[n.65](#).. See Rubin, supra note 62, at 283.

[n.66](#).. See, e.g., Usha Ramanathan, *Women, Law and Institutionalisation: A Manifestation of State Power*, 3 *Indian J. of Gender Studies*, 199 (1996).

[n.67](#).. See, e.g., *Global Sex Workers: Rights, Resistance, and Redefinition* (Kamala Kempadoo & Jo Doezema eds., 1998); Gail Pheterson, *The Prostitution Prism* (1996); Janie Chuang, [Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms, and Context](#), 11 *Harv. Hum. Rts. J.* 65 (1998); Carol Smart, *Unquestionably a Moral Issue: Rhetorical Devices and Regulatory Imperatives*, in Carol Smart, *Law, Crime and Sexuality* 88 (1995).

[n.68](#).. See Rubin, supra note 62.

[n.69](#).. Jeffrey Weeks, *Against Nature* 118 (1991).

[n.70](#).. Perez-Sanchez, supra note 1, at 5 Mich. J. Race & L. at 964, 33 U. Mich. J.L. Reform at 380.

[n.71](#).. Id. at 5 Mich. J. Race & L. at 970, 33 U. Mich. J.L. Reform at 386.

[n.72](#).. See id. at 5 Mich. J. Race & L. at 959, 33 U. Mich. J.L. Reform at 375.

[n.73](#).. See id.

[n.74](#).. See id. at 5 Mich. J. Race & L. at 966, 33 U. Mich. J.L. Reform at 382.

[n.75](#).. Id. at 5 Mich. J. Race & L. at 964 n.85, 33 U. Mich. J.L. Reform at 380 n.85.

[n.76](#).. Id. at 5 Mich. J. Race & L. at 965, 33 U. Mich. J.L. Reform at 381.

[n.77](#).. Id. at 5 Mich. J. Race & L. at 966, 33 U. Mich. J.L. Reform at 382.

[n.78](#).. Id.

[n.79](#).. See Anthony Giddens, *The Consequences of Modernity* (1990).

[n.80](#).. See generally Uday Singh Mehta, *Liberalism And Empire: A Study in Nineteenth-Century British Liberal Thought* (1999).

[n.81](#).. See generally id.

[n.82](#).. Francisco De Vitoria, a Sixteenth Century Spanish jurist, used this postulation of reason and the existence of a universal natural law to argue that the Indian was entitled to the same rights as other men. Any interference with the exercise of such rights, whether by the Spanish or the Indian, could justify retaliation. Moreover, as Indians were endowed with reason, they were

also capable of changing their peculiar practices and adhering to universal norms. If they refused to change, this could also justify sanctions and intervention. See generally Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (1990).

[n.83.](#) See Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 *Miami L. Rev.* 1219 (1999).

[n.84.](#) See John Gray, *Liberalism* (2nd ed. 1995).

[n.85.](#) See, e.g., John Locke, *Thoughts Concerning Education* (1880); Mehta, *supra* note 80; Tayyab Mahmud, [Race, Reason & Representation](#), 33 *U.C. Davis L. Rev.* 1581 (2000).

[n.86.](#) For nuanced expositions of a foundational project of modernity, namely the construction of non-Europeans as the “others” of Europe, and how this construction anchors the identity of modern Europe, see Peter Fitzpatrick, *The Mythology of Modern Law* (1993); Johannes Fabian, *Time and its Other: How Anthropology Makes its Objects* (1983); Robert Young, *White Mythologies: Writing History and the West* (1990).

[n.87.](#) Mehta, *supra* note 80, at 82.

[n.88.](#) Denise Frerrière da Silva, *Interrogating the Socio-Logos of Justice: Considerations of Race Beyond the Logic of Exclusion*, 1 (paper presented at 2000 Summer Institute of the Law and Society Association) (manuscript on file with authors).

[n.89.](#) *Id.* at 2.

[n.90.](#) See Peter Fitzpatrick, *Racism and the Innocence of Law*, in *Critical Legal Studies* 119 (Peter Fitzpatrick & Alan Hunt eds., 1990).

[n.91.](#) See Denise Ferreira da Silva, *Race & Nation in the Mapping of the Modern Global Space: A Critique of Sociology of Race Relations* (1995) (unpublished Ph.D. dissertation, University of Pittsburgh) (on file with authors).

[n.92.](#) Michel Foucault, *History of Sexuality* 1 (1981).

[n.93.](#) See *id.* at 143.

[n.94.](#) Michel Foucault, *Governmentality*, 6 *I & C* 5, 23 (1979).

[n.95.](#) Giorgio Agamben, *Homo Sacar: Sovereign Power and Bare Life* 6 (Daniel Heller-Roazen trans., 1998).

[n.96.](#) See generally Robert Young, *White Mythologies: Writing History and the West* (1990).

[n.97.](#) Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse?* 2 (1986).

[n.98.](#) See generally Etienne Balibar & Immanuel Wallerstein, *Race, Nation, Class: Ambiguous Identities* (1991); Peter Fitzpatrick, *The Mythology of Modern Law* (1992); Peter Fitzpatrick, ‘We Know What it is When You Do Not Ask Us’: Nationalism as Racism, in *Nationalism, Racism and the Rule of Law* (Peter Fitzpatrick ed., 1995).

[n.99.](#) See Perez-Sanchez, *supra* note 1, at 5 *Mich. J. Race & L.* at 969- 70, 33 *U. Mich. J.L. Reform* at 385-86.

[n.100.](#) *Id.* at 5 *Mich. J. Race & L.* at 969, 33 *U. Mich. J.L. Reform* at 385.

[n.101.](#) See *id.* at 5 *Mich. J. Race & L.* at 971, 33 *U. Mich. J.L. Reform* at 387.

[n.102.](#) See *id.*

[n.103.](#) *Id.* at 5 *Mich. J. Race & L.* at 974, 33 *U. Mich. J.L. Reform* at 390.

[n.104.](#) *Id.* at 5 *Mich. J. Race & L.* at 976, 33 *U. Mich. J.L. Reform* at 392.

[n.105.](#) See *id.* at 5 *Mich. J. Race & L.* at 972-73, 33 *U. Mich. J.L. Reform* at 388-89.

[n.106.](#) See Perez-Sanchez, *supra* note 1, at 5 *Mich. J. Race & L.* at 978, 33 *U. Mich. J.L. Reform* at 394 (summarizing the position of ‘underground, marginal minorities’ as discussed by Teresa Vilaros in *Los monos del desencanto espanol* [The Withdrawal Syndrome of Spanish Disenchantment]).

[n.107.](#) See *id.*

[n.108.](#) See *id.*

[n.109.](#) See *id.* at 5 *Mich. J. Race & L.* at 978-79, 33 *U. Mich. J.L. Reform* at 394-95.

[n.110.](#) See, e.g., Henry A. Giroux, *Disturbing Pleasures: Learning Popular Culture* (1994).

[n.111](#).. See Marjorie Garber, *The Occidental Tourist: M.Butterfly and the Scandal of Transvestism*, in *Nationalisms And Sexualities* 121-46 (Andrew Parker et al., eds., 1992).

[n.112](#).. For a more detailed discussion of this film, see Judith Butler, *Gender is Burning: Questions of Appropriation and Subversion*, in *Bodies That Matter: On the Discursive Limits of Sex* 121-42 (1993).

[n.113](#). See **Ratna Kapur**, *Post-colonial Erotic Disruptions: Legal Narratives of Culture, Sex and Nation in India*, 9 Colum. J. Gender & L. (forthcoming 2000) (on file with authors).

[n.114](#).. See Shohini Ghosh, *The Troubled Existence of Sex and Sexuality: Feminists Engage with Censorship*, in *Image Journeys: Audio-Visual Media & Cultural Change In India* 233-260 (Christiane Brosius & Melissa Butcher eds., 1999); Shohini Ghosh, *Deviant Pleasures and Disorderly Women: The Representation of the Female Outlaw in Bandit Queen and Anjaam*, in *Feminist Terrains In Legal Domains: Interdisciplinary Essays On Women And Law In India* 150-83 (**Ratna Kapur** ed., 1996).

[n.115](#).. Perez-Sanchez, *supra* note 1, at 5 Mich. J. Race & Law at 975, [33 U. Mich. J.L. Reform at 391](#).

[n.116](#). See [Baker v. Vermont](#), 744 A.2d 864 (Vt. 1999). The case emerged from an appeal by three same-sex couples to the Supreme Court of Vermont after a lower court dismissed their case in 1997, holding that the discrimination in the marriage law against same-sex marriage was not “invalid.” The lower court held that there was one surviving rationale for denying lesbian and gay couples the freedom-to-marry—they could not procreate and marriage ensures procreation. This holding was rejected by the Vermont Supreme Court. There were two considerations to be made by the Court: Whether the existing marriage laws were only applicable to heterosexual couples? The Court held they were. And secondly, whether such exclusion rendered the marriage laws unconstitutional? The Court did not go so far as to hold that the marriage laws were unconstitutional. Instead, it acknowledged that the plaintiffs were entitled to all the benefits and protections afforded by Vermont law to married opposite- sex couples. The Court directed the legislature to decide how to achieve that equality in a “reasonable” period of time. The Court did not address the question whether it would be constitutional for the legislature to opt for a “separate but equal” approach, by withholding marriage licenses to same-sex couples while granting the rights, benefits, and responsibilities that accompany such licenses.

[n.117](#).. Gayatri Chakravorty Spivak, *In Other Worlds: Essays In Cultural Politics* 197 (1988).

[n.118](#).. Michel Foucault engaged these questions in some of his later work, where he addressed the intimate relationship between modern technologies of power and the belief in authenticity. See *Truth, Power, Self: An Interview with Michel Foucault*, in *Technologies of the Self* 10 (Luther H. Martin et al., eds., 1988).

[n.119](#).. Keeping in view the need to assess the practice of sati in context, we use the Oxford English Dictionary’s definition of sati provided by Sunder Rajan. This states that sati is both a practice where “the Hindu widow ... immolates herself on the funeral pile with her husband’s body” and “the immolation of a Hindu widow in this way.” Rajeswari Sunder Rajan, *Real Or Imagined Women: Postcolonialism, Gender And Culture* 35 (1995). Sati is thus referred to both in relation to the burning of the woman as well as the woman who burns, that is, the widow is both the subject as well as the object of the sati. See *id.* For an important discussion about the historic problematic representation of the practice of sati, particularly in Western feminist texts, see Uma Narayan, *Restoring History and Politics to “Third-World Traditions”*: Contrasting the Colonialist Stance and Contemporary Contestations of Sati, in *Dislocating Cultures: Identities, Traditions, And Third-World-Feminism*, 41-80 (1997).

[n.120](#).. See Madhu Kishwar & Vanita, *The Burning of Roop Kanwar*, 42 *Manushi* 25 (Sept.-Dec. 1987); Sujata Patel & Kriswhna Kumar, *Defenders of Sati*, 23 *Economic And Political Weekly* 129 (Jan. 1988); Julie Stephens, *Feminist Fictions: A Critique of Feminist Studies of Third World Women, with Special Reference to India* (presented at the Second Subaltern Studies Conference in Calcutta, Jan. 1986) (on file with authors).

[n.121](#).. Stephens, *supra* note 120, at 2.

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- [n.122](#).. See Rajan, *supra* note 119, at 35.
- [n.123](#).. See Lata Mani, Cultural Theory, Colonial Texts: Reading Eyewitness Accounts of Widow Burning, in Cultural Studies 403 (Lawrence Graossberg et al., eds., 1992).
- [n.124](#).. See Lata Mani, Contentious Traditions: The Debate on Sati in Colonial India 190 (1998).
- [n.125](#).. Gramsci, *supra* note 17, at 324.
- [n.126](#).. See Slavoj Zizek, The Sublime Object of Ideology 3 (1989).
- [n.127](#).. See generally Gilles Deleuze & Felix Guattari, Anti-Oedipus: Capitalism And Schizophrenia (Robert Hurley et al. trans., 1983).
- [n.128](#).. Gilles Deleuze & Felix Guattari, A Thousand Plateaus: Capitalism And Schizophrenia 94 (Brian Massumi trans., 1987).
- [n.129](#).. See Kapur, *supra* note 113.
- [n.130](#).. Michel De Certeau, The Practice of Everyday Life 48 (Steven Rendall trans., 1984).
- [n.131](#).. Angela Harris, [Foreword: The Jurisprudence of Reconstruction](#), 82 Cal L. Rev. 741, 743 (1994).
- [n.132](#).. Mari Matsuda, [Looking to the Bottom: Critical Legal Studies and Reparations](#), 22 Harv. C.R.-C.L. L. Rev. 323 (1987).
- [n.133](#).. Thomas Keenan, Fables of Responsibility: Abberations And Predicaments Inethics And Politics 140 (1997) (quoting Michel Foucault).
- [n.134](#).. Spivak, In Other Worlds, *supra* note 117, at 198.
- [n.135](#).. Edward Said, The World, The Text and the Critic 246-47 (1983).

Appendix 1:

LatCrit Fact Sheet

What is LatCrit? LatCrit is a group of progressive law professors engaged in theorizing about the ways in which the Law and its structures, processes and discourses affect people of color, especially the Latina/o communities. LatCrits acknowledge that the Law operates in contradictory ways with its potential to oppress and marginalize co-existing with its potential to emancipate and empower. LatCrit is conceived as an anti-subordination and anti-essentialist project that attempts to link theory with praxis, scholarship with teaching, the academy with the community. LatCrit theory is trans-disciplinary and draws on many other schools of progressive scholarship, such as critical race theory, multiculturalism, ethnic studies, Queer theory, feminism, cultural studies, postcolonialism, post-modernism, and environmentalism.

Who are LatCrits? LatCrits include progressive law professors and other persons from around the country from different racial, ethnic and linguistic backgrounds, both straight and Queer. Thus, LatCrit includes Chicanas/os, Cubanas/os, Puertorriqueñas/os, mestizas/os, Central and South Americans as well as significant numbers of African Americans, Asian Americans, and some native/indigenous peoples. Our annual conferences are attended by more than 100 law professors, other academics, community organizers, and law students each year.

What have LatCrits Written? In addition to articles appearing in other journals, five symposia law review volumes have already appeared; one is being edited and another is scheduled.

- Puerto Rico Colloquium, Representing Latina/o Communities: Critical Race Theory and Practice, *LA RAZA LAW JOURNAL*, VOL. 9 (1996).
- LatCrit I Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, *HARVARD LATINO LAW REVIEW*, VOL. 2 (1997).
- Miami Colloquium, *International Law, Human Rights and LatCrit Theory*, *UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW*, VOL. 78 (1997).
- Special Symposium, *LatCrit Theory: Latinas/os and the Law*, *CALIFORNIA LAW REVIEW*, VOL. 85 and *LA RAZA LAW JOURNAL*, VOL. 10 (1997).
- LatCrit II Symposium, *Difference, Solidarity, and Law: Building Latina/o Communities Through LatCrit Theory*, *UCLA CHICANO-LATINO LAW REVIEW*, VOL. 19 (1998).

- LatCrit III Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, UNIVERSITY OF MIAMI LAW REVIEW, VOL. 53 (July 1999).
- LatCrit IV Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, UNIVERSITY OF CALIFORNIA-DAVIS LAW REVIEW, Vol. 33 (2000).
- LatCrit V Symposium, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, DENVER UNIVERSITY LAW REVIEW (Forthcoming 2001).
- LatCrit VI Symposium, *Latinas/os and the Americas: Centering North-South Frameworks in LatCrit Theory*, FLORIDA LAW REVIEW (Forthcoming 2002).

What about the annual LatCrit conferences? LatCrits have met once in Puerto Rico before being formally organized as a scholarship project and since then:

- October, 1995. San Juan, Puerto Rico (sponsored by University of Miami Law School) in connection with the Hispanic National Bar Association meeting (Puerto Rico Colloquium).
- May, 1996. San Diego, CA sponsored by Cal Western School of Law (LatCrit I)
- October, 1996. Miami, FL sponsored by University of Miami School of Law (International Human Rights)
- May, 1997. San Antonio, TX sponsored by St. Mary's School of Law (LatCrit II)
- May, 1998. Miami, FL sponsored by University of Miami School of Law (LatCrit III)
- May, 1999. Lake Tahoe, CA sponsored by a coalition of eleven law schools (LatCrit IV)
- May, 2000. Breckenridge, CO sponsored by Denver University School of Law (LatCrit V)

Locations (some are tentative) for future LatCrit Conferences:

- April, 2001. Gainesville, FL sponsored by the University of Florida Fredric G. Levin College of Law
- 2002: Portland, Oregon
- 2003: Washington, D.C.
- 2004: Albuquerque, New Mexico
- 2005: San Juan, Puerto Rico

LatCrit Primer, Volume 2 (Spring 2001)

Appendix 2:

Tables of Contents of

LatCrit Colloquia and Symposia

1. Puerto Rico Colloquium, *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 LA RAZA L.J. 1 (1996).

INTRODUCTION

FOREWORD

Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity and Post-Identity Politics in Postmodern Legal Culture From Practices to Possibilities*, 1.

COLLOQUIUM PROCEEDINGS

Leslie Espinoza, *Comments by Leslie Espinoza*, 33.

Juan Perea, *Suggested Responses to Frequently Asked Questions About Hispanics, Latinos and Latinas*, 39

Angel Oquendo, *Comments by Angel Oquendo*, 43.

Celina Romany, *Gender, Race/Ethnicity and Language*, 49.

Robert S. Chang, *The Nativist's Dream of Return*, 55.

Deborah Ramirez, *Foregoing A Latino Identity*, 61.

Berta Esperanza Hernandez-Truyol, *Building Bridges: Bringing International Human Rights Home*, 69.

ARTICLE

Enrique R. Carrasco, *Collective Recognition As A Communitarian Device Or, Of Course We Want To Be Role Models*, 81.

2. LatCrit I Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997).

FOREWORD

Francisco Valdes, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 1

ARTICLES

- Rachel F. Moran, *Neither Black Nor White*, 61
 Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 101
 Steven W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience*, 145

PANELS

[PANEL ONE *LATINA/O IDENTITY AND PAN-ETHNICITY: TOWARD LATCRIT SUBJECTIVES*

- Leslie Espinoza, *Introduction to Panel One: Latino Pan-Ethnicity? Histories and Conditions That United and Divide Our Communities*, 175
 Max J. Castro, *Making Pan Latino: Latino-Pan-Ethnicity and the Controversial Case of the Cubans*, 179
 Berta Esperanza Hernández-Truyol, *Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks*, 199
 Juan Perea, *Five Axioms in Search of Equality*, 231

[PANEL TWO *RACES, NATIONALITIES, ETHNICITIES: MAPPING LATCRIT (DIS)CONTINUITIES*

- Robert Westley, *Introduction to Panel Two: Races, Nationalities, Ethnicities: Mapping LatCrit (Dis)Continuities*, 243
 Keith Aoki, *(Re)Presenting Representation*, 247
 Adrienne D. Davis, *Identity Notes Part II: Redeeming the Body Politic*, 267
 Ian F. Haney Lopez, *Retaining Race: LatCrit Theory and Mexican American Identity in Hernandez v. Texas*, 279
 Michael Luis Principe, *A Reason For LatCrit Unification: Reflections on Comparative Efforts To Curtail Political Opposition and Terrorism*, 297
 Stephanie M. Wildman, *Reflections on Whiteness and Latina/o Critical Theory*, 307

[PANEL THREE *TEACHING, SCHOLARSHIP AND SERVICE: PRACTICING LATCRIT THEORY*

- Enrique Carrasco, *Introduction to Panel Three: Intellectuals, Awkwardness, and Activism: Towards Social Justice Via Progressive Instability*, 317
 George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 321

Margaret E. Montoya, *Academic Mestizaje: Re/Producing Clinical Teaching and Re/Framing Wills As Latina Praxis*, 349

Laura M. Padilla, *LatCrit Praxis To Heal Fractured Communities*, 375

[PANEL FOUR *MULTIPLICITIES AND INTERSECTIONALITIES: EXPLORING LATCRIT DIVERSITIES*

Keith Aoki, *Introduction to Panel Four: Multiplicities and Intersectionalities: Exploring LatCrit Diversities*, 395

Elvia Arriola, *Welcoming The Outsider To An Outsider Conference: Law and The Multiplicities of Self*, 397

Robert S. Chang, *Racial Cross-Dressing*, 423

Sumi K. Cho, *Essential Politics*, 433

Mary Coombs, *LatCrit Theory and The Post-Identity Era: Transcending The Legacies of Color and Coalescing A Politics of Consciousness*, 457

[PANEL FIVE *LATINAS/OS AND INTER-GROUP JURISPRUDENCE: BUILDING LATCRIT COMMUNITIES AND COALITIONS*

Elizabeth M. Iglesias, *Introduction To Panel Five: The Inter-Subjectivity of Objective Justice: A Theory and Praxis for Constructing LatCrit Coalitions*, 47

Barbara J. Cox, *Coalescing Communities, Discourses and Practices: Synergies in the Anti-Subordination Project*, 473

Jerome McCristal Culp, Jr., *Latinos, Black Others, and the New Legal Narrative*, 479

Ediberto Roman, *Common Ground: Perspectives On Latino/Latina Diversity*, 483

Eric K. Yamamoto, *Conflict and Complicity: Justice Among Communities of Color*, 495

3. Miami Colloquium, *International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1997).

FOREWORD

Elizabeth M. Iglesias, *International Law, Human Rights, and LatCrit Theory*, 177

KEYNOTE ADDRESS

Celina Romany, *Claiming a Global Identity: Latino/a Critical Scholarship and International Human Rights*, 215

COLLOQUIUM PROCEEDINGS

PANEL ONE

Berta E. Hernández-Truyol, *Civil and Political Rights—An Introduction*, 223

Elvia R. Arriola, *The Faces of Despair in INS Raids*, 245

Kevin R. Johnson, *The Social and Legal Construction of Nonpersons*, 263

Enid Trucios-Haynes, *The Role of Transnational Identity and Migration*, 293

PANEL TWO

Jose E. Alvarez, *North American Free Trade Agreement's Chapter Eleven*, 303

Enrique R. Carrasco, *Intersections Between LatCrit Theory and Law and Development Studies*, 313

Adrien Katherine Wing, *Critical Race Feminism and International Human Rights*, 337

Elizabeth M. Iglesias, *Human Rights in International Economic Law*, 361

PANEL THREE

Natsu Taylor Saito, *Considering "Third Generation" International Human Rights Law in the United States*, 387

Ileana M. Porras, *Reflections on Environmental Rights as Third Generation Solidarity Rights*, 413

Raúl M. Sanchez, *Mexico's El Cuchillo Dam Project*, 425

COMMENT

David S. Schiller, *Great Expectations: The North American Commission on Environmental Cooperation Review of the Cozumel Pier Submission*, 437

LEGAL MEMORANDA

Mexico, 479

4. Special Symposium, *LatCrit Theory: Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997) & 10 LA RAZA LAW JOURNAL 1 (1998).

FOREWORD

Francisco Valdés, *Under Construction: LatCrit Consciousness, Community and Theory*, 1087

RACE, ETHNICITY & NATIONHOOD

Ian F. Haney López, *Race and Erasure: The Salience of Race To LatCrit Theory*, 1143

Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 1213

Kevin R. Johnson, “Melting Pot” or “Ring of Fire”? : *Assimilation and the Mexican-American Experience*, 1259

POLICY, POLITICS & PRAXIS

Rachael E. Moran, *What If Latinos Really Mattered in the Public Policy Debate?*, 1315

Christopher David Ruiz Cameron, *How the Garcia 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*, 1347

Robert S. Chang & Keith Aoki, *Centering The Immigrant in The Inter/National Imagination*, 1395

Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 1449

Jean Stefancic, *Latino and Latina Critical Theory: An Annotated Bibliography*, 1509

AFTERWORD

Leslie Espinoza & Angela Harris, *Embracing the Tar-Baby: LatCrit Theory and The Sticky Mess of Race*, 1585

Anthony V. Alferi, *Black and White*, 1647

5. LatCrit II Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 UCLA CHICANO LATINO L. REV. (1998).

FOREWORD

Elvia R. Arriola, *Foreword: March!*, 1.

ARTICLE

Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as’ Race and Ethnicity*, 69.

ARTICLE COMMENTARIES

Anthony Paul Farley, *All Flesh Shall See It Together*, 163.

Jennifer M. Russell, *Constructing Latinoness: Ruminations of Reading Los Confundidos*, 177.

ESSAYS

RACE, ETHNICITY & GENDER AS ANTI-SUBORDINATION IDENTITIES: LATCRIT PERSPECTIVES

- Laura E. Gómez, *Introduction: Constructing Latina/o Identities*, 187
 Leslie Espinoza, *A Vision Towards Liberation*, 193
 Kevin R. Johnson, *Immigration and Latino Identity*, 197
 George A. Martínez, *African-Americans, Latinos, and The Construction of Race: Toward An Epistemic Coalition*, 213
 Robert S. Chang, *Who's Afraid of Tiger Woods?*, 223
 Antonio Castañeda, *Language and Other Lethal Weapons: Cultural Politics and The Rites of Children As Translators of Culture*, 229
 Maureen Ebben & Norma Guerra Gaier, *Telling Stories, Telling Self: Using Narrative To Uncover Latinas' Voices and Agency in the Legal Profession*, 243
 Ana M. Novoa, *American Family Law: History—WhoStory*, 265

COMPOSING LATCRIT THEORY: SELF-CRITICAL REFLECTIONS ON "LATINA/OS"

- Devon W. Carbado, *Introduction: The Ties That Bind*, 283
 Pat K. Chew, *Constructing Our Selves/Our Families: Comments on LatCrit Theory*, 297
 Berta Esperanza Hernández-Truyol, *Building Bridges III—Personal Narratives, Incoherent Paradigms, and Plural Citizens*, 303
 Enrique R. Carrasco, *Who Are We?*, 331
 Guadalupe T. Luna, *"Zoo Island:" LatCrit Theory, "Don Pepe" and Señora Peralta*, 339
 Luz Guerra, *LatCrit y La Des-Colonization Nuestra: Taking Colón Out*, 351
 Leslie Espinoza, *Learning About Latinos*, 363

RELIGION AND SPIRITUALITY IN OUTSIDER THEORY: TOWARD A LATCRIT CONVERSATION

- Margaret E. Montoya, *Introducing: Religious Rituals and LatCrit Theorizing*, 417
 Verna Sanchez, *Looking Upward and Inward: Religion and Critical Theory*, 431
 Nancy K. Ota, *Falling From Grace: A Meditation On LatCrit II*, 437
 Reynaldo Anaya Valencia, *On Being An "Out" Catholic: Contextualizing The Role of Religion at LatCrit II*, 449
 Emily Fowler Hartigan, *Disturbing the Peace*, 479
 Max J. Castro, *The Missing Center? Cuba's Catholic Church With A Preface And A Postscript/Reflections*, 493

AFTERWORD

Elizabeth M. Iglesias & Francisco Valdés, *Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Agendas*, 503

COMMENT

Lisa Rodríguez Navarro, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 589

6. LatCrit III Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 MIAMI L. REV. 575 (1999)

FOREWORD

Elizabeth M. Iglesias, *Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 575

BEYOND/BETWEEN COLORS: DE/CONSTRUCTING INSIDER/OUTSIDER POSITIONS IN LATCRIT THEORY

Eric K. Yamamoto, *LatCrit III: Introduction to Plenary Session Four*, 683

Guadalupe T. Luna, *On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sandford*, 691

Cheryl Little, *InterGroup Coalitions and Immigration Politics: The Haitian Experience in Florida*, 717

Lyra Logan, *Florida's Minority Participation in Legal Education Program*, 743

Virginia P. Coto, *LUCHA, The Struggle for Life: Legal Services for Battered Immigrant Women*, 749

INTER-GROUP SOLIDARITY: MAPPING THE INTERNAL/EXTERNAL DYNAMICS OF OPPRESSION

Robert Westley, *Introduction Lat Crit Theory and the Problematics of Internal/External Oppression: A Comparison of Forms of Oppression and InterGroup/IntraGroup Solidarity*, 761

Laura M. Padilla, *Social and Legal Repercussions of Latinos' Colonized Mentality*, 769

Alice G. Abreu, *Lessons from LatCrit: Insiders and Outsiders, All at the Same Time*, 787

- Berta Esperanza Hernández-Truyol, *Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex*, 811
- Siegfried Wiessner, *!Esa India! LatCrit Theory and the Place of Indigenous Peoples Within Latina/o Communities*, 831
- Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 855

SUBSTANTIVE SELF-DETERMINATION: DEMOCRACY, COMMUNICATIVE POWER AND INTER/NATIONAL LABOR RIGHTS

- Max J. Castro, *Democracy in Anti-Subordination Perspective: Local/Global Intersections An Introduction*, 863
- Ivelaw L. Griffith, *Drugs and Democracy in the Caribbean*, 869
- Irwin P. Stotzky, *Suppressing the Beast*, 883
- Mario Martínez, *Property as an Instrument of Power in Nicaragua*, 907
- Mario Martínez, *La Propiedad Como Instrumento de Poder en Nicaragua*, 913
- Julie Mertus, *Mapping Civil Society Transplants: A Preliminary Comparison of Eastern Europe and Latin America*, 921
- Ediberto Román, *Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm*, 943

ANTI-SUBORDINATION AND THE LEGAL STRUGGLE OVER CONTROL OF THE "MEANS OF COMMUNICATION": TECHNOLOGY, LANGUAGE AND COMMUNICATIVE POWER

- Keith Aoki, *Introduction: Language Is a Virus*, 961
- William Bratton, *Law and Economics of English Only*, 973
- Drucilla Cornell, *The Imaginary of English Only*, 977
- Catharine Peirce Wells, *Speaking in Tongues: Some Comments on Multilingualism*, 983
- Madeline Plasencia, *"Suppressing the Mother Tongue"—Anti-Subordination and the Legal Struggle Over Control of the Means of Communication*, 989
- Yvonne A. Tamayo, *Literal Silencing/Silenciando la Lengua*, 995
- Sharon K. Hom, *Lexicon Dreams and Chinese Rock and Roll: Thoughts on Culture, Language, and Translation as Strategies of Resistance and Reconstruction*, 1003
- John Hayakawa Torok, *Finding the Me in LatCrit Theory: Thoughts on Language Acquisition and Loss*, 1019

LABOR LAW AND LATCRIT IDENTITY POLITICS

- Elvia R. Arriola, *Introduction: The Value of Our Work*, 1037

Mary Romero, *Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: "Where Can You Find Good Help These Days!"*, 1045

Roberto L. Corrada, *Familiar Connections: A Personal Re/View of Latino/a Identity, Gender, and Class Issues in the Context of the Labor Dispute Between Sprint and La Conexión Familiar*, 1065

Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 1089

MAPPING INTELLECTUAL/POLITICAL FOUNDATIONS AND FUTURE SELF CRITICAL DIRECTIONS

Margaret E. Montoya, *Introduction: LatCrit Theory: Mapping Its Intellectual and Political Foundations and Future Self-Critical Directions*, 1119

Kevin R. Johnson & George A. Martínez, *Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship*, 1143

Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 1177

Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 1219

Stephanie L. Phillips, *The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History*, 1247

Victoria Ortiz & Jennifer Elrod, *Reflections of LatCrit III: Finding "Family"*, 1257

AFTERWORD:

Francisco Valdés, *Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 1265

7. LatCrit IV Symposium, *Rotating Centers, Expanding Frontiers: Latcrit Theory And Marginal Intersections*, 33 U.C. DAVIS L. REV. 751 (2000)

Dean Rex Perschbacher, *Welcoming Remarks for LatCrit IV*, 751

FOREWORD:

Kevin R. Johnson, *Celebrating LatCrit Theory: What Do We Do When the Music Stops?*, 753

CONSTRUCTING LATCRIT THEORY: DIVERSITY, COMMONALITY, AND IDENTITY

George A. Martínez, *Introduction: Constructing Latcrit Theory: Diversity, Commonality, and Identity*, 787

Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 795

Víctor C. Romero, "Aren't You Latino?": *Building Bridges upon Common Misperceptions*, 837

Berta Esperanza Hernández-Truyol, *LatIndia II—Latinas/os, Natives, and Mestizajes—A LatCrit Navigation of Nuevos Mundos, Nuevas Fronteras, Nuevas Teorias*, 851

Eric K. Yamamoto, *Practically Reframing Rights: Culture, Performance, and Judging*, 875

PIERCING WEBS OF POWER: IDENTITY, RESISTANCE, AND HOPE IN LATCRIT THEORY AND PRAXIS:

Francisco Valdés, *Piercing Webs of Power: Identity, Resistance, and Hope in LatCrit Theory and Praxis*, 897

Guadalupe T. Luna, *Gold, Souls, and Wandering Clerics: California Missions, Native Californians, and LatCrit Theory*, 921

Terry Rey, "The Virgin's Slip Is Full of Fireflies": *The Multiform Struggle over the Virgin Mary's Legitimierende Macht in Latin America and Its U.S. Diasporic Communities*, 955

Laura M. Padilla, *Latinas and Religion: Subordination or State of Grace?*, 973

Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 1009

FORGING OUR IDENTITY: TRANSFORMATIVE RESISTANCE IN THE AREAS OF WORK, CLASS, AND THE LAW

María L. Ontiveros, *Introduction: Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law*, 1057

William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 1075

Christopher David Ruiz Cameron, *The Rakes of Wrath: Urban Agricultural Workers and the Struggle Against Los Angeles's Ban on Gas-Powered Leaf Blowers*, 1087

Pamela J. Smith, *The Tyrannies of Silence of the Untenured Professors of Color*, 1105

Tanya K. Hernández, *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 1135

Larry Catá-Backer, *Measuring the Penetration of Outsider Scholarship into the Courts: Indifference, Hostility, Engagement*, 1173

Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 1227

PERFORMING LATCRIT:

Robert S. Chang & Natasha Fuller, *Introduction: Performing LatCrit*, 1277

Pedro A. Malavet, *Literature and the Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production: The Confessions of an Accidental Crit*, 1293

Nicholas A. Gunia, *Half the Story Has Never Been Told: Popular Jamaican Music as Antisubordination Praxis*, 1333

Alfredo Mirandé González, *Alfredo's Jungle Cruise: Chronicles on Law, Lawyering, and Love*, 1347

Sumi Cho and Robert Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 1377

GLOBALIZATION OR GLOBAL SUBORDINATION?: HOW LATCRIT LINKS THE LOCAL TO GLOBAL AND THE GLOBAL TO THE LOCAL: INTRODUCTION

Sylvia R. Lazos Vargas, *Globalization or Global Subordination?: How LatCrit Links the Local to Global and the Global to the Local*, 1429

Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 1451

Gil Gott, *Critical Race Globalism?: Global Political Economy, and the Intersections of Race, Nation, and Class*, 1503

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