The last two years have witnessed the birth of the LatCrit movement in and through the work of an increasingly expanding group of legal scholars. These scholars, who come from different Latina/o, Asian, and back communities, have been drawn together by a shared commitment to reinvigorate the antisubordination agenda of Critical Race theory, or RaceCrit, revive its ethical aspirations, and expand its substantive scope by introducing new themes, perspectives, and methodologies. Their efforts have produced a series of conferences focused on exploring how Critical Race theory might be expanded beyond the limitations of the black/white Pdigm to incorporate a richer, more contextualized analysis of the cultural, political, and economic dimensions of white supremacy, particularly as it impacts Latinas/os in their individual and collective struggles for self-understanding and social justice. Equally important, these conferences reflect a commitment to ensuring that LatCrit theory is developed in a manner which produces a form of scholarship relevant to the legal struggles of other subordinated communities, whose particular histories of oppression and resistance have also been neglected in and through the black/white Pdigm.

This Foreword introduces the proceedings of the third such gathering, which was organized in the form of a one day Colloquium entitled International Law, Human Rights, and LatCrit theory. The proceedings can be read both as an effort to continue the conversations already underway and as a unique and significant scholarly event. Connecting this effort to articulate a LatCrit perspective on international law and human rights to past and future efforts in other substantive areas of law reveals the rapidly expanding scope of the collective dialogue that is, in essence, the heart of the LatCrit movement. LatCrit discourse continues to grow, in part, because the practice of diversity and inclusion has enabled each successive conference to explore new points of departure, thus, building on the conceptual formulations, thematic priorities, and political concerns of earlier conferences.

Reading and publishing LatCrit conference proceedings as part of an evolving conversation serves important practical objectives as well. Professor Francisco Valdes argues persuasively that these
publications transform critical legal scholarship into a practice of political activism. The publications expand the depth, breadth, and quantity of legal scholarship devoted to issues relevant to Latina/o communities—a compelling imperative given the current lack of such scholarship. Equally important, Valdes emphasizes the community building effected through publication. Publishing these proceedings strengthens our intellectual community by transforming the production of legal scholarship from an experience of intellectual isolation into a practice of collective engagement and empowerment.

The proceedings of this Colloquium also have value in themselves and apart from the substantial contribution they will make to the development of LatCrit legal theory. The Colloquium represents the first self-conscious collective effort to explore some of the major issues in international law and international human rights from a critical race perspective and to articulate the significance of these issues to the antisubordination agenda that currently links the LatCrit movement to its RaceCrit precursors. This makes the Colloquium a significant scholarly event for two distinct, but interrelated reasons.

First, the effort to link the resolution of current international legal controversies to the domestic struggle against subordination calls upon the RaceCrit and LatCrit movements, both jointly and severally, to develop a broader scope for a more inclusive vision of the antisubordination agenda. The idea that international law and processes are relevant—let alone fundamental to the antisubordination agenda of Critical Race theory—is hardly ubiquitous in the [*180] scholarship. Indeed, a number of the conference participants have noted the extent to which the antisubordination struggles of various social movements in the United States have been impoverished by their relative isolation from and ignorance of the ongoing struggles for human rights and self-determination of peoples of color throughout the world.

This isolation may be due, in part, to a failure of vision that reflects inherited patterns of collective action and identity politics. From this perspective, both the RaceCrit and LatCrit movements face a common set of questions about the positions we will take, not only in relation to each other, but also towards the far larger group of humanity that does not share the privileges of our First World citizenship. These are the peoples of color, whose claims of right and struggles for justice will become increasingly compelling, both domestically and internationally, as the processes of globalization continue to unfold. Making the international move in our scholarship confronts us with the question whether our particular experiences of oppression will inspire us to imagine a broader more inclusive community, based on our common humanity and in solidarity with each other and the struggles and suffering of our Third World “others,” or whether these experiences of oppression will become the media through which we stake our claim in the privileges of our First World citizenship.

Focusing on the relationship between international and domestic relations of subordination will also further constructive engagement between the RaceCrit and LatCrit movements by suggesting new points of intersection for imagining community and building solidarity. Many of the problems we share, as racially subordinated peoples, are a function of the impoverishment and subordination of our nations of origin through the processes of colonialism and imperial capitalism. Of course, there are differences in these histories, differences, for example, in the terms and timing of colonial penetration, political independence, and outmigration. Understanding the way these historical differences reach into the present and are manifested in the institutional structures and discourses of international law will enable us to combat more effectively, the processes through which these differences are used strategically to divide us politically.

From another perspective, making the international move reveals new sites of contestation in the legal struggle against subordination. This is because the fragmentation of the various liberation [*181] movements in the United States and their isolation from similar movements throughout the world is not exclusively attributable to a failure of inclusionary vision. The ability to forge a common political agenda and organize collective action across the divisions of class, race, gender, and national boundaries requires more than vision and will. It requires resources, but more importantly, it presupposes the existence of social spaces and institutional arrangements that can operate effectively as forums for the development and expression of collective political identities. While the practice of international advocacy may promote some of the cross-national solidarities needed to broaden and deepen our antisubordination struggles, the ultimate effectiveness of this strategy is limited by the fragmentation of international and domestic legal regimes. n4

International and domestic legal regimes are fragmented at multiple points, for example, by denial of the indivisibility and interdependence of the human rights enumerated in the Universal Declaration of Human Rights (Universal Declaration), by the separation of international and domestic rights regimes effected
through state refusals to incorporate international human rights into their internal domestic laws and to accept accountability for their violations of international law in international forums, and by the separation of "private" and "public" international law. In the United States, this jurisprudential fragmentation has made international human rights and the human rights movement almost completely irrelevant to the legal struggle for domestic social justice precisely because these rights have been denied recognition as a legitimate basis for making claims within or against the United States. Promoting cross-national solidarities is, consequently, a socio-political struggle that will require LatCrits to develop the analytical resources necessary to evaluate the consequences of different ways of integrating international and domestic legal regimes and to intervene effectively in the legal struggles that the pursuit of jurisprudential integration will increasingly generate. Indeed, a number of the presentations make significant contributions to this theoretical project, thus suggesting a second major contribution of this Colloquium.

Just as engagement with international law promises to expand the way LatCrits/RaceCrits formulate and pursue our antisubordination agenda in theory and practice, these Colloquium proceedings also show how the application of LatCrit/RaceCrit methodologies, perspectives, and themes can expand international human rights legal discourse. The various presentations illustrate the extent to which critical methodologies like story-telling, the mapping of legal terms, and the incorporation of political economy and postmodern conceptualizations of identity can alter the terms of debate on key concepts and issues in international and human rights law.

Concepts like national sovereignty, refugee and alien, sustainable development, free trade, and regional integration take on new dimensions when approached through a LatCrit perspective. By bringing the perspective and methodologies of Critical Race theory to bear on the analysis of international law, processes, relations, and institutions, LatCrit theory has created a conceptual space for exploring how the formulation and resolution of key debates in international law reproduce the conditions of subordination of peoples of color, both domestically and internationally. In short, by making the international move, these proceedings open the door to the formulation of new critical perspectives and sites of contestation in the struggle for social transformation through law.

The rest of this Foreword tracks the structure of the Colloquium in the Miami proceedings. Professor Celina Romany's keynote address, laying out in broad strokes the theoretical and political possibilities for LatCrit scholarship in the field of international human rights, was followed by three panel presentations. The panels were organized thematically around the so-called "three generations" of international human rights. All the panel participants were asked to address their remarks to one or more of the following three questions:

1. Does a LatCrit theoretical perspective on identity politics, the multiplicity and intersectionality of Latina/o identities and cultural values, as well as the convergences and divergences in our histories and discourses of assimilation, independence, and revolution offer new perspectives on the traditional themes and concerns that have organized the legal and political struggle to promote the recognition and enforcement of human rights, broadly conceived?

2. Does LatCrit theory offer new perspectives on the recent trend toward regional economic integration in agreements such as NAFTA, and the likely impact of these developments on the human rights of Latinas/os within the United States, at the borders, and within the Latin American states considering regional integration?

3. Does LatCrit theory have anything to say about key debates over (a) the status of national sovereignty in international law, (b) the proper scope and limits of state intervention in civil society, for example, police interventions to enforce immigration restrictions or promote drug enforcement operations, particularly in minority communities, at the borders or within the territorial jurisdiction of Latin American states or both, and (c) the status of international human rights in regional integration agreements?

In presenting an introductory overview of the participants' rich, varied, and compelling interventions, Part I focuses on the presentations of panel one, which addresses the ways in which LatCrit theory can further the theoretical and practical work of promoting respect for first generation civil and political rights. Part II examines panel two, which addresses second generation economic, social, and cultural human rights, and Part III focuses on the third panel analysis of third generations solidarity rights. Read cumulatively, these presentations illustrate both the contributions a richer understanding of key debates in international law can make to our struggles against subordination, as well as the contributions LatCrit theoretical perspectives can make to the development of international law.

II. IMAGINED COMMUNITIES AND TRANSNATIONAL IDENTITIES: LATCRIT PERSPECTIVES ON FIRST GENERATION CIVIL AND POLITICAL HUMAN RIGHTS
The presentations of the first panel develop a critical analysis of the role international civil and political rights discourse and practices can play in promoting and invigorating the antisubordination struggles of the LatCrit movement in the United States. Using different methodologies and points of departure, each presentation offers insightful variations on some common themes. In each presentation, U.S. domestic laws, policies, and judicially articulated legal doctrines are measured against the requirements of international law. Each presentation questions, in one way or another, the legitimacy of these policies and doctrines, focusing particularly on the way they impact the enjoyment of internationally recognized civil and political human rights.

Professor Hernandez-Truyol’s intervention provides an excellent point of departure. In introducing panel one, Hernandez-Truyol [*185] provides an overview of the evolution and development of international human rights law. This history reveals that human rights law, in general, and civil and political rights, in particular, are artifacts of a long and continuing struggle to articulate normative frameworks and develop enforcement mechanisms that might be effectively invoked to restrict the manner and conditions under which states exercise coercive power against individuals within their jurisdiction. Early formulations grounded individual rights against the state in religious and metaphysical conceptions of a transcendent moral order or natural law. Since World War II, these rights have been asserted by reference to the positive laws of the world community, grounded for example, in the provisions of the United Nations Charter, the Universal Declaration, the International Covenants, and a proliferation of international human rights instruments articulating the rights of the world’s most vulnerable groups.

In recounting this history, Hernandez-Truyol makes numerous important observations. Although the Universal Declaration includes both economic and social, as well as civil and political rights, the legal framework for the enforcement of human rights law was subsequently divided into two regimes—one focused on civil and political rights, the second on economic, social, and cultural rights, each embodied in a different Covenant establishing different institutional arrangements and enforcement procedures. By reminding us that this fragmentation was a product of differences in the ideological commitments and priorities of developed and developing countries, Hernandez-Truyol strikes two important themes. The first theme focuses on the way the inequality of states in the international political economy constrains the articulation and enforcement of human rights law, a theme developed more fully in subsequent interventions. The second theme, while related, goes directly to the heart of the antisubordination project of the LatCrit movement (as a project in legal theory and scholarship), that is, the effort to articulate a vision of human identity that offers the most inclusive normative reference point for the enforcement of international human rights.

Hernandez-Truyol argues that "a human rights construct makes sense only with a holistic reading of rights that truly allows the enjoyment of the aspirational dignity that attaches to our [*186] status as human." Accordingly, she attacks the fragmentation of human rights law into separate regimes. While the United States recognizes only civil and political rights and continues to deny economic and social rights any legal status, Hernandez-Truyol argues that this separation is morally and conceptually incoherent. From the perspective of individual persons, these rights are clearly interdependent and interrelated. Civil and political rights mean very little without the enjoyment of economic, social, and cultural rights, particularly given the differences that class and culture can otherwise make in our access to the state and to the resources necessary for effective political mobilization. Indeed, this observation has not escaped the world community, as evidenced by the Third World sponsored General Assembly Resolution 32/130 of 1977, as well as in the numerous other human rights instruments Professor Hernandez-Truyol discusses.

By sourcing the foundation of human rights in the individual’s status as an individual and in the dignity and justice owed to individuals because of our status as human beings, Professor Hernandez-Truyol deploys a formulation and stakes a position that transcends, as contingencies, the differences of race, class, gender, and citizenship. Her formulation invokes our common humanity as the fundamental normative reference point for the conceptualization and enforcement of international human rights. Making this move, she provides a normative basis for combating the very real violence that is perpetrated by domestic legal regimes organized around contingent constructs like citizenship. In short, Hernandez-Truyol offers LatCrits an invitation to move even further beyond the black/white paradigm of early Critical Race theory and embrace the objective of achieving a global moral order that treats all human beings as equal.

To be sure, this formulation is not entirely unproblematic. The international legal order that LatCrits have inherited is one profoundly at odds with the centrality Hernandez-Truyol would confer upon the individual. As she acknowledges, sovereign states, not individuals, still remain the primary subjects of
international law. International human rights enforcement practices [*187] are still constrained by and within institutional procedures constructed around deference to sovereignty. Moreover, achieving a normative consensus will not necessarily produce effective social change, since law still operates in and against the structures and relations of power it seeks to regulate.

More troubling however, this emphasis on the human dignity of the individual person, when deployed as a normative reference point for combating the state-centric positivism of international law, resonates, perhaps intentionally, with the language of natural rights and divinely ordained moral order. [*188] n10 Can such a move withstand the modernist challenge that it represents a psychological lapse into utopian delusion, a retreat from critical engagement to a metaphysical moral order which exists only in the imaginings of a new (LatCrit) coterie of high priests and priestesses? To my mind, it can. If modernism struck a death blow to any claims of direct access to the mind of God, the crisis in modernist categories, institutions and values has opened a space for what Professor Richard Falk has called "the postmodern possibility." n11 This is the possibility of creating a new world order that resolves the crisis of modernism by transcending the mess it has left us. That mess is the poverty produced by market efficiency; the conflict, instability, and violence perpetuated and exacerbated for the sake of national security; the confusion disseminated through a technocratic objectivity that purports to separate the articulation of fact and value; the ecological and human disasters that mark our development; and the crisis of identity and solidarity we confront as we struggle to imagine communities that can resolve and transcend the hatreds and injustices we have inherited from the modernist categories of class, race, and nation.

In short, what Professor Hernandez-Truyol's formulation offers is an enigma--a point of re-entry into a normative order we have yet to create. Rather than building this future through excaheda pronouncements grounded on some privileged epistemological access to divine will or natural law, her emphasis on the human dignity of the individual is a call to commit ourselves to the project of a radical and global democracy--based on a recognition [*188] of the fundamental equality of all human beings and a faith that more inclusive participation is our only real means of access to the common good.

Professor Elvia Arriola's presentation embraces this commitment to inclusion and addresses its implications for LatCrit scholarship at multiple levels. [*189] n12 Taking, as her point of intervention, the representational politics at work in popular media accounts of INS raids, she prefaces her substantive critique with an effort to define more precisely and self-consciously the normative commitments that should inform the LatCrit movement. Arriola links the development of the LatCrit movement, not initially to the production of a body of legal scholarship, but instead to the development of a diverse and inclusive community of scholars. She discusses LatCrit conferences, not primarily as a forum for the exchange of scholarship, but as socio-political spaces in which to practice our commitments to diversity and inclusion. By doing this, she openly invites and explicitly challenges LatCrit scholars to develop an ethical community.

Arriola's focus on LatCrit community-building is a politically and poetically appropriate preface to her substantive critique of the representational practices used to legitimate the violence of INS raids. In both instances, her call is for the development of an ethical community. In both instances, the danger is that community has often been and often is an enemy of diversity and inclusion, for as Arriola's story-telling illustrates, communities are too often constituted through the delimitation of boundaries and the construction of otherness.

Taking up her own challenge, Professor Arriola illustrates how story-telling methodologies can disrupt the boundaries of exclusionary community by exposing the inhumanity (and illegality) of the practices through which these boundaries are enforced. Significantly, her story-telling calls us to focus precisely on the narrative elements suppressed in mainstream media accounts of INS raids--the physical and psychological violence visited on the detained and deported; the terror of confronting each day the risk that friends or family will be caught without papers, their papers rejected, indefinitely detained, deported without notice, in effect disappeared.

[*189] By emphasizing these narrative elements, Professor Arriola exposes how popular cultural representations manipulate the lines of empathy through which we imagine community. She asks whether INS immigration practices would withstand legal/political scrutiny if the judicial/popular conscience were more regularly exposed to stories of the hopes, fears, and aspirations of the individuals these practices target and terrorize. In short, by focusing on the common humanity that is denied in popular accounts of INS raids, Arriola's story-telling goes a long way toward recontextualizing U.S. immigration policy and enabling the exposure of its failure to comply with basic human rights.

Professor Kevin Johnson's intervention further develops these points in a rich, compelling, and
multilayered analysis of U.S. immigration laws. n13 In his account, immigration law appears as a field of representation populated, among other things, by teeming hoards of rapidly multiplying, fearsome, loathsome creatures called "illegal aliens." Johnson's significant contribution begins by mapping their appearances on the field of legal discourse. Through a systematic analysis of the way the term "alien" is deployed in the articulation of U.S. immigration policy, Johnson invites us to explore more critically the values and assumptions embedded in the legal construction of citizenship. Not only does Johnson reveal the significant human costs of decisions enforcing the citizen/alien dichotomy, he also exposes the dichotomy's empirical indeterminacy--who is "illegal?" n14 --as well as its normative bankruptcy--why should any human person ever have to suffer the label? In this way, he, like Professor Hernandez-Truyol, leads us to a new threshold for imagining community--a human community beyond the nation-state.

[*190] First, Johnson shows how U.S. immigration law subordinates the individual's enjoyment of fundamental civil and political rights to the enforcement of the citizen/alien dichotomy. Only citizens have the right to vote, to participate in jury deliberations, to engage in political activities without fear of deportation, to challenge indefinite terms of detention, and to enjoy the protection of judicial review through habeas corpus. These rights are denied to "aliens," a term that legitimates these restrictions by connoting illegality and otherness--rather than a common humanity.

Equally important, Johnson shows how the citizen/alien dichotomy contracts the parameters of community. Through this dichotomy, the political community is defined, not by reference to the human dignity of all individuals in relation to the state, but rather by citizenship. Aliens, no matter what their "real" connections to the community, remain only partial members, as marked by their more restricted rights against the state.

By reading U.S. immigration law through the normative prism of international human rights, Johnson's analysis establishes a vantage point from which we can challenge the artificiality of the imagined community underlying the citizen/alien dichotomy. Thus Johnson observes, there is no inherent requirement ...that society have a category of "aliens" at all. We could dole out political rights and obligations depending on residence in the community, which is how the public education and tax systems generally operate in the United States. Indeed, a few have advocated extending the franchise to "aliens," a common practice in a number of states and localities at the beginning of the twentieth century. n15

This revealed artificiality, in turn, enables us to explore more critically the kind of community the dichotomy sustains--the why of it all. This is Professor Johnson's second major contribution. By mapping the uses (and abuses) of the term "alien," Johnson enables us to see how the citizen/alien dichotomy legitimates practices of racial exclusion and economic exploitation. Through this dichotomy, U.S. immigration law continues to police the racial identity of the community it defines as citizens, even as it fosters, on an international level, the divide and conquer strategy that have so successfully undermined the American labor movement. The "alien" presence is tolerated in times of labor shortage, repudiated when work is scarce, super-exploited in either case through the denial of citizenship-based rights. In this way, the citizen/alien dichotomy creates a legal space in which exploitation and exclusion are legitimated.

At the same time, Professor Johnson makes a broader and more general contribution to the development of LatCrit theory. Johnson's work urges LatCrites to focus on legal doctrine and, more particularly, on the way language is deployed in the articulation of legal doctrine. His mapping of the term "alien," provides a powerful framework for challenging U.S. immigration policies and practices, in part, because it shows us that the legality of these policies is always a predetermined conclusion as a result of the meanings embedded in the language deployed. It makes sense, in any particular instance, to deny "aliens" basic civil and political rights--not because they are "human persons," not because they are "individuals," but because they are "aliens."

For LatCrit scholars, the implications of this analysis are profound. If legal discourse is a field of representation, legal interpretation is, all the more, an instrument of power. In order to challenge the subordination reproduced through law, we need to bridge the gap between the reality represented in legal discourse and the reality it rhetorically suppresses. Professor Johnson's intervention is, thus, a call for us to develop our critical legal theories in the interdiscipline. This means finding new modes of analysis and importing them into the field of legal discourse. It is a call he answers, as much through his skillful mapping of the language used in immigration law, as through the external critique he develops using social science data on the contribution undocumented immigrants have made to the U.S. economy, a contribution otherwise invisible in the rhetoric of monumental social problems generated by teeming hoards of invading aliens.
If Professor Johnson leads us to the threshold of a newly imagined community, Professor Enid Trucios-Haynes pushes us through, for her intervention begins precisely where Johnson [*192] stops. n16 Despite his devastating critique of the way U.S. immigration law partitions community and legitimates the denial of citizenship-based rights to its partial members, Johnson ultimately accepts the citizen/alien dichotomy. n17 Perhaps the consequences of rejecting this dichotomy are deemed unacceptable, perhaps the feasibility too tenuous, but in either event it is Trucios-Haynes, who leads us to imagine a postmodern possibility superseding this dichotomy by invoking images of community and identity that transcend the nation-state.

Clearly, she travels a different route. Rather than focusing on the violence effected through the exclusion of aliens, Trucios-Haynes imagines the demise of the nation-state as a fulfillment of the possibilities embedded in the growing recognition of transnational identities. These identities, reflected in the legal form of dual citizenship, are artifacts of the increasing flows of peoples across national borders. These flows subvert inherited legal categories and compel a redefinition, a new map, of the international.

Rather than bemoaning these new changes, her formulation reveals and validates the possibilities they engender. More specifically, she views the increasing displacement of individual identity from the territorial boundaries of the nation-state as an opportunity, a new socio-political space, in which to promote the development of radical and plural democracy based on the personal self-determination of individuals. From this perspective, immigration law, particularly its construction and exclusion of aliens, reads like a last ditch effort to re-impose modernist categories in a postmodern world, a violent and regressive intervention aimed at preserving "the nation-myth, that defines the United States as a tribal community with a shared white, Christian, Western European heritage ... ." n18

Professor Trucios-Haynes encourages LatCrit scholars to embrace our transnational identities as unique and empowering positions from which to develop cross-national solidarities. Many of us speak the languages of our places of origin. We may maintain [*193] family and community ties to and travel between these places and the homes we have made in the United States. Engagement in and with the social justice struggles in these places will make us the embodied instruments of social transformation. Crossing borders is our way of being and creates a vantage point from which to challenge more effectively and profoundly the borders we must cross.

At the same time, Professor Trucios-Haynes is not unaware of the substantial legal obstacles we confront in our efforts to promote cross-national solidarities with human rights movements in other places. If the fragmentation of political and economic human rights reflects the impoverished vision of social justice through which international capitalism maintains its dominance and claims its legitimacy, Trucios-Haynes shows us how the sePtion of domestic and international law enables the United States to maintain its dominance by rejecting its accountability to the international community. In both instances, the fragmentation of legal fields reproduces the relations of subordination that undermine cross-national solidarity and contracts the jurisprudential and institutional spaces that might otherwise enable international legal advocacy to generate cross-national organizing. This makes the fragmentation of legal fields an important target for LatCrit critical scholarship--precisely because of its impact on the solidarities we want to develop.

To be sure, Trucios-Haynes's formulation is not entirely unproblematic, in part, because its most visionary elements need and deserve further development by her and other LatCrit scholars. She offers the personal right to individual self-determination as the focal point for and instrument of the cross-national solidarity she wants to promote. According to her, this right permits individual choice about loyalty to country, ethnic or racial group, or any other common bond and is evidenced in the growing recognition of dual citizenship. Can this postmodern conception of individual identity withstand the challenge it will face from scholars operating through modernist categories of group identity? Can it withstand the objection that a right to individual self-determination, at least the "choose your favorite loyalty" sort, is a recipe for possessive individualism, not collective solidarity? To my mind, it can because the contradiction between individual self-determination and collective solidarity is in large part an artifact of the policies, practices, and institutional arrangements through [*194] which modernist categories of group identity--of race and class and nationality--have been imposed upon and enforced against the human race. n19 To my mind, Trucios-Haynes's postmodern possibilities are worth pursuing, but not in a world of nation-states, dual citizenship notwithstanding. Thus, the challenge she puts to LatCrit scholars is precisely the task of envisioning and producing the type of world legal order in which the contradictions between individual self-determination and collective solidarity can be superceded.
III. FREE MARKETS, WELFARE STATES AND CULTURAL GENOCIDES: LATCRIT PERSPECTIVES ON ECONOMIC, SOCIAL, AND CULTURAL HUMAN RIGHTS

The presentations of the second panel move the focus of LatCrit analysis into the field of economic, social, and cultural human rights. These second generation rights depend upon the programmatic interventions of the welfare state, a state form increasingly under attack both in the United States and in Latin America. In the United States, these attacks are waged through the discourses of deregulation and reverse-discrimination and through a racist misogyny that targets all welfare recipients, particularly poor mothers and recent immigrants, even as it denigrates Latin cultural values and familial structures.

The welfare state, in Latin America, is also under attack through the discourses of privatization, structural adjustment, the repudiation of Latin economic nationalism and dirigista policies such as import-substitution, and increasing pressures to establish legal arrangements that protect free markets and free trade. Using different methodologies and points of departure, each of the four presentations offers a different perspective on these recent developments, their impact on the economic, social, and cultural rights of racially subordinated people and the practical and legal alternatives that a LatCrit perspective might afford.

The first presentation by Professor Jose Alvarez provides a critical analysis of the investment rights regime established by NAFTA, the North American Free Trade Agreement. His analysis of NAFTA's Investment Chapter makes a number of important contributions to the development of LatCrit theory, in large part because it demonstrates the significance of international trade and investment agreements to our antisubordination agenda. Alvarez encourages LatCrit scholars to turn their attention to these agreements because they are directly implicated in reproducing the patterns of subordination we struggle to dismantle. At the same time, his analysis illustrates how methodologies already familiar to critical race theorists can increase our understanding of the way international investment agreements impact on Latina/o economic, social, and cultural rights.

Like other commentators, Professor Alvarez is interested in revealing the realities of enforced subordination that are suppressed by the rhetoric through which the NAFTA is represented in legal discourse. However, Alvarez exposes these realities by invoking the rights critiques of early critical legal theory. Liberal rights, particularly negative rights, like the rights to property and privacy, have been the focus of heated debate in critical legal theory, as these rights have often proven to be empty formalisms of limited use in the struggle for social justice. Invoking these insights, Alvarez demonstrates how NAFTA's investment rights regime reproduces relations of economic and political subordination. Put differently, Alvarez can pierce the rhetoric of NAFTA's Investment Chapter, in part, because he knows how to do critical rights analysis.

Alvarez begins his rights analysis by noting that NAFTA is represented as a fair contract between sovereign equals, that establishes symmetrical and reciprocal rights between the state parties and their investors. NAFTA's Investment Chapter establishes a legal regime of substantive rights and remedial procedures for the benefit of "foreign investors." The rights are broad ranging and impose significant restrictions on the state's authority to regulate economic activity within its territory. Indeed, many of these rights track the human rights enumerated in the Universal Declaration. Thus, under NAFTA's Investment Chapter, foreign investors enjoy the rights to be free of discrimination "to security, to recognition as a legal person and to nationality, to freedom of movement, and to own property and not be arbitrarily deprived of it." 

Alvarez's first move is to reveal the fundamental asymmetry of the rights established by the Investment Chapter. He does this by invoking the critical distinction between formal rights equality and equal rights enjoyment. For example, the rights to national treatment and unencumbered repatriation of profits may be equally afforded to all investors of the three contracting parties, but these rights are much more valuable to U.S. investors than to Mexican investors because U.S. companies are moving into Mexico much faster than Mexican companies are expected to move into the United States. Like other liberal rights regimes, NAFTA's formal rights equality for all foreign investors ignores the very real inequalities in levels of economic development between the state parties. These inequalities mean that U.S. companies will be the main beneficiaries of the NAFTA investment rights regime for some time to come.

This rights asymmetry is not the only thing that Professor Alvarez's rights analysis reveals. The formal rights equality of NAFTA's Investment Chapter hides the economic subordination it perpetuates. As a regime of negative rights, NAFTA investment rights operate as restrictions on the Mexican state's authority to regulate economic activity in ways that have promoted the economic development of Mexican investors, prohibiting requirements like domestic content rules, technology transfers, local sourcing, and the use of
local managerial personnel. Mexican investors get formal rights equality in exchange for economic extinction, even as the Mexican economy becomes another American market and the border becomes an INS encampment and a toxic [*197] waste dump.

Professor Alvarez's critical rights analysis takes another turn, striking a now familiar theme. Alvarez shows yet another way in which the fragmentation of legal fields undermines the struggle for human rights. While NAFTA's Investment Chapter purports to establish a self-contained regime of substantive rights and remedial procedures for foreign investors, this agreement and the economic activities and relations it protects from state regulation have a direct impact on many rights and interests not included, nor even recognized, within the rights regime the agreement establishes. The NAFTA investment rights regime only protects the human rights of the foreign investor. The rights most directly impacted and blatantly excluded are the social, economic, and cultural human rights of the most vulnerable Latinas/os, both in the United States and throughout Latin America.

Alvarez's analysis of the Investment Chapter is more than an illustration of the way critical rights analysis can be applied to international investment treaties. It also demonstrates the value (and limitations) of storytelling methodologies in the field of international economic law. The incomplete and asymmetrical rights regime established by the Investment Chapter depends on the deployment of a particular story for its legitimacy. The narrative elements of this story project the image of innocent investors as helpless victims of nationalistic expropriations by all powerful (but corrupt) states. LatCrits can and should combat the hegemonic deployment of this story in legal discourse, but not primarily through the counter-narratives of all powerful multinational corporations super-exploiting the oppressed peoples of the Third World, whose governments are too dependent on foreign capital to enforce their own social welfare laws.

Instead, what Professor Alvarez's analysis ultimately suggests is that the innocent investor story is best combated by analyzing the economic and political impact of investment treaties through the analytical frameworks of dependency theory, international political economy, and the economic sociology of immigration flows. These interdisciplinary methodologies are relatively new to critical legal theory, but they will increase the LatCrit repertoire of critical methodologies in ways that will substantially expand the scope of our antisubordination agenda and enhance the depth of our analyses.

[*198] Deploying different points of departure and critical methodologies, Professor Enrique Carrasco also encourages LatCrit scholars to turn our attention to the international economic legal order and, in doing so, illustrates the rich variety of perspectives represented in the LatCrit movement. n23 By organizing his analysis around a critical historical account of development ideas and practices in Latin America, Carrasco's intervention teaches us that the legal struggle to promote economic, social, and cultural human rights must target the policies and practices of international economic institutions such as the World Bank and the International Monetary Fund. These institutions have a direct impact on the socioeconomic and political environments in developing countries and must be rigorously monitored to ensure that their policies enable the enjoyment of these rights through progressive social development.

It is no accident that Professor Carrasco's analysis does not focus directly on the substantive content of the rights recognized in the International Covenant on Economic, Social and Cultural Rights, nor on the United Nations procedures and institutions established to promote them. To be sure, these rights are crucial to eliminating the conditions of economic, political, and cultural subordination. Nevertheless, the realization of these rights--either through their incorporation in domestic legal regimes or through the development of effective international enforcement mechanisms--has been captive to a profoundly ideological debate over the way the international political economy should be organized.

The history of this debate reveals a fundamental fracture between developed and developing countries or, more precisely, between defenders of free market liberalism and advocates for the interventionist welfare state. Free market liberals reject economic, social, and cultural rights as mere aspirations; treating them as enforceable rights is viewed as completely incompatible with the processes of "creative destruction" through which free market competition produces economic growth. Developing countries have, on the other hand, invoked the failure of liberal economic policies to effectuate these rights in order to challenge the assumption that unregulated private economic activity increases [*199] the general welfare and to defend the regulatory and programmatic interventions of the welfare state.

Carrasco organizes his critical historical analysis of this debate around four key concepts he associates with LatCrit theory: opposition, justice, structuralism, and particularity. This analysis makes him weary and wary of operating on the assumption that radical critiques will promote progressive social change. Indeed, he argues that the history of Latin American development demonstrates the futility of critical theories that assume
radical oppositional stances and proceed through abstract analyses and generalized pronouncements.

While the post-World War II liberal economic order failed to fulfill its promises that open markets and an interdependent international economy would bring world peace, prosperity, and equal opportunities for all the world's peoples, liberal ideology has survived the radical critiques of Latin American development theorists. These theorists challenged the basic structures of the liberal legal order. Their theories enabled Third World states to announce the dawn of a New International Economic Order, encouraged Latin American policymakers to reject free market competition in favor of state economic regulation and applauded the nationalization of major industries, the implementation of currency controls and other import-substitution policies as well as the social programs of the welfare state. And yet, Latin America still remains a region marked by the violence and injustices of under-development. Latin American policymakers have since jumped on the neoliberal band wagon, adopted the Washington Consensus, repudiated economic planning and social welfare spending and embraced the imperatives of structural adjustment. Neoliberalism is full force throughout Latin America, and the poor are getting poorer.

Carrasco is weary of this cycle and attributes it to the flawed assumptions and methodologies of both liberal economic theory and its radical development critics. None of these theories have been able to produce a legal order that secures social justice and enables economic development for the world's peoples because all are captive to a totalizing ideology that positions them on one side or another of a false dichotomy between the free market and a state-centric political economy. While each ideology offers a series of solutions to the problems created by the policies and practices prescribed by the others, all have, in different ways, enabled the production and reproduction of vast inequalities of wealth and power, the manipulation and exacerbation of uneven development, both within and between nation states, and the marginalization of a majority of the people. Careful and critical analysis would quickly reveal this.

Weary and wary of radical critiques that operate through abstract theory and righteous normativity, Professor Carrasco urges LatCrit scholars to reconstitute our oppositional strategies. Focusing specifically on the development context, Carrasco warns LatCrit scholars against making frontal attacks on neoliberalism and urges us instead to develop analytical tools that will enable "radically rigorous monitoring" of the policies and practices of international economic institutions. n24 Professor Carrasco knows this suggestion may be heard as a call to make our scholarship more acceptable to policymakers and consequently rejected as too much a capitulation to the way things are, but his response is compelling. Carrasco wants social development and economic justice for Latinas/os. Thus, he insists that we plant ourselves in the real world and begin to develop and deploy analytical methodologies that will have some chance of changing the policies and practices of international economic institutions. For Carrasco, this means mastering economic analysis and finance theory, getting the real stories from development victims and using this knowledge to reveal the structural discrimination neoliberal policies produce. It also means working to conceptualize and advocate new institutional structures and decisionmaking procedures that will facilitate the task of monitoring these institutions and the impact of their policies on the development process.

While the first two presentations focused on the way the structures of international political economy impact upon the enjoyment of economic, social, and cultural human rights, Professor Adrien Wing's intervention shows the essential role these rights can play in developing effective remedies for the various forms of spirit injury inflicted on women of color through the practices of rape, domestic violence, and other forms of sex-based oppression. n25 Her presentation also makes a more general contribution to the development of LatCrit theory by introducing and deploying the new perspectives and methodologies of Critical Race Feminism.

Like LatCrit theory, Critical Race Feminism challenges the black/white Pdigm of Critical Race Theory. It places women of color at the center of critical analysis and focuses specifically on the intersecting impact of multiple forms of class, race, and gender subordination women of color often experience. n26 In this way, critical race feminism invites us to develop a collective political identity and to forge an antisubordination agenda across the divisions of race, class, and ethnicity. Like LatCrit theory, it urges us to transcend a black/white Pdigm that has ignored the oppression of women of color as much as it has ignored the impact of white supremacy on nonblack minorities. At the same time, Critical Race Feminism also constitutes a direct and compelling challenge to LatCrit theory to develop in ways that are engaged with and responsive to women's claims of autonomy, dignity, and self-determination.

Professor Wing uses Critical Race Feminism to reveal important connections between the wide-spread rapes perpetrated on Bosnian women by Serbian men and the rapes of black women by white men under
slavery in the United States. In both instances, the rapes did more than inflict severe physical and psychological harm on individual women; these rapes imposed systemic injuries on the entire ethnic/racial group to which these women belonged. Like the untreated spirit injuries suffered by black Americans, these injuries will reach far into the future, as the children produced by these rapes grow to confront the history that marks their very existence as an instrument of racial oppression and cultural genocide. Wing also shows how her spirit injury analysis can help LatCrits more fully understand and effectively address the many injuries inflicted on Latinas/os through the practices of state terrorism, compulsory sterilization, employment discrimination, environmental racism, and defamation.

In drawing these comparisons, Professor Wing criticizes the limited remedies available for these profoundly debilitating spirit injuries. Focusing on the victims of rape, she notes that criminal prosecutions and tort claims may provide some limited remedies to some limited number of women, but they do not remedy the spirit injuries of the women or their racial/ethnic group. Long-term spirit injuries require "a combination of law and rehabilitative and preventive measures in the fields of education, counseling, employment training." \[*203\] In short, like social, economic, and cultural rights, adequate remedies require fully financed programmatic interventions. The fact that these affirmative interventions are the only adequate remedies for long-term spirit injuries underscores the crucial role of economic, social, and cultural human rights in the struggle against subordination. A greater acceptance of and commitment to the realization of economic, social, and cultural rights would make Professor Wing's suggestions seem much less radical.

Professor Wing also encourages LatCrits to acknowledge and oppose the ways in which Latin cultural norms, expectations, and practices enable and enforce the continued subordination of Latinas, both in the United States and in Latin America. Using her analysis of the substantial disabilities, constraints, and second class status imposed on Palestinian and South African women by cultural norms and, in the former instance, by the precepts of Islamic religion, Wing draws important parallels to Latin culture, noting that the glorification of machismo and marianismo and the teachings of the Catholic Church enable analogous forms of discrimination against Latinas. \[*203\]

Professor Wing identifies numerous practical strategies LatCrits might use to combat these cultural norms and practices through international law. In making these suggestions, Wing is well aware that male elites have often resisted compliance with basic international human rights laws aimed at eliminating all forms of discrimination against women by declaring these sexist customs and traditions to be essential elements of their culture. Wing flatly rejects these claims and shows LatCrits how Critical Race Feminism provides the needed perspective from which the deployment of law against culture can be seen as part of a process of liberation. Cultural imperialism is most certainly a form of subordination LatCrits need to oppose, but the meaning and substance of a culture is neither static nor is it the exclusive jurisdiction of cultural elites. To the extent women resist the norms, practices, and expectations that oppress us, we are participants in the process through which cultures evolve and are entitled to have our claims to dignity, autonomy, and self-determination respected and enforced.

In the final panel presentation, I urged LatCrits to focus on and contribute to the evolution of various new rights regimes linking the enforcement of human rights to international economic law. \[*204\] I organize this analysis around four specific linkage regimes: (1) the rights regime established by federal statutes imposing labor rights conditionality on developing countries seeking preferential access to U.S. markets; (2) the multilateral labor rights regime established by the North American Agreement on Labor Cooperation (NAALC); (3) the linkage regime established by the U.S. embargo of Cuba, read as an effort to promote the right to democratic governance, and finally (4) proposals to link the enforcement of international human rights to the decisionmaking processes of the World Bank.

These linkage regimes are all relatively recent developments and reflect a variety of possible responses to the fundamental restructuring both global capitalism and the inter-state system are currently undergoing. In different ways, each linkage regime challenges and transcends the fragmentation of legal fields. Some are more likely than others to enable progressive developments in the struggle against subordination. Nevertheless, in either case, the rapid transformations currently underway in the international structure of production, investment, and trade have profound implications for LatCrit struggles against subordination both in the United States and in Latin America. Consequently, legal regimes linking the enforcement of human rights to the international regulatory frameworks that govern these processes are crucial sites for LatCrit critical analysis and political intervention.

At the same time, I urge LatCrits to approach this area super critically. Proposals to enforce human rights
through the institutions and procedures established by international economic law can be designed to achieve many different ends. None of these ends are uncontroversial, and not all Latinas/os are similarly situated in relation to the economic arrangements, political institutions, cultural formations, and interstate structures that would be transformed by different human rights linkage regimes. For this reason, the legal debates over different human rights linkages constitute a concrete field of analysis through which we can move beyond a simple reiteration of the now familiar insights of postmodern identity politics. While we all know that Latinas/os occupy multiple identity positions at the intersection of many different social relations of privilege and subordination, we now need to better understand the political consequences of our assuming any particular subject position. My presentation demonstrates that the legal debate over human rights linkages provides a rich and fruitful field for developing that political analysis and assessing its practical implications for our struggles against subordination.

After briefly describing the four linkage regimes, I examine the difficulties involved in identifying the critical perspective from which the LatCrit movement should begin to analyze and intervene in the debates over these different linkages. To do this, I organize my analysis around three distinct but interrelated discourses. I call these the discourses of development, dependency, and neoliberalism. By focusing on the different ways these three discourses represent the problem of Latina/o subordination, I am able to show the relations of privilege and oppression that would be reinforced and the different political alliances that would be enabled and suppressed by analyzing these linkages through the critical perspectives expressed in each of the three discourses. For example, development discourse attributes Latina/o subordination to the persistence of underdevelopment (or underachievement) and underdevelopment to our failure to assimilate Western capitalist cultural values, modes of production, and social relations. Dependency discourse, by contrast, links Latina/o subordination to the inequality of Latin American states within the interstate system, while neoliberalism links it to the restrictions imposed on free market competition through state interventions and protectionism, as well as private monopolies and discrimination in the markets. Because each discourse attributes Latina/o subordination to different causes, each prescribes different responses and encourages different forms of political alliance and confrontation.

This analysis contributes to LatCrit theory in a number of ways. First, it illustrates the ways in which postmodern understandings of political identity and the politics of discourse can help LatCris develop more comprehensive analyses of the legal structures through which relations of subordination are both challenged and reproduced. Any of these three discourses can be deployed either in support of or in opposition to any legal regime designed to link human rights enforcement to international economic law because each discourse simultaneously privileges and politicizes a different subject position.

Development discourse privileges subject positions most assimilated to First World cultural values and politicizes the unassimilated. Thus development discourse makes it possible to organize both support for and opposition to human rights linkages around issues related to the impact of international economic activity on pre-existing social relations of production, reproduction, and exchange. Dependency discourse privileges subject positions with control over the state apPtus and politicizes those without; thus it organizes the lines of political alliance and confrontation around issues related to the impact of international scrutiny on the sovereignty of the state; support and opposition to human rights linkages is, therefore, made to turn on one's position in relation to the state. Neoliberal discourse privileges those subject positions most favorably situated to exploit the opportunities offered by unregulated markets and politicizes those victimized by unregulated market competition; thus, it organizes support and opposition to human rights linkages around issues related to the [*206] impact of these linkages on the operation of the markets neoliberalism seeks to free.

These understandings, in turn, enable us to engage the legal struggle against subordination with greater awareness of the political implications of the subject positions we embrace. They clue us into the different ways in which our political identities are discursively constructed and politically manipulated and enable us to see the need for an antisubordination agenda which transcends the limited perspectives of all these various identity positions. These positions are, after all, only artifacts of the historically contingent structures of a world order we intend to transform.

This analysis also makes a second contribution. It is no accident that my intervention in the legal struggle for human rights specifically targets the way these rights have (and have not) been incorporated into the substantive and procedural frameworks of international economic law. Not only does this approach reflect my considered opinion that law facilitates the reproduction of subordination most insidiously through the fragmentation of legal fields, it also reflects my perhaps more controversial belief that the nation state will (and should) become a legal anachronism--a thing
of the past. While this fate will be most directly attributable to the economic and political strategies multinational corporations are deploying in their efforts to liberate international capitalism from state interventionism and regulation, the demise of the interstate system of sovereign nations is potentially a progressive development for the struggle against subordination. After all, this system has been a major factor in enabling the processes of uneven development both within and between states and, in many ways, fosters the practice of war. n30

The problem, of course, is that until recently the nation-state has been the only meaningful target for antisubordination movements, at least in the United States. Indeed, in this country, most advances in the struggle for racial, gender, and economic justice have been achieved through the power of the state. This is changing. As international legal regimes increasingly restrict and assume the regulatory power formally held by states, they are creating new sites for the struggle against subordination. Linking human rights enforcement to these regimes is a legal strategy LatCrits should pursue because it furthers our antisubordination agendas without requiring us to continue investing in a bankrupt system of nation-states.

IV. GROUP SOLIDARITY, ENVIRONMENTAL RIGHTS AND DEVELOPMENT WRONGS: LATCRIT PERSPECTIVES ON THIRD GENERATION HUMAN RIGHTS

The presentations of the third panel provide different perspectives on the way key debates surrounding the recognition of the third generation solidarity rights might be addressed through LatCrit theory and practice. Solidarity rights have been even more controversial than economic, social, and cultural human rights. Attacked as excessively general, unenforceable and likely to undermine respect for other human rights, solidarity rights have been defended, on the other hand, as derivatives of the mutual rights and obligations inherent in the interdependence that constitutes all social life and have been sourced to Article 28 of the Universal Declaration, which entitles everyone "to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized." n31

They include the right to equitable and sustainable development, the rights of self-determination movements, and the right to a healthy environment, to security, and to peace.

The three panel presentations provide very different perspectives on the way a greater familiarity with the substance, purpose and conceptual structure of these rights might inform the development of LatCrit theory and antisubordination practices. From some perspectives, these rights promise to increase the range of strategies and expand the collective solidarities through which this agenda might be more effectively realized; from other perspectives, their implications are more ambiguous. These differences reflect the different positions from which the presenters approach these issues: Professor Natsu Saito's points of reference are the legal struggles of social justice movements in the United States; Professor Ileana Porras's concern tends to emphasize the development claims of Third World states in international forums constituted to establish environmental standards, while Professor Raul Sanchez's perspective is directly informed by his experiences representing Mexican farmers devastated by development wrongs. Together their different perspectives and positions provide a rich and compelling contribution to the development of LatCrit theory and practice.

Professor Saito's presentation provides the first point of departure. n32 Saito encourages LatCrits to explore the many new legal and political possibilities that would be enabled by reconceptualizing our struggles against subordination through the discourse of international human rights, generally, and group solidarity rights, in particular. She shows us these possibilities by retelling the story of the civil rights movements in the United States—re-envisioning their history as a struggle for human rights. These movements were initially movements for first generation civil and political rights, yet the struggle for social and racial justice quickly exceeded the limited meters of civil and political rights. The struggle for economic justice—for the rights to housing, welfare, public education, and health care—that is, for second generation economic, social, and cultural human rights soon followed, costing many civil rights leaders their lives. Recognizing these various social struggles as related movements in a broader struggle for human rights is a first step toward conceptualizing new forms of solidarity that would enable racially subordinated groups to exercise effective political power across the divisions of class, ethnicity, and citizenship.

Using human rights discourse as a consciousness raising device is only one of Professor Saito's suggestions. This discourse also offers a variety of new approaches for LatCrits operating as legal advocates and theorists. The U.S. government has often asserted that the U.S. Constitution contains all the rights needed in this country and has responded to international criticism of its failure to secure second generation welfare rights by rejecting their status as human rights. But the idea that international human rights are unnecessary in the United States is simply an
expression [*209] of arrogant ignorance and a refusal to see the fundamental PIIIs Professor Saito notes between practices such as the ethnic cleansing in Rwanda and former Yugoslavia and the impact of welfare cutbacks and ordinances aimed at homeless people.

The United States is bound by international law, and the increasingly narrow interpretations of constitutional rights by a reactionary and activist Supreme Court make international law an even more important resource in the struggle for social justice within the United States. Greater familiarity with international human rights will provide lawyers with a broader perspective from which to challenge the limitations of U.S. rights regimes. LatCrits can contribute by invoking these rights in domestic litigation and international forums and by integrating them into our scholarship.

The most important site Professor Saito targets for careful critical legal analysis is the task of conceptualizing ways to promote the recognition and enforcement of group rights in American jurisprudence. American rights regimes are profoundly individualistic because American lawmakers tend to approach every social problem they want to address by articulating individual rights and remedies. Professor Saito provides a number of examples of the way this individual rights approach undermines the very interests it purports to vindicate. In one particularly compelling example, she recounts the impact of U.S. policies towards Native Americans. In the 1920s, the U.S. government attempted to divide up the Indian lands it held in trust by giving the divided parcels, along with U.S. citizenship, to individual Indians. This effort to translate the group interests of Native Americans into individual rights resulted in the loss of land, resources, communities, and access to culture and history.

The lesson Professor Saito urges us to draw from this example is that many fundamental human interests, both group interests and individual interests that arise from an individual's membership in a group, cannot be effectively protected by individual rights regimes. This lesson is there to be learned in many different areas of American law. In the 1960s and 1970s, the desegregation of longshoremen unions throughout the South was carried out over the strenuous opposition of black and Mexican unions and their members. Through an excessively individualistic interpretation of Title VII's antidiscrimination mandate, the union merger cases stripped minority communities of many of the advances they had been able [*210] to achieve through the exercise of collective rights established under the National Labor Relations Act. n33 The union mergers were necessary to preserve the illusion that Title VII protects individual antidiscrimination rights, but the price of this illusion was the power of self-determination. By illustrating the importance of group rights in the struggle for human rights, Professor Saito enables and encourages us to continue challenging the conceptual limitations of U.S. rights regimes and, in doing so, helps us reconceptualize the antisubordination agenda. Freedom from discrimination is not the same as self-determination and, for precisely this reason, it is not enough.

Professor Porras's intervention takes a more skeptical stance towards human rights discourse. n34 Focusing specifically on efforts to address environmental problems through the framework of international human rights, Porras asks whether LatCrit theory will embrace the rights critique articulated by the early Critical Legal Studies movement. This movement, like many social movements in Latin America, rejected the formalism of liberal rights. These rights were criticized for their tendency to obstruct the development of authentic community, to ignore social interests that are untranslatable into the language of rights, and to divert social actors from pursuing more transformative political strategies in favor, for example, of legal strategies like litigation. While Professor Saito's intervention suggests a number of ways in which the CLS critique of liberal rights might be integrated into a new narrative linking the civil rights movement to the struggle for human rights more broadly conceived, early Critical Race Theorists responded by aligning the struggle against racial discrimination to an affirmation of the negative rights regimes established by first generation civil and political rights.

In effect, Professor Porras's question asks how LatCrits, particularly those proposing to address environmental issues through a human rights framework, will position themselves in this debate. She herself expresses several doubts about the usefulness of international human rights discourse in addressing environmental problems. She notes that environmental problems are intergenerational. Solving them requires us to focus on and protect the interests [*211] of future generations, but human rights law prioritizes the present needs of individuals. When environmental values conflict with the satisfaction of basic human needs, the current human rights framework makes the satisfaction of human needs the fundamental priority—an anthropocentrism Professor Porras also rejects.

After sketching out some of her more immediate reservations, Professor Porras asks whether LatCrit theory can offer any more helpful insights on the issue of international environmental rights. She asserts that it can, focusing particularly on the way LatCrit insights
can help Latinas/os negotiate the different socio-cultural processes that position our interventions in the international field between two dilemmas. On the one hand, a LatCrit perspective can help Latinas/os respond more effectively to the imperatives of assimilation; it enables us to resist the pressures to construct a USLat identity by denying what she calls the OtroLat; and it urges us to remember the contingencies of geopolitical boundaries. After all, as Professor Porras reminds us, the only difference between us and them is our papers. On the other hand, whatever our sense of cross national solidarity, a LatCrit perspective compels us to confront and combat the invisibility of privilege--including our own. As Professor Porras reminds us, we are Americans. The OtroLats we encounter will view us as Americans, in large part, because whatever our intentions or inclinations, we will think and act from the positions of our First World privilege.

How should this analysis inform our approach to environmental problems? For Professor Porras, it suggests the need for a politics that values the diversity and fluidity of the present and the indeterminacy of the possible--"a politics of embrace and non-exclusiveness." This in turn translates into a critical stance towards efforts to address environmental problems through international standards or the harmonization of domestic environmental laws or both. In taking this stance, Professor Porras is not unaware that it represents a particular subject position aligned in defense of Third World sovereignty. On the contrary, she invokes her experience as a Costa Rican representative working with the G-77 developing countries during the United Nations Conference on Environment and Development. There she saw first hand how the debates over environmental protection were manipulated in order to maintain the First World's economic domination. From [*212] this position, Porras would affirm the legitimacy of Third World claims to permanent sovereignty over resources within their jurisdiction.

At the same time, Professor Porras rejects any facile prioritization of economic development objectives or Third World sovereignty over environmental values and the human rights of people these states purport to (but may not actually) represent. In this way, her argument illustrates the strategic positioning a LatCrit perspective enables, even as it suggests the limitations of positionality. We cannot move in all directions at the same time--though we can certainly imagine doing so. Moving from theory to practice means moving from positionality to positions, even as we use the insights of our theoretical perspectives to redesign the structure of positionality that constrain the positions we must take.

Professor Sanchez's intervention closes the panel presentations and the Colloquium proceedings. n35 It is a case study of the development wrongs perpetrated in the planning, construction, and management of a large infrastructure project located near the U.S.-Mexico border. By telling the story of the El Cuchillo Project, Professor Sanchez provides us with rich and detailed insights into the environmental and socio-economic harms created by unsustainable development projects; the governmental negligence, corruption, and political expediencies that produce them; the role and responsibilities of development banks in development disasters and the violations of domestic and international law that remain irremediable for lack of effective enforcement mechanisms.

Professor Sanchez's case study of the development wrongs produced by the El Cuchillo Project provides a graphic depiction of the way socio-economic subordination becomes a seamless web of violence constituted by innumerable and interrelated social and legal problems of daunting proportions. The development victims, whose story Sanchez tells, are enmeshed in a system that criminalizes their efforts to survive the socio-economic disruptions and environmental racism that threaten both their lives and their livelihoods, even as it allows government representatives to ignore and suppress the claims of right they assert.

[*213] Professor Sanchez's story of El Cuchillo also illustrates directly and concretely the pressing need for the legal recognition and enforcement of collective rights. Development projects produce collective harms and require collective remedies. At the very least, they require collective action. Nonelite individuals do not have the economic resources or the political power to intervene effectively in the political machinations through which these projects are planned, implemented, and managed. Thus they need the rights to act collectively (rights like the right to information, participation, and collective bargaining).

In addition, Professor Sanchez's description of the various groups dependent upon the water supplies affected by the project's dam--including human beings needing potable water, farmers needing water for irrigation, and local merchants living off recreational fishermen, boaters, and tourists--gives another reason to pause. Our own experience with class actions and structural injunctions in the United States should provide a concrete reminder that legal claims crafted around the assertion of individual rights do not provide an adequate framework for resolving the many competing and legitimate claims triggered by the impact of development projects. Resolving these competing interests requires the development of
forums for informed negotiation and fair compromise—forums whose effective operation presupposes a balance of power among the claimants, or at the very least, a set of ground rules that prohibits the compromise of any claimants’ fundamental interests. Legal scholarship aimed at articulating the procedural and institutional structures that could establish such forums at an international level is a project worthy of LatCrit attention.

V. CONCLUSION

The proceedings of this Colloquium span a broad range of substantive issues and analytical methodologies that arise from and bear upon two distinct but related projects in critical legal scholarship: the project of integrating international human rights into LatCrit struggles for social justice and the project of integrating LatCrit theoretical perspectives and our antisubordination agendas into the development of international law. The depth, breadth, and rich variety of the presentations evidence the many possibilities embedded in both projects. They are a credit to the movement and a promise of more to come.

FOOTNOTE-1:


n2 The Colloquium was organized in conjunction with the Law Professors Section of the Hispanic National Bar Association (HNBA) and cosponsored by the University of Miami School of Law and the Inter-American Law Review and presented in Miami during October of 1996. It was preceded by the first gathering of the HNBA Law Professors Section (cosponsored by the University of Puerto Rico and the University of Miami) in Puerto Rico during the Fall of 1995 and LatCrit I (cosponsored by CalWestern and the University of Miami School of Law) in La Jolla during the Spring of 1996. It is currently scheduled to be followed by LatCrit II (sponsored by St. Mary’s School of Law) in San Antonio during the Spring of 1997, and LatCrit III (sponsored by the University of Miami School of Law) during the Spring of 1998.

n3 Valdes, Latina/o Ethnicities, supra note 1, at 11-12 (noting that the publication of LatCrit conference proceedings serves "to build relationships among and between Latina/o legal scholars and journals; [and] in this way ... foster the work and success of both.”).

n4 The political fragmentation of the civil rights and labor movements in the United States provides a good example of the way the fragmentation of legal fields can obstruct the development of cross-national solidarity. See 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, 497-502 (1993). Both movements have been severely weakened by their failure to develop a cooperative political agenda. This failure is, in part, attributable to the race-based essentialism of civil rights leaders and the class-based essentialism of the labor movement, in other words, to their exclusionary visions of community. However, the failure to develop effective intermovement alliances is also attributable to structural constraints established and enforced through the interpretative fragmentation of Title VII and the NLRA. The fragmentation of national labor policy across these two statutory regimes (and the subordination of Title VII’s antidiscrimination mandate to the imperatives of an antidemocratic industrial relations policy) has suppressed the development of institutional arrangements that might have fostered the evolution of intermovement alliances and the consolidation of new collective political identities that could help us supersede the race and class essentialism that has undermined these movements.

This is all to say that the fragmentation of legal fields (like the fragmentation of domestic and international law) is an
interpretative strategy that has a direct impact on the kinds of alliances and collective action we are likely to imagine or able to pursue because it has a constitutive impact on the institutional arrangements we inhabit. The fragmentation of legal fields is, however, a strategy that operates at a jurisprudential level, thus making critical legal theory a crucial element in any struggle for social change. For a further discussion of these issues, see generally id.


n6 The "three generations" terminology reflects an effort to distinguish and categorize the thirty human rights principles listed in the Universal Declaration of Human Rights. See generally THOMAS G. WEISS ET AL., THE UNITED NATIONS AND CHANGING WORLD POLITICS 115-18 (1994). In this terminology, civil and political rights (for example, the freedom of speech, association, and religion) are referred to as "first generation rights" because these were the only rights included in the national constitutions of the industrial states. They are called negative rights because they aim to protect individual freedom by limiting state power. "Second generation rights" refer to socioeconomic rights (for example, the rights to food and shelter). These rights are associated with the rise of the welfare state. They are called positive rights because they aim to promote freedom by imposing upon the state the obligation to ensure a minimum standard of living, commensurate with the state's level of development. "Third generation rights" refer to the rights to peace, development, and a healthy environment. These rights are called solidarity rights because they "pertain to collections of persons rather than to individuals." Id. at 116.


n8 Id. at 225.

n9 As further evidence of interdependence, and more importantly, as evidence that this interdependence is simultaneously acknowledged even as it is strategically suppressed, Hernandez-Truyol points to the coexistence of these rights in international instruments such as the Children's Convention and the Women's Convention.

n10 "An underlying assumption of natural law is that there is a common human nature that presupposes the equality of all human beings." See Hernandez-Truyol, supra note 7, at 228 n.21.


n14 As Professor Johnson notes:The "illegal alien" label ... suffers from inaccuracies and inadequacies at several levels. Many nuances of immigration law make it extremely difficult to distinguish between an "illegal" and a "legal" alien. For example, a person living without documents in this country for a number of years may be eligible for relief from deportation and to become a lawful permanent resident. He or she may have children who citizens, as well as a job and community ties here. It is difficult to contend that this person is an "illegal alien" indistinguishable from a person who entered without inspection yesterday.Id. at 277.

n15 Id. at 268.

n17 "My point in this discussion is not that all distinctions between different types of "aliens" and between "aliens" and citizens should be discarded." Johnson, supra note 13, at 278.

n18 Trucios-Haynes, supra note 16, at 295.

n19 See Iglesias, supra note 4 (deconstructing the manipulation of the individual/collective rights dichotomy by foregrounding the way this dichotomy has suppressed the transformative agency of women of color, whose collective political identity supersedes the various group identities into which we are subsumed).


n21 For purposes of NAFTA, Chapter Eleven, "foreign investors" are investors of one of the three state parties to the NAFTA, who invest in the territory of one of the other two state parties. Chapter Eleven governs the treatment accorded by one state party to the investors of another state party operating within its territory. Thus, American investors are "foreign investors" protected by the provisions of Chapter Eleven, vis-a-vis their investments in Canada or Mexico, but not in the United States. Similarly, Mexican investors are "foreign investors" in the United States and Canada, but not in Mexico. Investors of states that are not party to the NAFTA are not protected by Chapter Eleven's substantive rights or remedial procedures.

It should also be noted that the term "foreign investors" refers broadly to persons involved in the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." Thus, it applies broadly to companies doing business in the territory of another party.

n22 Alvarez, supra note 20, at 308 n.24 (citing Universal Declaration, Articles 2, 3, 6, 7, 8, 10, 13, 15, 17, and 27(2)).


n24 This is not to say that either Professor Carrasco's historical account or the lessons he draws are entirely uncontestable. While it is certainly true that Latin American welfare states have been unable to redistribute in an equitable and sustainable manner the wealth produced by import substitution policies, it does not follow that LatCrits should accept the structural adjustment policies and free trade agenda advocated by neoliberalists. A very different development trajectory would begin with the reconfiguration of Fordist production relations in the import-substituting industries and a recognition that the welfare state cannot narrow the gap between rich and poor without the power to impose real redistribution on economic elites, a power few Latin American states have ever commanded. Without that power, any redistributive policies will come inevitably at the expense of macroeconomic health because they will be financed through inflationary spending rather than through real redistribution. See generally Tamara Lothian, The Democratized Market Economy in Latin America (and elsewhere): An Exercise in Institutional Thinking Within Law and Political Economy, 28 CORNELL INT'L L.J. 169 (1995). Nevertheless, Professor Carrasco's call for radically rigorous monitoring is hardly objectionable.


n26 See Iglesias, supra note 4, at 400 (arguing that "women of color constitute a distinct political subject and represent a meaningful perspective from which existing legal regimes may be examined and judged."). See also 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) [hereinafter Iglesias, Rape, Race and Representation] (analyzing the way racialized images of women's sexual desire
and feminine identity, both as mothers and as sexual beings, as well as women's economic vulnerability, reproduce the logics of white supremacy and male supremacy through the processing of rape cases, the regulation of welfare eligibility, and the resolution of child custody disputes).

n27 Wing, supra note 25, at 345.

n28 For an extensive analysis of the way Latin cultural norms and practices, in complicated ways, both undermine and enable the expression of female autonomy, see Iglesias, Rape, Race and Representation, supra note 26.


n30 See generally CHRISTOPHER CHASE-DUNN, GLOBAL FORMATION: STRUCTURES OF THE WORLD ECONOMY, 107-50 (1989). See also 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) (offering a brilliant analysis which reveals the irrationality of international legal doctrines designed to uphold the concept of sovereignty by ignoring claims of liberation movements within the nation-state until they "earn" such recognition through successful military actions--thus fostering civil war).

n31 See Sanchez, infra note 35.


n33 See Iglesias, supra note 4.

KEYNOTE ADDRESS: CLAIMING A GLOBAL IDENTITY: LATINO/A CRITICAL SCHOLARSHIP AND INTERNATIONAL HUMAN RIGHTS

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SUMMARY: ... Today, I would like to offer suggestions for the formulation of a dual strategy to be pursued at both the international and domestic levels. On the one hand, the international human rights field offers an ideal scenario for the exploration of a human rights discourse, which, in gaining a global perspective, re-energizes and transforms the U.S. civil rights agenda. As the dismantling of the civil rights agenda gets underway, a revitalized human rights agenda gains strength and empowers grassroots movements. On the other hand, as members of communities which constitute the South within the North, our positions must be incorporated in the critique of an international human rights framework that falls short in delivering the promised goods to subordinated groups.

Take the domestic front where the need to pass from a civil rights agenda to its human rights counterpart has reached emergency proportions. A post-Cold War globalization impulse, which erodes traditional notions of nationhood, sovereignty, and borders, sets the stage for passing. To stay in the niche of a civil rights agenda that has delivered crippled results to our communities amounts to not rising to the occasion and eludes undertaking the necessary inventories which precede a globally informed human rights advocacy.

In passing from civil rights to human rights, we incorporate a broader array of perspectives to our critiques of the formal/liberal dimension of political citizenship. Notions of equality--whose resilience to sameness and assimilation constitute hostile soil to differences--must be explored from the redefined location of the interrelatedness of the civil, political, socio-economic, and cultural spheres. It is in light of such an integrated approach that a redefinition of marginalization and political citizenship can better weave the fabric of a human rights agenda, which reverses the disappeared status of our communities. A redefined human rights agenda is better equipped to challenge the systematic assault against the more recent and darker waves of immigrants, waged within the framework of sanitized versions of political citizenship which devalue identity politics.

Alongside an expanded concept of political citizenship lies the recognition of broader notions of national origin, which adequately capture its cultural and racial dimensions, or the recognition of the realities of transnational diasporic identities. The legal treatment of ethnicity, cultural difference, and national origin, based on colonizing sociological/anthropological renditions of immigration, can profit from an interdisciplinary critique which redefines such conceptual frameworks. The generations framework, a descriptive mechanism accounting for the development of international human rights legislation and implementation, traces expansive maps which can guide a critique of domestic acontextual legal interpretations entrenching our social marginality. The critique of diverse identities, in particular of ethnicity, race, and gender, must follow the footsteps of capital and go global.

Latino/a Critical scholars and activists have a unique opportunity to crack the provincial shell that shelters critical legal scholarship in this country. Today, I would like to offer suggestions for the formulation of a dual strategy to be pursued at both the international and domestic levels. On the one hand, the international human rights field offers an ideal scenario

[*215] Latino/a Critical scholars and activists have a unique opportunity to crack the provincial shell that shelters critical legal scholarship in this country. Today, I would like to offer suggestions for the formulation of a dual strategy to be pursued at both the international and domestic levels. On the one hand, the international human rights field offers an ideal scenario
interdisciplinary critique which redefines such conceptual frameworks. To talk about national origin discrimination without addressing the importance of its cultural dimension, such as language, amounts to advancing shallow notions of discrimination that fail to link cultural and economic marginalization. Another instance of a parochial vision.

Let us examine some examples. Enter the concept of equality. In both the Convention on the Elimination of Discrimination Against Women and in the Race Convention (ratified by the United States), equality is approached from a broader perspective than the one that U.S. courts are willing to accept. At the international level, the formal equality embedded in the concept of equality of opportunity, gives way to de facto equality or equality of outcome.

[*217] The generations framework, a descriptive mechanism accounting for the development of international human rights legislation and implementation, traces expansive maps which can guide a critique of domestic acontextual legal interpretations entrenching our social marginality. Coupled with an active and strong nongovernmental organization (NGO) movement advocating the interpretation of conventions as living documents, revised notions of state responsibility have emerged.

In the context of violence against women, the International Covenant on Civil and Political Rights is an illustration of a broad construction, which includes human rights violations perpetrated by private actors. The erosion of the nation-state, coupled with the realities of women who suffer violence at the hands of both private and public actors, has exposed the need to incorporate the structural relationship of power, domination, and privilege in the construction of state responsibility. In a similar vein, the Women's Convention Committee reacted to women's lobbying and, in a General Declaration, explicitly characterized violence against women as a form of gender discrimination.

The second generation of economic, social, and cultural rights is another illustration of a scheme of rights and interpretations that ventures into the waters of distributive justice and which acknowledges the interdependence of civil/political and economic/social/cultural rights. The latter are particularly important in our efforts to redefine political citizenship along the lines of identity politics and revised social contracts which incorporate the connections between cultural disrespect and social/political marginality.

The so-called third generation of human rights travels the roads of communitarian values, privileging the welfare of groups and elaborating notions of the human rights subject which transcend the individual. The evolution of these rights also offer significant frameworks for our critiques of individualistic legal Pidgins, which fail to acknowledge group identity as a source of rights. Discussions about the contours of the right to development and self-determination should be incorporated domestically in the formulation of critiques, which address equal protection concerns and relate to the multiple faces of discrimination.

The reluctance to deal with a global understanding of the movement of labor and its relationship to structural adjustment [*218] policies renders an analysis of economic divestment and affirmative action in this country severely confined. A human rights perspective, which engages the extraterritorial potential of Title VII and transcends the privileging of a U.S. based racial perspective, can offer a more nuanced discussion of the legal and political strategies to be pursued in the affirmative action context. Likewise, the emergence of a "knowledge sector" and the class gaps, brought about by a high-tech global economy, must be at the forefront of our critiques of labor laws and policies. It is within our communities where the bulk of displacement, generated by an information elite that manages such economy, will be felt.

Theoretical and doctrinal reconceptualizations only constitute a piece in developing a stronger domestic human rights agenda. The expansion of implementation and enforcement strategies is equally significant in the domestic human rights approach. We can expand the range of accountability. The existence of treaty-based bodies, which allow for the presentation of state reports and international and regional complaint mechanisms as well as the potential litigation around violations of customary norms of international law, broadens the range of necessary dialogues. Regional and international mechanisms such as the Inter-American Commission of Human Rights as well as treaty bodies which deal with race discrimination issues, offer opportunities for filing complaints that take human rights violations committed in the United States to international levels. The Optional Protocols of the Covenants on Civil/Political Rights and on Race Discrimination provide a forum for filing complaints or narratives upon which significant case law can emerge. There are current efforts advocating for the existence of similar protocols for the Women's Convention and for the Covenant on Economic, Social, and Cultural Rights.

We cannot forget the classroom. The incorporation of an international human rights perspective can erode a compartmentalized domestic and international legal pedagogy. Workers' rights and employment issues in
the face of global markets must be discussed in light of their human rights dimension. To teach labor law without acknowledging the limitations of a U.S. based advocacy framework is to blind our students to the realities facing workers in the twenty-first century. Self-determination issues, which transcend traditional territorial definitions such as those which arise among minority groups, are not the exclusive province of the former Yugoslavia. Students must often learn how to suspend disbelief when revised self-determination frameworks are used as a backdrop for the discussion of issues of discrimination in the United States.

In the few instances that U.S.-based NGOs have documented human rights violations, the use of an international lens to address domestic issues has proven to be quite successful in capturing the attention of policymakers. Informed by a human rights perspective, the Human Rights Watch report on sexual offenses against women in U.S. prisons captured the congressional attention that previous domestic reports on this politically marginalized issue did not.

A transnational approach to our scholarship and activism can inform the dual roads of vision and reform. Our critiques of the racialization maneuvers existing in a society informed by white supremacist values must have both visionary and reformist ingredients. The critique of diverse identities, in particular of ethnicity, race, and gender, must follow the footsteps of capital and go global. A narrow focus on federal-state based legal protections, which dwell on national boundaries, must be transcended in order to better address the current moves and flows of people, the phenomenon of diaspora.

On the international front, our insertion in the international debate plays horizontal and vertical roles. Horizontally, our presence serves to forge the political alliances that move international human rights law in the direction of serving the needs of oppressed people. Vertically, we refine the advocacy and lobbying skills necessary to formulate the critiques of exclusionary constructions and practices in international human rights law.

In an arena which requires constant flow of information and the development of sophisticated advocacy and lobbying skills, it is imperative to build networks that work to solve problems and to challenge human rights interpretations privileging the views of the developed world. We must insert ourselves in a global network of nongovernmental organizations that deal with similar and equivalent issues confronting our communities. At economic and social levels, the plight of underdeveloped countries resemble those facing our communities in the inner cities. The problems facing minority communities in developed countries of Europe reveal the entrenched colonized and racist practices with which we are familiar.

At the 1995 Beijing World Conference, I had the opportunity to work in putting together a delegation of U.S. Latina civil rights advocates. In fact, it was the first time that U.S. Latinas had an official presence in an international gathering of this nature. The significance of our international presence was immediately felt. We had the opportunity to join ranks with other women of color from the United States, who, as a group, were initiating themselves in those settings. We managed to lobby and to advocate the U.S. governmental delegation to the conference, which allowed us to have a voice in critiquing the U.S. position, as well as those other potentially supportive delegations. We held meetings and caucuses, where we discussed our reactions to the proposed Beijing Platform for Action. All these efforts, instances of the vertical approach, allowed us to lobby for the concrete ramifications of the intersection of ethnicity, race, and gender analysis. Horizontally, we also gained an invaluable experience, since we reached out to networks of Latin American women, women who are minorities and immigrants in Europe, and Third-World women in general. The connections with Latin American women began important dialogues in advancing mutual understandings of our realities in the here and there.

Vertically, our presence can further elaborate the concept of "minorities" and "minoritization processes," a conceptual springboard for the elaboration of equality and antisubordination protections such as the right to development. Our realities can serve to demonstrate the need to liberate the right to self-determination from its rigid ties with traditional notions of statehood, particularly when the latter--in a systematic fashion--can be actively pursuing or perpetuating (or both) gender, racial, ethnic, and cultural subordination. In challenging the problem of the often homogenous portrayal of the "North," our presence voices the need for a more nuanced institutional approach to data collection. It is extremely important that international institutions and NGOs begin to properly document the realities of our communities in this country and the ways our legal system addresses them.

Our presence breaks current patterns that make non-representative U.S.-based NGOs the sole international spokes-persons of this country's realities, thus reinforcing our invisibility. Likewise, our presence challenges the control of Northern coalitions of NGOs that, in advancing progressive agendas, reenact the Orientalist script which Edward Said so
aptly captured. Such NGOs, if the missionary approach is to be avoided, must further refine the necessary self-restraint skills.

The South within the North must enter the international dialogue. The South within the North must, at the domestic level, play a central role in moving the agenda from civil rights to human rights. Although daunting, we cannot forget, as Terry Eagleton notes, that we are "spontaneous semioticians," the "natural hermeneuticians, skilled by hard schooling in the necessity of interpreting [the] oppressors' language."

An edge that should inspire our moving forward.
COLLOQUIUM PROCEEDINGS: PANEL ONE: INTERNATIONAL LAW, HUMAN RIGHTS, AND LATCRIT THEORY: CIVIL AND POLITICAL RIGHTS--AN INTRODUCTION

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* Professor of Law, St. John's University School of Law. Many thanks to the University of Miami Law School for its kindness and generosity in hosting this Second Annual Law Professors' Colloquium being held in conjunction with the Hispanic National Bar Association's Annual Meeting. Special thanks to Frank Valdes for his indefatigable work and amazing organizational concentration and skill; Lisa Iglesias who, together with Frank, organized this wonderful Colloquium; and to University of Miami School of Law Dean Sam Thompson without whose support this type of event could not take place.

SUMMARY: ... This short essay is adapted from introductory comments delivered at the Second Annual Law Professors' Colloquium, held in Miami, Florida in conjunction with the Hispanic National Bar Association's Annual Meeting. ... LatCrit and international human rights norms are indispensable to the articulation of a cohesive, holistic paradigm that effectively can develop, expand and transform the content and meaning of a rights construct.

[*223] I. INTRODUCTION

This short essay is adapted from introductory comments delivered at the Second Annual Law Professors' Colloquium, held [*224] in Miami, Florida in conjunction with the Hispanic Bar Association's Annual Meeting. The Colloquium, "International Law, Human Rights, and LatCrit theory," focused on understanding how, why, and with what theoretical, political, and practical implications, the critical concerns of the LatCrit movement intersect with key issues of international law and human rights.

To explore the relevance of human rights to LatCrit theory, this Colloquium is conveniently organized into three panels representing the three so-called generations of rights: civil and political rights (the first generation); social, economic, and cultural rights (the second generation); and solidarity or collective rights (the third generation). However, at best, it is naive to claim that clear distinctions as to the character and nature of rights exist so as to permit inflexible, clearly delineated, generational classifications. Rather, as human rights instruments recognize, all human rights are indivisible and interdependent --notions invaluable to the LatCrit discourse which were recently reiterated in the Vienna Declaration, the consensus document that emerged from the 1993 United Nations World Conference on Human Rights held in Vienna, Austria. The Vienna Declaration plainly states that "all human rights are universal, indivisible and interdependent and interrelated." n2

To be sure, the rights of free expression, free association, and free exercise--quintessential examples of the civil and political rights of the first generation--are at best meaningless without the health, education, and social security rights--all of the second generation. Similarly, these health, education, and social security rights are illusory without the peace or environment to facilitate them. Moreover, trade union rights and property rights can be viewed as either (or both) civil and political or social and economic rights.

[*225] Attesting to the indivisibility and interdependence construct, the European system n3 considers the right to education and cultural rights as part of the civil and political rights construct, but interestingly, they do not appear in the International Covenant on Civil and Political Rights (ICCPR). n4 Rather, they appear in the International Covenant on Economic, Social, and Cultural Rights (Economic Covenant). n5 Moreover, there are myriad significant documents in which the first, second, and third generation rights coexist, such as in the Children's Convention, n6 the Women's Convention, n7 the Convention on the Elimination of All Forms of Racial Discrimination, n8 and the African Charter. n9 Thus, a human rights construct makes sense only with a holistic reading of rights that truly allows the enjoyment of the aspirational dignity that attaches to our status as human.

Nonetheless, in order to organize presentations, this Colloquium uses the generational structure while
concurrently debunking it. Every panel will, in some fashion, address all the "generations" of rights. For example, take immigration status—a much maligned status in the hallowed halls of Congress in the recent past. An appropriate question to ask, one of great importance and relevance to the LatCrit Pdigm, is whether, in light of international human rights norms, the United States as a sovereign [*226] enjoys the sovereign right to deny health, education, and welfare services/benefits to persons based upon their immigration status? And what insights can LatCrit offer in light of such dilemmas?

This brief introduction to the first panel, which will focus on civil and political rights, has three aims. First, it will introduce the theme of this panel and present some preliminary considerations concerning the so-called first generation of international human rights law. Second, this article will articulate the three questions the panelists were asked to keep in mind in the course of the prePtion of their remarks. Finally, this preface will introduce the panelists, preview the rights that they will each address, and suggest some themes that show the inter-connections between and inter-relatedness of the concerns of international human rights law and LatCrit theory.

II. THE FRAMEWORK: INTERNATIONAL HUMAN RIGHTS LAW

International human rights are those rights vital to an individual's existence; they are fundamental, inviolable, interdependent, indivisible, and inalienable rights. Simply put, they are predicates to life as human beings. [*227] Human rights are moral, social, religious, and political rights that concern respect and dignity associated with personhood and a human being's identity. n11

The origins of the concept of human rights, a relatively recent, modern concept, are based in religion, "natural law, [and] contemporary moral values." [*228] The foundation for human rights is the individual's status qua individual within the international community and the dignity and justice owed to persons based upon that status. n13

 [*227] Justice and human dignity are concepts central to any conception of the rights of individuals. For example, the notion of social justice is inherent in the nondiscrimination norms. Similarly, human dignity elevates human rights to a universal level of inviolability in the public and private spheres. Consequently, there can be no challenge to the universal acceptance that, for example, genocide, race discrimination, and terrorism are wrong and universally condemned, n14 regardless of whether the actors are states or private persons and regardless of the victims' nationality.

In the beginning, individual human rights were not part of the international law Pdigm. Rather, the concern of international affairs was left exclusively to the state. Such notions notwithstanding, early writers recognized the importance of individuals to the Law of Nations because individuals are "the personal basis of every State" and, consequently, international law must "provide certain rules regarding individuals." [*229] Individuals, however, were deemed to be objects, and not subjects, of the Law of Nations. n16

A. Historical Background of the Development of Civil and Political Rights

History traces the development of rules to deal with relationships between or among different peoples to the end of the Roman Empire at which time the emergence of independent and separate states required the development of rules that guided sovereigns' interactions with one another. [*230] Thereafter, increased [*231] trade, improvements in navigation, and the discovery of new lands accelerated the development of the new law of nations. [*232] The diversity of peoples and ideologies also required orderly processes for state-to-state communications and interchanges. n19

The emergence of human rights law is traced to "premodern natural law doctrines of Greek Stoicism." n20 Although later conceptions of natural law included theories of natural rights, early views emphasized duties of "man." n21 Natural law philosophy also had religious foundations which posited that all human laws derive from, and are subordinate to, the law of God. [*233] Instrinsically [*234] contradictory to any notion of human rights was the recognition of the legitimacy of slavery and serfdom—concepts anathema to the notion of human rights, liberty, freedom, equality, and dignity that are at the heart of human rights as viewed today. n23

From the early days, the view of these rights of "man" as inalienable was reflected in the language in which they were couched. For example, Locke argued that "certain rights self-evidently pertain to individuals as human beings ... that chief among them are the rights to life, liberty (freedom from arbitrary rule), and property" and that individuals in civil society only ceded to states the right to enforce these natural rights, not the rights themselves. If the state does not safeguard the rights, it will give "rise to a right to responsible, popular revolution." [*235]

The shift from natural law to positivism signified that the focus of states' conduct would be on what states did in practice rather than what occurred based upon forces
existing in nature. n26 The value of the positivists' contributions to the development of human rights law lies in their recognition of the importance of organizing rules by established processes of the states. Its weakness, however, lies in the fact that the values promoted as human rights become wholly dependent upon the perspective of the governing elite. n27 Thus, under a positivist model, human dignity is what a state makes it.

The reality is that the evolution of rights recognized both positive and natural law. Certainly, there was acceptance of a state's sovereignty over its own subjects; however, the suprasovereign nature of the inviolability of a human being was also recognized. n30 As one writer plainly stated, "[i]f a tyrant practices atrocities towards his subjects, which no just man can approve, the right of human social connection is not cut off in such case." n28

The contemporary conceptualization of human rights, such as the rights to life, liberty, and equality, remained unarticulated until the last decades of the eighteenth century when they emerged contemporaneously with the institutionalization of democratic forms of government. n29 This was a time when political and social uprisings sought to identify and particularize those impermissible governmental intrusions into individuals' rights. Such movement is symbolized and embodied in the American Declaration of Independence n30 and the French Declaration of Les Droits de l'Homme. n31 These rights, however, emerged at a time when all women and all slaves were mere chattel--conditions anathema to the very rights being articulated, developed, and embraced.

Early examples of express protection of individuals, predating even the democratic movements, include the seventeenth century negotiations by Catholic princes to ensure appropriate treatment of Catholics by Protestant princes and vice versa. n32 These agreements were precursors of the late nineteenth and early twentieth century treaties concluded by states which protected the rights of certain classes, mostly minority groups (i.e., persons of a different race, religion, or language from the majority group) within a state n33 and which abolished slavery. n34 These n32 early manifestations of the importance of protecting minority groups even within a sovereign provide historical momentum, utility, and support to a LatCrit proposal that rights of Latinas/os in this country, citizens, and noncitizens alike, merit and warrant protection from state intrusion.

Those treaty obligations notwithstanding, in the early development of human rights law, states mainly observed their commitments in the breach. States considered such provisions as intrusions into their national sovereignty n35 --the same arguments presently echoed in the current nativistic legislative and congressional trends to curtail non-citizens' access to basic services such as health, education, social security, and welfare. But even then, in light of breaches of minority treaty provisions and prevailing statist principles, an early writer listed the following "rights of mankind" as guaranteed to all individuals in their state of nationality as well as by foreign sovereigns pursuant to the Law of Nations: "right of existence, the right to protection of honour, life, health, liberty, and property, the right of practising any religion one likes, the right of emigration and the like." n36

The truly revolutionary events in human rights development followed the Second World War after which emerged the unique acceptance of individuals in se, and not only states (even if on behalf of, or having an impact on, individuals), as primary actors in the global sphere, rendering individuals both objects and subjects of law and its enforcement. n37 As a noted scholar has reported: [n233] Before the Second World War, scholars and diplomats assumed that international law allowed each equal sovereign an equal right to be monstrous to his subjects. Summary execution, torture, conviction without due process (or any process, for that matter) were legally significant events only if the victim of such official eccentricities were the citizen of another state. In that case, international law treated him as the bearer not of personal rights but of rights belonging to his government, and ultimately to the state for which it temporarily spoke. n38

This modern view of human rights, placing the individual at the center, emerged in 1945 in the wake of the Nuremberg and Tokyo trials and the vivid awareness of the Nazi human rights atrocities. n39 Nuremberg clearly established that rules of international law applied to individuals. In a now famous and oftquoted phrase, the Tribunal provided that "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." n40

With the signing of the United Nations Charter in 1945, international law structurally protected individuals qua individuals against all forms of injustice regardless of whether the abuse or injustice was committed by a foreign sovereign or the individuals' own state of nationality. n41 As such, these rights are permanent and universal and are ingrained as a purpose of the United Nations Charter to "promote and encourage respect for human rights and for fundamental freedoms for all without n234 distinction as to race, sex, language or religions ... ".


On December 16, 1966, the General Assembly adopted the Universal Declaration of Human Rights (Universal Declaration). This document that articulates the civil and political rights of individuals. For example, the ICCPR's prohibition against the suspension of certain rights by the state, even in the event of public emergencies that threaten the life of the nation, reflects the notion of the inalienability of rights. Such rights include 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.

Civil and political rights comprise the so-called first generation. Ironically, and aptly, called "the rights of Man," these rights were in their apogee starting in the eighteenth century when, among others, women had no rights. These rights are traced to the "bourgeois" revolutions, particularly the French and American Revolutions in the last quarter of the eighteenth century that gave rise to the Declarations which are viewed as the foundation of this group of rights.

Civil and political rights originally were conceived as negative rights, which meant freedom from governmental interference in the various realms. Rights that fall into this negative construct include the freedom of opinion, conscience, religion, expression, the press, assembly, movement, from arbitrary detention or arrest, interference with correspondence, and the right to property. However, such a conception of negative rights is exceedingly and misleadingly limiting as civil and political rights also include some rights that can be categorized as positive because they require some action by the state, such as the right to participate in free elections and the right to a fair trial. The nondiscrimination provision in the ICCPR, the UN Charter, and the Universal Declarations—prohibiting discrimination on the basis of race, gender, language, religion, culture, family, ethnicity, national origin, and social origin—make clear that all persons enjoy these rights.

Notwithstanding the universality of civil and political rights, the development of these rights has been nationalized, politicized, and gendered. The notion of human rights that emerged, rather than being universal, was normative; the norm was the white, Anglo, Western, European, Judeo-Christian, educated, propertied, heterosexual, able-bodied male. The Western domination in the development and articulation of law has resulted in challenges to its validity, authenticity, and universality with the conception of universality frequently meeting with
resistance from representatives of different cultures and ideologies. n51 Civil and political rights are meaningless to a population that cannot exercise them. Rights of this first generation have been criticized as being "meant for the majority of the working class and peoples of conquered lands, the right to be exploited and colonized. They were regarded as 'formal' freedoms that neglected the material realities of social conditions." n52

Today, world events following the fall of the Berlin Wall, the break-up of the Soviet Union, the virtual end of communism, and the destabilizing global consequences of these occurrences, including regional strife, ethnic and religious wars, genocide and ethnic cleansing, and a turn towards nativism, nationalism, and isolationism in politics, governance, and trade, indicate that global society is in a second revolutionary stage, even from a traditionalist human rights perspective. This last decade of the twentieth century thus becomes but a beginning of a new era for human rights law. In such a context, this Colloquium can and will articulate the great expectations for years to follow--a vision of a great future for all persons in the world; where women and men of all races, religions, ethnicities, sexualities, abilities, classes, colors, and cultures can elect and be elected representatives of society; where cultures and people are protected, valued, [*238] and heard; where poverty, malnutrition, and premature deaths are eliminated; where not only boys, but also girls are healthy, well-fed, cared-for, valued, and educated; and where Latinas/os (and all "others") form an integral part of the social construct and are significant participants in any existing social contract.

III. THE QUESTIONS: CIVIL AND POLITICAL RIGHTS

The Civil and Political Rights panel will explore whether latcrit theory can further the theoretical and practical work of promoting civil and political rights in both the domestic and international arenas, particularly in light of the United States Supreme Court's recent constitutional jurisprudence effecting a dramatic contraction of certain individual rights in this country. The following questions were offered to the speakers to present a framework within which to explore this theme.1. Does a latcrit theoretical perspective on identity politics, the multiplicity and intersectionality of Latina/o identities and cultural values as well as the convergences and divergences in our histories and discourses of assimilation, independence and revolution offer new perspectives on the traditional themes and concerns that have organized the legal and political struggle to promote the recognition and enforcement of human rights, broadly conceived?

Significant themes raised by this inquiry include the theoretical and historic origins of the particular generation, here the first generation, of human rights. LatCrit can be instrumental in suggesting and proposing ways to conceptualize differences and commonalties in designing an agenda to promote the recognition and enforcement of human rights in domestic and international fora. For example, international human rights instruments expressly recognize the indivisibility, interdependence, and inviolability of rights. This Pdigm is well-suited to LatCrit analysis as it supports the multidimensional nature of Latinas/os' identities. Thus, international human rights norms' protection against discrimination on the basis of race, sex, color, culture, and language serves Latinas/os well because their identities are the combination of many of the protected characteristics, [*239] not the fragmentation of them as U.S. law would have it. n532. Does LatCrit theory offer new perspectives on the recent trend toward regional economic integration and the likely impact of such developments on the human rights of Latinas/os within the United States, at the borders, and within the Latin American states considering regional integration?

This query insinuates that international human rights law provides a fulcrum from which to take a global perspective that encourages diversity of analysis rather than a parochial and nationalistic perspective that eschews others and insists on a preordained hierarchical normativity. What would happen, for example, if one were to focus on the border crossing issues from a Mexican worker's perspective instead of taking an irate Estado Unidense outlook? Rather than hear the cacophonous sounds of nativistic voices from this side of the border, which attempt to convince others that the so-called "illegal aliens" are stealing American jobs (jobs which in reality involve performing tasks no "American" worker wants to carry out), one might simply hear the voices of concerned mothers and fathers whose family values render them willing to risk their lives for the sake of making a living at a job that will enable them to feed, clothe, and educate their children--a task not possible in their country and a risk easily understood when one compares the U.S. $ 4.00 per day wages earned in their countries working for U.S. companies to the U.S. $ 4.00 per hour wages earned by simply crossing the border.3. Does LatCrit theory have anything to say about the key debates over (a) the status of national sovereignty in international [*240] law, (b) the proper scope and limits of state intervention in civil society, and (c) the status of international human rights in regional agreements such as free trade agreements or procedural norms for the enforcement of international human rights?
LatCrit, and in particular the Latinas/os and Asian-American colleagues and coworkers, as well as other hyphenated "Americans," may have an especially valuable contribution to make because of our conflated North/South and East/West identities. To us, with our trans/international roots, origins, and families, and our multilingualism, national sovereignty takes a different form. We can all ask which part of a national identity or which of our nations a particular concern/policy triggers, since our claim to citizenship is not homo-national. With such multiplicity claims, again the indivisibility and interdependence Pdigm of international human rights norms is both constructive and instructive. For one, national origin and its indicia such as language are expressly protected classifications in the international sphere. For another, the very notion of sovereignty and citizenship gets confused when in border raids in the United States, both Mexican nationals and U.S. nationals of Mexican ancestry get rounded up and herded out--simply because of their physical traits--regardless of nationhood. n54

In addition, the notion of the individual in the global text is a concept broader than citizenship with protections of individuals based on their personhood, not their citizenship. Significantly, all states, not just the state of nationality, owe all peoples, not just their citizens, these international protections. Finally, the lesson from Nuremberg and its progeny is that state sovereignty cedes to human rights protections. Consequently, international human rights norms set the proper baseline scope and limits of state intervention in civil society as well as the threshold observance of such rights in any regional or international agreement.

[*241] IV. HUMAN RIGHTS AND LATCRIT THEORY--THE FIRST GENERATION

The indisputably suprasovereign nature of fundamental human rights offers LatCrit theory fertile ground on which to develop conceptions of law that will be of significance to the comunidad latina as well as to all other communities in our midst. For example, with sovereignty ceding to basic human rights principles, it follows logically that human rights norms can trump local law which derogates from such principles.

Considering current issues of interest and activism, the immigration rights discourse provides a significant forum in which to apply the theory to practice. It is beyond question that a state has the sovereign right to enact immigration laws; however, human rights norms dictate that such a sovereign right is not unfettered. While immigration norms can be, and are, promulgated, such norms cannot derogate from fundamental human rights principles. If a state, hiding behind the sovereignty shield attempts to treat similarly situated folks differently based upon grounds proscribed by human rights norms, such as the broad nondiscrimination mandates that include language, national origin, and conditions of birth, international principles simply prohibit the state's conduct. These same nondiscrimination principles could be put to good use against the welfare law, beyond the immigration provisions.

Last, but certainly not least, is the introduction of these exciting panelists who will, by their conversations, focus on some of the international human rights to which this introduction has alerted the readers. Elvia Arriola from the University of Texas is one of the leaders of "queer" theory, who has been doing some fantastic LatCrit work. Her presentation focuses on Immigration and Naturalization Service raids and the rights which are placed in jeopardy by such raids. As far as human rights go, this presentation raises issues of race, color, culture, and citizenship; the rights to life, liberty, security of the person, and human dignity; and the right to freedom of movement.

The following presenter is Kevin Johnson who teaches at UC Davis and has studied, represented persons in cases dealing with, and has extensively written on immigration issues, particularly as they affect the Latina/o community. His panel discussion, entitled "Aliens and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons" scrutinizes how the construction of the alien has allowed these noncitizens to be afforded limited rights, to be mistreated, and to be abused--a timely topic in light of the recently signed pieces of legislation on welfare and immigration. Again, this theme raises the issues of global rights of others, in this instance, foreign others, outside the jurisdiction of their nationality.

Last is Enid Trucios-Haynes who teaches at the University of Louisville and has practiced, taught, and is writing up a storm in the area of immigration. She focuses on "Transnational Identities and the Implication for Global Advocacy Strategies and State Sovereignty." This presentation underscores the tension between, on the one hand, the individual rights of those who, because of immigration, language, ancestry, or family have identities with transnational reach rather than a single national identity, and, on the other hand, the sovereign states for which nationality is a crucial identifying factor for granting rights and taking responsibilities vis a vis the individual.

All of these presentations weave a unified challenge to LatCrit theorists: the identification of that fine balance of what is a legitimate exercise of power by the state and what is the pretextual overbearance of state power to others/outsiders, particularly Latinas/os who often may be citizens by birth, but foreigned out of full
citizenship by name, language, color, accent or appearance. How can we reconcile the deportation of citizens because they look like their brothers and sisters from south of the *frontera* with their birthright to be present and enjoy life in their country and dignity to which all persons are entitled, free from governmental obstruction and intrusion? How can we use the diversity of Latina/o panethnicity to make international human rights a reality in the life of the immigrant rather than aspirational paper rights that leave the immigrant at the margins of the discourse? How can we use that panethnic diverse experience to reconstruct the meaning of alien, after its deconstruction shows its pretextual, thinly veiled patina aimed at contracting basic human rights to disempower foreigners by rendering them aliens, something less than human? How can we use the experiences grounded in our multidimensionality, often including a transnational identity(ies) factor, to make the indivisibility and interdependence of that diversity central to the rights discourse? [*243]

LatCrit offers the multifaceted experiences of numerous persons who travel many worlds because of their Latina/o-ness. This experience and the successes we can share because of our non-mainstream culture, color, ethnicity, and multilingualism while traveling within our *estadounidense* home is a real life complement to the theoretical human rights framework. The international Pdigm recognizing, indeed mandating, the recognition of a holistic rights construct—the indivisibility, inviolability, and interdependence of rights—is a reflection of the lives of Latinas/os whose multiple identities and multilingualism enable our world-travelling.

And so what does LatCrit have to offer? It can serve to urge, promote, and insist upon a local to universal theoretical construct that eschews the single-trait, myopic approach of our system of laws in favor of a holistic one that promotes the indivisibility and interdependence of our identities. Rather than focus on our differences, let our multilingualism be at the center of the creation of a cohesive theory that insists upon our protections notwithstanding our differences. And, this is of Pmount importance to Latinas/os, as well as Asians and others: our panethnicity should be a source of strength rather than a pretext for surrender. We are the diverse peoples—we are tall and short; blond and brunette; blue-eyed and brown-eyed; we are India/o, mestiza/o, blanca/o, morena/o, triguena/o; men and women; lesbian, gay, and straight; Catholic, Protestant, Santera, and Jew; all levels of ability and education; all classes and religions; from all parts of the world, including all parts of the *estados unidos*, yes, *nuestros* United States as well. It is time to eschew the notions that our hyphenated entities are less than nonhyphenated ones. LatCrit and international human rights norms are indispensable to the articulation of a cohesive, holistic Pdigm that effectively can develop, expand and transform the content and meaning of a rights construct.

**FOOTNOTE-1:**

n1 Significantly, based on this notion of indivisibility and interdependence of rights, the United Nations General Assembly called upon the United Nations Commission on Human Rights to adopt a single convention on human rights. G.A. Res. 421 (V), U.N. GAOR, 5th Sess., U.N. Doc. A/1775 (1950). Because of disagreements as to the obligatory nature of social and economic rights between industrialized and developing nations, the one contemplated covenant was fragmented into two documents—one addressing civil and political rights and the other addressing social, economic, and cultural rights.


n10 Berta E. Hernandez, *To Bear or Not to Bear: Reproductive Freedom As an International Human Right*, 17 BROOK. J. INT'L L. 309 (1991). See also REBECCA M. WALLACE, INTERNATIONAL LAW 175 (1986) ("Human rights ... are regarded as those fundamental and inalienable rights which are essential for life as a human being.").

n11 See generally supra note 10.


n14 This is not to say, however, that universality as opposed to relativity, at least as originally articulated, represent the appropriate analytical Pdigm. For a discussion on the universality versus relativity debate, see 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, 657-67, 657 n.201 (1996).


n16 Id. § 290.

n17 See generally LOUIS HENKIN ET AL., INTERNATIONAL LAW at xxii-xxiii (3d ed. 1993); COVEY T. OLIVER ET AL., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 1390 (4th ed. 1995). The *jus gentium* system that the Roman Empire had developed to govern the relations between Roman and non-Roman citizens, which (contrasted with the *jus civile*, which applied between or among Roman citizens) was modeled on the Roman system and incorporated principles of equity and natural law. Contemporary scholars analogize the *jus gentium* to the source of international law called "General Principles of Law Recognized by Civilized Nations" contained in Article 38 of the Statute of the Court of International Justice.

n18 HENKIN, supra note 17, at xxii, xxiii. Another significant historic event in the evolution of international law is the Thirty Years War (1618-1648) in Central Europe which marked the emergence of independent nation-states as the primary actors in the global setting underscoring the need to create norms to govern interactions between and among sovereign equals. James Friedberg, *An Historical and Critical Introduction to Human Rights, in HUMAN RIGHTS IN WESTERN CIVILIZATION 1600-PRESENT* 2 (John A. Maxwell & James J. Friedberg eds., 2d ed. 1994).

n19 Friedberg, supra note 18 (quoting Grotius). Indeed, in the seventeenth century Grotius's visionary statement: "Human rights norms must exist today in a diverse world of immensely varied ideologies and beliefs"—effectively predicted the development of a sophisticated human rights system. *Id.* Hugo Grotius, an important international jurist who was guided by natural law, provided a bridge to the positivists' theoretical foundations that followed the natural law epoch. Grotius distinguished between natural law and the customary law of nations based on the conduct and will of
nations. As "a rationalist who derives the principles of the law of nature from universal reason rather than from divine authority," HENKIN, supra note 17, at xxiv, Grotius' natural law concept was secular and was based on "man's" rationality rather than revelation and deduction of God's will. OLIVER, supra note 17, at 1391.

n20 Burns H. Weston, Human Rights, in ENCYCLOPEDIA BRITANNICA, reprinted in INTERNATIONAL LAW ANTHOLOGY 21, 22 (Anthony D'Amato ed., 1994) (stating that "the school of philosophy ... which held that a universal working force pervades all creation and that human conduct therefore should be judged according to, and brought into harmony with, the law of nature.").

n21 See generally MYRES McDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 68-71, 73-75 (1980), excerpted in FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 167-68 (2d ed. 1990). The underpinnings of natural law are assumptions that there are laws existing in nature--both theological and metaphysical--that confer rights upon individuals as human beings. The two sources for these rights are either in divine will or metaphysical absolutes, and they are deemed to constitute a higher law than is identified with all of humankind and requires protections of individual rights. An underlying assumption of natural law is that there is a common human nature that presupposes the equality of all human beings.

n22 HENKIN, supra note 17, at xxiv. Thomas Aquinas, for example, viewed the law of nature as "a body of permanent principles grounded in the Divine Order, and partly revealed in the Scripture." In his thirteenth century writings, Aquinas even noted the notion that one sovereign could interfere in the internal affairs of another when one mistreats its subjects. Michael J. Bazyler, Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia, 23 STAN. J. INTL L. 547, 570-74 (1987) (quoting Fonteyne, The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter, 4 CAL. W. INTL L.J. 203, 214 (1974)). This religious view of the natural law was carried forward by Spanish theologians Francisco de Vitoria and Francisco Suarez, both of whom recognized that beyond individual states there existed a community of states that was governed in their interactions with each other by international rules that were found "by rational derivation from basic moral principles of divine origin." OLIVER, supra note 17, at 1390-91. See also HENKIN, supra note 17, at xxiv.

n23 Weston, supra note 20, at 22.

n24 Id.

n25 Id.

n26 HENKIN, supra note 17, at xxv. The popularity of positivism corresponds to the rise of the nation-state and the view of the state as independent and sovereign. Id.

n27 See generally McDOUGAL, supra note 21.

n28 Bazyler, supra note 22 (quoting Hugo Grotius, De Jure Belli Esti Pacis 438 (William Whewell trans., Cambridge Univ. Press 1853) (1625)). See also Emmerich de Vattel, Le Droit des Gens, ou Principes de la Loi Naturelle, Appliques a la Conduite et aux Affairs des Nations et de Sovereigns (1758), reprinted in Covey T. Oliver, et al. Cases and Materials on the International Legal System 742 (4th ed. 1995). De Vattel articulates in section 71 some of the early notions of human rights law: Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full rePtion; since otherwise the citizen would not obtain the great end of the civil association, which is, safety.Id. § 71. Section 72 states: but, on the other hand, the nation or the sovereign, ought not to suffer the citizens to do an injury to the subjects of another state; much less to offend that state itself: and this, not only because no sovereign ought to permit those who are under his command to violate the
precepts of the law of nature, which forbids all injuries, but also because nations ought mutually to respect each other, to abstain from all offense from all injury, from all wrong, in a word, from every thing that may be of prejudice to others. If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation either in its body or its members, he does no less injury to that nation than if he injured it himself. In short, the safety of the state, and that of human society, requires this attention from every sovereign. If you let loose the reigns to your subjects against foreign nations, these will behave in the same manner to you; and instead of that friendly intercourse which nature has established between all men, we shall see nothing but one vast and dreadful scene of plunder between nation and nation. Id. § 72.


n30 The inalienability and inviolability of rights that Locke addressed and the natural law roots of these rights is also reflected in the language of the American Declaration of Independence, which proclaims the self-evident truth "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness." THE DECLARATION OF INDEPENDENCE P. 1 (U.S. 1776).

n31 The French Declaration of the Rights of Man and Citizen of August 16, 1789 also reveals its natural law roots. That document provides that "men are born and remain free and equal in rights... the aim of every political association is the preservation of the natural and imprescriptible rights of man ... [which are] Liberty, Property, Safety and Resistance to oppression." THE DECLARATION OF THE RIGHTS OF MAN AND CITIZEN (Fr. 1789). Liberty is defined to include the right to free speech, freedom of association, religious freedom, and freedom from arbitrary arrest and confinement. Id.

n32 HENKIN, supra note 17, at 596-97.
conformity with the principles of international law." RICHARD B. LILlich, INTERNATIONAL HUMAN RIGHTS 1 (2d ed. 1991). Thirty-four years later, the Brussels Conference condemned slave trade and also agreed on measures for the suppression of such practices, which included "granting of reciprocal rights of search, and the capture and trial of slave ships." Id.

n35 This attitude of states resulted in the Permanent Court of International Justice's (PCIJ) reiteration that discrimination against minorities within a state constituted a violation of obligations under the treaties. See Advisory Opinion No. 6, German Settlers, 1923 P.C.I.J. (Ser. B) No. 6 (Sept. 10); Advisory Opinion No. 44, Treatment of Polish Nationals in Danzig, 1932 P.C.I.J., (Ser. A/B) No. 44 (Feb. 4); Advisory Opinion No. 64, Minority Schools in Albania, 1935 P.C.I.J. (Ser. A/B) No. 64 (Apr. 6).

n36 OPPENHEIM, supra note 15, § 292 reprinted in LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 4 (1973). After providing such a catalogue of rights, Oppenheim fretted that those rights could not be guaranteed by the Law of Nations because individuals cannot be subjects of law that is limited to relations between states. Yet, he also recognized the suprasovereign nature of "human" rights in the statement that:there is no doubt that, should a state venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention for the purpose of compelling such state to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilisation.Id.

n37 See generally 1 WHITEMAN, supra note 33, at 51 (quoting CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 125, n.8 (P. E. Corbett trans., 1957)).


n40 Nuremberg Trial, 6 F.R.D. 69, 110 (1946).

n41 See generally Michael Akehurst, A Modern Introduction to International Law 75-76 (5th ed. 1984). Prior to that, as the peace treaties and the treaties with respect to slavery and the slave trade show, the concentration was onremedying specific abuses or protecting particular groups.

n42 U.N. CHARTER art. 1, P. 3. See also other U.N. Charter provisions that confirm it as a watershed moment in the internationalization of human rights. The preamble provides that the members "reaffirm [their] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small [as well as the institution's goal] to promote social progress and better standards of life in larger freedom." Id. Preamble. In addition, Article 55 mandates that the United Nations promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Id. art. 55. To achieve this end, the state members "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement" of such purposes. Id. art. 56.

n43 The second panel of this Colloquium on social, economic and cultural rights, as well as the third panel on solidarity rights, will address this theme more directly.

n44 Universal Declaration on Human Rights, G.A. Res. 217A, U.N. Doc. A/180 (1948)[hereinafter Universal Declaration]. Although there is ongoing debate on the legal status of the Universal Declaration,
many scholars consider it to be legally binding as a general principle of international law while others consider it to have the status of jus cogens—a peremptory norm. CHERIF BASSIOUNI, THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE xxiv (1994). Moreover, notwithstanding that at its adoption the U.S. representative stated that the Declaration "is not and does not purport to be a statement of law or of legal obligation," (19 Dep't of State Bulletin 751 (1948)). Subsequent developments in both domestic and international law confirm the Declaration's status as a statement of customary international law. See LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 518-19, 522 (1973).


n46 See Universal Declaration, supra note 44 passim. See also SOHN & BUERGENTHAL, supra note 44, at 516; AKEHURST, supra note 41, at 76-77.

n47 See ICCPR, supra note 4.

n48 Id. arts. 6, 7, 8(1)-(2), 15, 16, and 18. Aside from the U.N. Charter, the Universal Declaration, the ICCPR, and the Economic Covenant, a rich body of human rights treaties, including regional human rights systems, exists. Other significant treaties include the Women’s Convention, supra note 7; Race Convention, supra note 8; International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, U.N. Doc. A/Res/39/46 (1984) (entered into force June 26, 1987), reprinted in 23 I.L.M. 1027 (1984); Children’s Convention, supra note 6.

n49 Stephen P. Marks, Emerging Human Rights: A New Generation for the 1980s?, 33 RUTGERS L. REV. 435, 437 (1981) (stating that "the commonly recognized starting point for the emergence of international human rights as we know them today is the movement for the 'rights of man' in eighteenth century Europe."). Significantly, notwithstanding these origins, Marks notes that he does not suggest "that the concept of human rights is exclusively or even essentially Western. All cultures and civilizations in one way or another have defined rights and duties of man in society on the basis of certain elementary notions of equality, justice, dignity, and worth of the individual (or of the group)." Id. at 437 (citing UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, BIRTHRIGHT OF MAN (1969); HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS (1949)).

n50 Id. at 438. It appears that the right to property properly belongs as a civil and political right; however, it can easily be viewed as an economic right. Interestingly, it is often placed under the civil and political rights because property was central to the interest fought for in the French and American Revolutions.


n52 Marks, supra note 49, at 438.

n53 See, e.g., Rogers v. American Airlines, 527 F. Supp. 229 (S.D.N.Y. 1981) (the court held that a black woman claiming discrimination based upon a company policy that prohibited her wearing braided hair could not conflate her identities (i.e., her blackness and her womanness to enhance her case in court), and the court, noting that corn-rowed hair was made popular by Bo Derek, found the policy was not discriminatory against women or blacks). See also, Paulette Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, in CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995) (discussing the Rogers case); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, in CRITICAL RACE THEORY: THE CUTTING EDGE


I. INTRODUCTION

Thank you and good morning. I understand we are on a really tight schedule so my comments will be brief. Thank you very much Celina, for your overview remarks intended to guide us in our sessions today on the relationship between the emerging LatCrit theory and International Human Rights, and for this panel, on how the focus on identity politics in LatCrit theory can broaden our understanding of "human rights law and policy."

You made several important points, Celina: one is how our teaching and scholarship in "civil rights law" could benefit by bringing in a human rights perspective. As one who teaches this subject, I have often felt that contemporary civil rights textbooks could improve their doctrinal presentations by also examining the historical, social, economic, and political conditions surrounding a civil rights dispute. You have inspired me to expand my own horizons in this course by experimenting with materials which illustrate the intersection between such bodies of law as immigration, employment discrimination, constitutional torts, and international human rights. Second, you noted correctly that the discourse of international human rights and LatCrit theorists shares a concern with "accountability." Finally, I agree that what is being called "LatCrit theory" has probably always been around but just had not been given a label.

I have been very enthusiastic about participating on this panel, following, as it does, on the heels of the first LatCrit conference sponsored by the California Western School of Law last May in La Jolla, California. I want to begin by sharing some of my own process in becoming part of this developing discourse called "LatCrit theory." As I noted back in May, I felt somewhat tentative in my role as a "first generation LatCrit theorist," given the heavily feminist and "queer" directions in my scholarship. I have been very enthusiastic about participating on this panel, following, as it does, on the heels of the first LatCrit conference sponsored by the California Western School of Law last May in La Jolla, California. I want to begin by sharing some of my own process in becoming part of this developing discourse called "LatCrit theory." As I noted back in May, I felt somewhat tentative in my role as a "first generation LatCrit theorist," given the heavily feminist and "queer" directions in my scholarship. Yet, I have always felt that my "Latinanness" has expressed itself in my lesbian/feminist writings—usually as a critical voice reminding progressive
scholars of the importance of diversity and conflict raised by race, gender, sexuality, and class within our own movements. n7 In this vein, I would like to express my own observations about the promises and the challenges for this developing discourse. For example, the first LatCrit conference displayed a commitment to diversity and identities by including as attendees, not only supportive whites, Asians, African-American, and Native-Americans, but also lesbian and gay men and women. I hope we will continue to display that respect for multiple consciousness n8 which will enrich our discourse, and also challenge us to practice conflict resolution when tensions arise because our identities have collided on one or more of the factors by which we define ourselves. I also sincerely hope that the centering of issues like gender, sexuality, and multiple consciousness in this developing LatCrit movement will be a catalyst for the enhanced production of writings by and about Latinas, aimed at empowering Latinas/Hispanas n9 everywhere. I therefore encourage my Latino colleagues to include, wherever possible, the gendered perspective in their studies. n10

I now turn to my role on this panel. Because I have been in this process of trying to figure out the role LatCrit theory will play in my scholarship and teaching, I experienced some angst about how to address the themes of this panel--the relationship between LatCrit theory and the theoretical/historical origins of "first generation" human rights--also known as "civil and political rights." Being asked to think about the differences and commonalities in a LatCrit agenda, which promotes the recognition and enforcement of human rights in domestic and international forums sounded like such an ominous task! Energized as I was after the first LatCrit conference, I was having some difficulty putting "it"--the first LatCrit experience--into concrete terms. What finally lit my fire was a movie I saw over the summer while still on the wave of energetic enthusiasm generated last May at La Jolla.

II. LAW, SOCIAL JUSTICE, AND POPULAR CULTURE

Legal theorists have recently begun to pay greater attention to the role that popular culture, in particular films and theater, can play in not just telling stories, but in communicating ideas about the meaning and practice of the law and social justice. n11 Feminist and critical race theorists have also noted the value of telling good stories to question the status quo for social groups who are at the bottom of white male hierarchies. n12 I have valued the use of stories to construct the meaning of individual and collective experiences in a particular time noted for the intensity of its gendered politics. n13 I suspect that LatCrit theorists will also use storytelling to construct the meaning of identity raised by a scholarship focusing on the social justice issues for Latina/o communities in the United States. I begin my discussion today, therefore, with the story of a movie which helped me see the complexity of the issues raised for analysis by this emerging commitment to articulate the premises of engaging in LatCrit theory.

John Sayles' recent film *Lone Star* is a good example of [*249*] popular culture which educates viewers about a complex social and political history by simply relating the life of a town and its people. The first words I spoke as I exited *Lone Star* were, "this movie touched on all those issues we just explored at this conference I attended in La Jolla on LatCrit theory!"

Very briefly, the film situates a murder mystery in a south Texas U.S.-Mexico border town after a member of the nearby military base out on a desert excursion finds a skeleton, a Mason ring, and a sheriff's badge. A follow-up investigation produces a bullet and identifies the victim as a male who had died at least thirty-five years prior, about the time Rio County's much-hated Sheriff Wade had disappeared without a trace. Described by oldtimers as an arrogant racist and iron-fisted bully, Wade had ruled this territory bordering on the Rio Grande with ruthless exercises of the southern white male privilege he enjoyed. Flashback stories reveal everything from beatings of people who threatened his authoritarian enforcement of the racially segregated patterns of 1950s America in south Texas to brutal murders of "coyotes," n14 who had defied Wade's payoff system for being allowed to transport undocumented Mexicans across the border. Wade had killed or at least physically or financially hurt many of those who had questioned his run of law enforcement in Rio County.

I was struck by the ease with which *Lone Star'*s characters, events, and situations embodied so many of the concepts we had tentatively explored as critical to the discourse on identity politics, power, and oppression of the LatCrit movement. I urge use of this film as a powerful teaching tool for examining the intersection of immigration and employment discrimination law, foreign policy, human rights, and civil and political rights. It also provides an excellent point of departure for exploring the "borderlands" concept n15 being used by some critical scholars to [*250*] illustrate the ways in which social borders are created, internalized and used by others and ourselves to shape and reshape our identities. *Lone Star'*s characters and their stories can be used to explore how relations between individuals seemingly of the same culture, race/ethnic group, etc., come to exist nearly
"worlds apart" as their experiences, marked by factors like age, class, education, and personal history illustrate the tension, conflict, and transformation that arise from either accepting or rejecting the value system of a "borderlands." The history in Lone Star centers on the meaning a town and its people give to the U.S.-Mexico border and to border crossings. At the same time the film's fluid use of flashbacks breaks down the border between the past and the present. In the fictional Rio County, several characters' stories illustrate the shifting attitudes of various social groups and individuals for whom the U.S.-Mexico border means having an identity and sense of community with the better "us" (whites), while maintenance of the border prevents being overtaken by the lesser "them" (Mexicans and African-Americans).

The changing methods of policing the U.S.-Mexico border are portrayed through flashback stories of the 1950s when local and state officials were the primary enforcers of the international boundaries, as contrasted with today, where the U.S. side of this boundary is policed by the federal government through the Immigration and Naturalization Service (INS) Border Patrol.

Certain relationships in Lone Star serve as metaphors for the ways in which an individual self-constructs borders as a way to shape an identity or role in a community or a relationship. This is best illustrated by the conflict-filled relationship between two female characters, a mother and a daughter. Each represents first and second generation Mexican-American women whose identities have been critically shaped by the value system of the borderlands, a not uncommon situation for millions of Mexican, Latinas/os, and Chicanas/os living in the Southwest today. The story of the elder Mercedes Cruz, who is frequently at odds with the views of her daughter Pilar, involves not only a secret crossing of the Rio Grande as an illegal "wetback," but also the loss of a young husband to an untimely and violent death at the hands of the hated Sheriff Wade. Mr. Cruz had served as a "coyote" for Mexicans desiring to cross the border illegally to work in the United States, but he had also underestimated the depth of Wade's powerful rage against those who defied the payoff system for his "protection." The border cost Mercedes Cruz her husband.

Meanwhile, a past secret affair with Wade's possible killer, an Anglo, has produced a complex mystery by which Mercedes comes into some money that enables her to open a restaurant. She gives birth to a daughter who grows up not knowing she is half Anglo and half Mexican, who thinks her father was the unjustly murdered Mr. Cruz, and who does not understand that it was her mother's fear of incest and not racism which destroyed her first love to an Anglo boyfriend. These secrets underlie the tense emotional and intergenerational borders which have arisen between Mercedes and her daughter, Pilar, because each has a different view of the role of the border crossings in their lives. Mrs. Cruz has buried the memories of her life of poverty in Mexico and her river crossing as if the events occurred in another life; yet, she allows her daughter to nurture the belief that her father was a martyr. That story has undoubtedly played a role in the shaping of Pilar's identity as a "Tejana" citizen who questions the borderlands' hypocritical value system. Pilar decries her mother's denial of her heritage and her mother's harsh treatment of recent Mexican immigrants while manager of the town's largest restaurant staffed by Mexican workers. Pilar is a politicized Tejana who views her duties as a high school teacher as requiring her to teach a multicultural history of the United States through which the complex intersection of racism and classism in the Southwest are exposed.

[*252] Age, culture, class, education, and power intersect in a tense scene between the two women, which dramatizes how each sees her "Latina identity" differently from the other. The daughter's conflict with her once-mojada mother shows when she questions her mother's tyrannical management of the workers in her large and prosperous Mexican restaurant. Pilar also disapproves of her mother's distrust of her workers and her demand to them that they "speak English only." The mother/daughter tensions illustrate how differently they have experienced and internalized or rejected the dominant value system. In another scene, the daughter is seen arguing with defensive colleagues over the role of multiculturalism in the curriculum. Meanwhile, her own mother has identified with the oppressor's values and has come to believe in the Pdigm of "us/them" based on race, class, language, nationality, and residence status as the shaper of people's identities and their moral worth. Mrs. Cruz's identity critically depends on internalized oppression. She denies her own ties to the life of poverty her workers have left behind, by not only demanding that they speak "English only," but also by summoning the Border Patrol on the mojados she often sees running from the river and across her backyard to safety. Mercedes' actions reinforce her acquired identity as the good "American citizen," and that of the mojados as the bad and illegal "aliens." It is a scene that illustrates how deeply some immigrants internalize the values and meaning given to physical borders by a dominant culture and region like that of Texas and the southwestern United States, especially where the transition leads to personal success accompanied by gratitude and loyalty to the new sovereign power.
Mrs. Cruz's own river crossing long ago and her acquired identity as a wealthy *Americana* clash in another scene where, instead of summoning the Border Patrol, she provides shelter to a *mojado* she recognizes as one of her valued employees and his intended wife. Seeing the young woman injured and helpless, Mrs. Cruz crosses her self-constructed border—a border which sePtes her identity as a U.S. nationalized citizen and vigilante from her identity as a compassionate Mexican woman who [*253*] is unable to barricade her own feelings of compassion and, as a result, ends up providing the immigrants with shelter and aid.

### III. SHAPING A VIEW OF LATCRIT SCHOLARSHIP

My purpose here is not to examine all of the themes of borders and transgression or of mythical and inviolable boundaries based on race and class raised by *Lone Star*, but rather to illustrate the impact of this fascinating two-hour film in helping crystallize the essence of the dialogue we had initiated in May, 1996 at the first LatCrit conference. Among those themes, at a minimum, were the meaning of identity politics for Latinas/os, internalized oppression, the black/white race Pdigm and the nature of Latina/o racism, intersectionality, gender, and the politics of history. *Lone Star* helped me formulate some tentative organizing concepts for a discourse which has definitely affected my personal identity as a Latina and my professional identity as a feminist, Latina, lesbian law professor. My expanded vision literally has me looking at the world very differently, not unlike the expanded awareness I recently experienced as I explored the gendered nature of our cultural attitudes by writing about discrimination against transgenders. 

n20 I am now in touch with a new meaning of the "border concept" at the theoretical level. At the experiential level, the stories of this not-so-fictional town, n21 set in the very state in which I currently reside in, connected my inquiry into the meaning of LatCrit theory to a familiar desire of mine to humanize the law by using stories to critically examine the impact of law and public policy.

*Lone Star*'s examination of the lives of blacks, whites, and browns in Rio County, reminded me of, and also reshaped my understanding of, the Pdigm of white supremacy over black and brown. Again I understood how white supremacy is capable of nurturing intergroup conflict and hostilities between members of "the oppressed." n22 I saw how the hypocrisy of immigration law enforcement, which has focused so heavily on one border, the Southwest, has managed to escape criticism for its racist nature [*254*] and has continued to exist because fear, economic need, and greed allow the system to thrive. The stories of killings, loves lost, and dehumanization in Rio County were all centered on the somewhat peaceful yet tense coexistence of African-Americans, Mexicans, and whites—a coexistence which depended upon the values of greed, racism, white male supremacy, fear, deceit, denial, and struggles for power and control.

### IV. WHAT IS LATCRIT THEORY?

At this point I asked myself some of the questions I needed to focus on for this panel's theme; the most critical being, what is LatCrit theory? I see LatCrit theory as an intention to broaden the scope of legal analysis and scholarship so that it reflects the needs of the diverse Latina/o communities of this nation. I also see LatCrit theory as embracing a commitment to multiple consciousness; that is, a recognition that as we define our Latina/o identities, that identity is not essentialist, but rather, is inclusive of our gender and sexuality, culture, class, language, religion, resident status, age, and ability. I then connected these organizing concepts to issues of international human rights, with which I am less familiar but understand somewhat from a feminist perspective, thanks to Berta Hernandez's work. n23 As I thought about how to connect LatCrit theory and international human rights, I borrowed from the way in which feminists have argued that one's views of human rights change when one asks whether a nation can be deemed "good" on human rights if it does not consider issues like sexual harassment or genderrelated bias to be human rights abuses. n24

With these analogies in mind, I queried how these two things, LatCrit theory and human rights, intersect. One could see LatCrit theory as redefining the racial politics of identity for its failure to be sufficiently ethnicized or for conflating the meaning of race discrimination into ethnicity-based discrimination. n25 Some LatCrit scholars may see their mission as centering [*255*] the existence of unrecognized social groups in the white male and heterosexist discourse of American legal theory, which has tended to focus more on the black/white race Pdigm. In this vein, LatCrit theory may be seen as trying to validate the concerns of those various U.S. communities, rural and metropolitan, made up in the United States of those people we call (and this list is not exhaustive): Mexican-American, Chicano, Puerto Rican, Cuban, Caribbean, Central American, South American, and more specifically, Guatemalan, Salvadoreno, and Nicaraguense. Similarly, a human rights discourse connected to a LatCrit perspective may change one's views about a nation like the United States when we consider the extent to which Latinas/os, whether residing in the United States legally or not, are discriminated against based on the intersection of those
factors which typically characterize a "Latina/o" identity (e.g., ethnicity, race, language, and resident status). n26

I had these formative ideas in mind one day when I opened up the Austin-American Statesman daily newspaper and read on the front page about the latest INS raid in Austin which affected about four or five construction companies and nine hundred workers. n27 My musings on LatCrit theory, border crossings, and the usefulness of stories in popular culture to explore the intersection of law and social justice forced me to look at the newspaper article about the INS raid with a fresh and most offended view. I have traveled far in this talk to make a point, which is nothing new to at least one of my copanelists, n28 and the point that the published account of the contemporary INS raid serves more as an effective propaganda tool rather than as a recorder of actual history. I would like to suggest that one goal of LatCrit theory, then, is to humanize the law and policy through more detailed [*256] stories, designed to expose the need for more humane treatment of those Latinas/os known as Chicanas/os, Mexicans, and Mexican-Americans whose lives, especially in the Southwest, have been affected by the INS practice known as the workplace raid.

V. FACES OF DESPAIR IN INS RAIDS

INS raids, when assessed by way of the standard newspaper article with its skimpy details about who, when, and what happened, tells the American voter that Mexicans, at least in Texas, are taking jobs away from good American workers. Accounts of INS raids encourage readers to believe that, even if it is illegitimate to target such workers solely on the basis of their skin color n29 or their accented English, no sanctions will be imposed on the offending federal agents. n30 Furthermore, it may appear legal from these published accounts to enforce the law. n31 not on employers, but rather to focus on the workers. In fact, rarely does an account of a typical INS raid reveal the names of the employers who have been caught n32 violating the Immigration Reform and Control Act's prohibition against hiring a worker without [*257] proof of citizenship or legal residence. n33 Nor does any published account ever explore the impact of a raid on the lives of the people caught without legal papers or of the failure of the INS to come up with nondiscriminatory methods of enforcement. n34 Because there is so little focus on the employers, there is nothing said about the value of educating them on how to spot illegal documents or forcing them to produce proof that they are not engaging in rehires of illegal workers. Of course, never does an account of an INS raid consider the possibility that the INS's approach to apprehending workers, with its heavy focus on the Mexican population and on people with brown skin, n35 smacks of blatant human rights abuses when the consequences of getting caught are to send a worker off to be detained and deported without due process or time to contact the family he or she is leaving behind. Nothing in contemporary accounts of INS raids ever suggests that there might be a need to put more of a burden on the employer rather than the worker. n36 In fact, enforcement fines on employers have been substantially relaxed in recent years. n37

My LatCrit focus has me wondering how a different kind of account of an INS raid would change our views of this nation's compliance with basic human rights if one humanized the same [*258] stories of recent INS raids and of the design and enforcement of INS policy. The typical studies on INS raids offer at best cold, impersonal data which only reports the numbers. n38 A newspaper article, which typically is full of facts and stories, is totally lacking in that kind of information when it comes to write-ups on an INS raid. One has to wonder who is discouraging the newspapers from accomplishing their usual task of providing the names of employers who are recidivists in the area of noncompliance with INS regulations. What one gets instead are the propagandist versions of INS raids. For example, one newspaper account reports that in Texas over the last three to four months, there have been over 5000 workers who have been arrested and detained by the INS; however, we are provided with no information that would help us learn about the industry that tends to employ undocumented workers. n39 Over ninety-eight percent of immigrants arrested were Mexican. In Austin, they were one-hundred percent Mexican, and they included Mexican and American legal residents. n40

LatCrit theory encourages me to go further and beyond the reported numerical data. As I stated earlier, I believe many will view the LatCrit perspective as committed to the methodology of storytelling. This humanizing of law and policy can connect the data to reality and the numbers deported to the people and their experiences of pain, humiliation, fear of "la migra," n41 abandonment [*259] of children, economic and health needs, and discrimination. Thus, for example, I want to get at the underlying experiences which define the term "deportation" in a common INS raid. As a LatCrit theorist, it is no longer enough for me to know of the numbers deported; rather, I want to know: who they deported, where they lived and worked, who employed them, how many times have they been deported and later returned to the same employer, how they got back, whom they are leaving behind, how long they have resided in this country, how they were spotted, whether the INS was
contacted by the employer's competitors, were they treated well, and were distinctions made on the job site based on skin color and language. These questions, which for me derive from the "critical" aspect of LatCrit theorizing, tell me that the term "deportation" has a life behind it—the life of a worker, a husband, a father, a mother, a child, a community, and so on. It means being kicked out of the place you are currently calling home. It means no way of making arrangements for children whose parents won't be coming home that night. It means no right to pick up some belongings or to go home to pick up valid identification. It means no right to pick up medication if suddenly you are being put on a bus or a train back to Mexico. It means even being charged for that bus or the train that is now going to take you thousands of miles away from your home.

I would stress as important in the LatCrit perspective the methodology of storytelling or the humanizing approach to our criticism of the status quo and of American law and policy for its neglect of the impact of racism, sexism, and nationalism Latinas/os in the United States. The sources of stories can come from unusual places. As an historian, I typically draw from the works of scholars like Professor Vicki Ruiz, whose studies give us a different focus on the impact of the exclusion of the "casual domestic servant" from the Immigration Reform and Control Act. Her study on Mexicana domestic workers in El Paso, Texas, illustrates the hypocrisy of INS law and policy when one sees how Mexican women can be paid low wages, sexually harassed, and threatened with deportation by vengeful employers, yet, also constitute a critical component of the local economy, which thrives on the abilities of such employers to be exempt from civil rights sanctions or minimum wage laws.

There are other sources of stories for examining the impact of INS raids on people's lives and on the social fabric of the southwestern United States. One book that is clearly a must for research in this area is Marilyn Davis's Mexican Voices/American Dreams. It is a wonderful compilation of ninety oral histories used to examine the patterns of Mexico-U.S. immigration flow as an identity-shaping phenomenon for some Mexican villages and for Mexican, Chicana/o people in the United States. Through Davis's detailed stories on the lives of people who came and went, back and forth, and created transnational communities, one can learn about the reality of the hopes, dreams, and existence of that identity which this society labels "the illegal alien." It is a compelling reading not only because we learn of the reasons why people leave their homes, how they fail and try again, and how they eventually succeed, but also because the stories capture the human dilemmas created by the need to continue the crossings even when one has been deported.

To return momentarily to the film Lone Star, there is a truly horrific scene involving the killing of Mr. Cruz, who has been caught driving a truckload of Mexican men across the border into Rio County. One should not believe that the rules Cruz defied, of getting protection for such transports in return for a bribe, are a thing of the past. While it is a brutal picture of the costs of a system which depends on the enforcement of "borders," it also communicates an important reality—that of the high personal risks involved in making these continual crossings. There is no guarantee of a successful crossing, and yet, these people continue to try and try until they are caught. Some eventually stay here, but many others continue to try at the risk of losing their own lives. An Austin paper recently reported the story of a truck which was found abandoned on a Texas highway in the middle of the summer. Twelve men were found dead, suffocated in a locked truck which had been abandoned by their driver who most likely feared being caught by the Border Patrol. Stories like this demonstrate the need to expose the hypocrisy, the injustice, and the fundamental wrongness of the largely exclusive focus on Mexicans and brown people as the source of the United States' immigration "problems."

I will end with a short story based on my own first-hand experience with the impact of an INS raid. I was educated in Mexico for what would have been my high school years. For two years, I lived in a boarding school which opened its doors to approximately 350 day students. By my third year, the school closed its residency program, and I had to live temporarily in the home of a second cousin in Guadalajara, whom I stayed with for a total of five months. I soon learned that my second cousin's husband was living in California and that he sent money back to the family once a month. I think he worked in a meat packing plant. This was a very small house. There were literally three adults, three teenagers, and six small children sharing three rooms, a courtyard, and a water closet.

One day, my cousin's husband appeared on the front door step without prior notice of his arrival. He had been caught in an INS raid and had nothing on him other then the clothing on his back and a few dollars. I was only fifteen years old at the time, so I was very naive about the violence connected to INS raids and deportation methods.

My family certainly had contact in the United States with many people who had crossed the border illegally; we sometimes hired the friends of friends who needed jobs doing anything, which in our home, was domestic service. But now I was on the other side...
of the border. I heard Senor Bolanos describe in painful [*262] detail the experience of being treated, in his words, "no better than cattle." He and hundreds of men had endured bad food, little water, and a long three day train ride to the Mexican interior, which for him was at least close to home. Many people were actually sent thousands of miles away from their original hometowns. They had no money and no ability to contact their families; overall he described it as a very frightening event.

The financial impact was felt in my cousin's household for several months because Senor Bolanos returned to California as soon as he could, but was unable to get his old job back. They became dependent on the money that my family was sending to temporarily board me there, which was about fifty dollars a month. We ate beans and tortillas for a very long time. I got sick. My cousins got sick. I felt the malnutrition even through the next term. I eventually moved out and went to live in a boarding house and convent. I never forgot the feelings of anger and frustration upon learning about my second cousin's plight. When my vacation came up, I told my dad all about it. I excitedly described what I had learned about the Bolanos family's plight. As I spoke, my father looked at me with what appeared to be both resignation and sadness, as he responded, "mija, that's just the way it is. These things go on all the time. You just never hear about it."

I want LatCrit theory on this subject and any subject of concern to Latinas/os, to tell the stories will enlighten, scold, and maybe even change the minds of the politicians and the policy-makers who create and enforce law and policy which is tantamount to an exercise in human rights abuse.

FOOTNOTE-1:

n1 If there is an official date to the beginning of a LatCrit Legal Theory movement and discourse, it would be the gathering of Latina/o law professors at what was quickly termed "LatCrit I" in La Jolla, California on May 2-5, 1996. See Colloquium, 2 HARV. LATINO L. REV. (forthcoming 1997).

n2 Feminist history provides another vehicle for demonstrating this intersection and for expanding the scope of analysis on the terms and conditions of employment for workers unable to seek protection under federal laws such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 e-1 to 2000 e-17 (1982), or whose hiring is explicitly exempt from the scope of the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.) (e.g., undocumented domestic servants). See, e.g., Vicki L. Ruiz, By the Day or Week: Mexican Domestic Servants in El Paso, Texas, in "TO TOIL THE LIVELONG DAY" AMERICA'S WOMEN AT WORK, 1780-1980, at 269-83 (Carol Groneman & Mary Beth Norton eds., 1987).

n3 See, e.g., Murillo v. Musegades, 809 F. Supp. 487 (W.D. Tex. 1992) (illustrating the intersection of complex litigation, employment, immigration, constitutional torts, and human rights law). Murillo v. Musegades addresses the effort to certify a class of Hispanic citizens, students, and staff of a south Texas border town high school against various unknown INS Border Patrol officers who followed, harassed, beat, and otherwise targeted legal residents for questioning about their English speaking abilities and their nationality, based solely on their brown skin color.


n5 See Colloquium, supra note 1.

n6 I intentionally adopt the term "queer" as an umbrella term to reflect the theorizing by lesbian and gay scholars as well the emergent discourse of bisexuals and transgenders and to reflect that such a term at all times reflects a sensitivity to diversity on the basis of other factors such as race, class, ethnicity, language, religion, ability, and age. See 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).


n8 I borrow the term used by Angela Harris to describe the scholar's need for sensitivity to the multiple facetness of our identities. See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1990).

n9 Although I recognize that people often divide quite strongly on whether one should employ the term "Latina/o" or "Hispana/o" or "Hispanic," I feel that as scholars we must honor the choice of people in certain communities to self-identify in their politics or identity as "Hispanics." This issue was pressed upon the members of the Planning Committee of the Second Annual LatCrit Conference as we wrote up the tentative agenda for a program which would be attended by many people from the San Antonio, Texas region—a community which draws political strength from the oft-decried and Anglo-imposed term, "Hispanic."

n10 For an excellent example of this accomplishment, see Kevin R. Johnson, Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class, 42 UCLA L. REV. 1509 (1995). Kevin Johnson personally embodies the intersectional identity as a "white-looking" Latino with an Anglo last name.


n14 The term "coyote" is shared by the Spanish and English languages to identify night-prowling desert canines. Thus, the term applies to men and women who assist groups of Mexican nationals across the southern U.S.-Mexico border, usually at night through the desert, at often exploitative prices. For colorful descriptions by selected interviewees in an oral history project, of repeated and successful efforts to cross the California-Mexico border on foot, see MARILYN P. DAVIS, MEXICAN VOICES/AMERICAN DREAMS: AN ORAL HISTORY OF MEXICAN IMMIGRATION TO THE UNITED STATES (1990).

n15 The "borderlands" as a concept signifies not only the physical topography of the region between Mexico and the United States, but also a metaphoric concept employed by scholars to represent cultural and epistemic sites of contestation. In non-legal writings, one of the first critical voices to use the "border" concept to apply to psychological, sexual and spiritual sites was Gloria Anzaldúa. See GLORIA ANZALDUA, BORDERLANDS, LA FRONTERA: THE NEW MESTIZA (1987).

n16 The recent militarization of Border Patrol in the southwestern United States, particularly since the 1980s, is at odds with the overall history of the creation and enforcement of the border in United States and Mexico, which has generally been lacking in hostility and has been characterized by the sharing of language, resources and culture. See Margaret E. Montoya, Border Crossings in an Age of Border Patrols: Cruzando Fronteras Metaforicas, 26 N.M. L. REV. 1, 3-5 (1996). See also TIMOTHY J. DUNN, THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992 (1996).

n17 The idea of swimming to a new life by crossing the river evokes the fundamentalist Christian image of rebirth by way of full-bodied baptisms in lakes, ponds, or ritualistic pools.

n18 Tejana/o is a term used to define native Texans of Mexican descent.

n19 In Spanish, "mojada" is the equivalent of the American derogatory label "wetback," long used in Southwestern jargon to stereotype Mexicans, whether legal or illegal, who have crossed into the
U.S. territories by swimming the Rio Grande in unpatrolled regions of the nineteen hundred mile U.S.-Mexico border.

n20 See Arriola, Law and the Gendered Politics of Identity, supra note 7.

n21 On my second viewing of Lone Star, a friend who accompanied me, a lifelong Texan, recognized that the film was shot on location, in and around the town of McAllen, Texas.


n24 Thus, for example, a gendered perspective changes one’s views of a nation which appears to comply with human rights accords, but then becomes the subject of disrepute in a request for political asylum by a female citizen trying to escape an unwanted female circumcision.

n25 Cases in which this conflation appear give rise to odd definitions of why a particular form of discrimination based on race, ethnicity, language, or nationality offend the principles of equality embodied in the U.S. Constitution and civil rights laws. See, e.g., St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (holding that a person of Arabian ancestry is protected from racial discrimination under Section 1981. The Court drew upon confusing notions of race used in the nineteenth century, thus precluding the usefulness of other studies).


n28 That would be Kevin Johnson, who has made substantial contributions to criticisms of existing immigration law and policy. See, e.g., Kevin Johnson, Racial Restrictions on Naturalization: Another Example of the Intersection of Race and Gender in Immigration, 11 BERKELEY WOMEN’S L.J. 142 (1996).

n29 An occasional journalist notes the racist character of the INS raid. See Enedelia J. Obregon, Latino Workers Feel Hassled by INS Raids, AUSTIN-AM. STATESMAN, Aug. 27, 1996, at D1.

n30 Very oddly, one newspaper article reported that the INS determined which firms to target for a raid in Central Texas based on tips from competitors or "comments made by undocumented immigrants." George Rodriguez, Regional Crackdown by INS Targeting Texas Companies, DALLAS MORNING NEWS, Sept. 16, 1996, at 25A. One could query whether "comments" refers to the manner (e.g., whether the individual uses accented English or not) in which a worker responds to an INS officer's inquiry about his or her legal status or request for documentation proving he or she can work in the United States.

n31 The relevant law is the Immigration Reform and Control Act of 1986 which was designed to cut back on the hiring of undocumented workers who had either crossed the border illegally or overstayed their visas. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

n32 The recent reports of raids in Central Texas always refer to numbers of businesses raided and total numbers of undocumented workers arrested, the great majority of whom are from Mexico. Reports of raids in other states, which do not experience as great a number of raids or do not have as frequently targeted employers and workers, do mention names of employers. Compare George Rodriguez, INS Raids Hundreds of Texas Businesses, DALLAS MORNING NEWS, Sept. 6, 1996, at 6A, Teri Bailey, 3,679 Illegal Immigrants Caught by INS, HOUSTON CHRON., Sept. 6, 1996, at A5, and Jackie Crouse, INS Snares More than 70 Workers,
n33 8 U.S.C. § 1324a (a)(1) (1988) ("it is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States-(A) an alien knowing the alien is an unauthorized alien...”). The I-9 form serves as the basis of proper identification, while the notice of intent to fine, Form I-763, is given to an employer when the INS has found a violation of Immigration Reform and Control Act. Charles C. Foster, Immigration Law and Employer Sanctions, HOUSTON LAW., Dec. 26, 1988, at 19.

n34 The discriminatory impact of the Immigration Reform and Control Act has been noted. See Michael Crocenzi, IRCA-Related Discrimination: Is It Time to Repeal the Employer Sanction?, 96 DICK. L. REV. 673 (1992).

n35 See Obregon, supra note 29.

n36 A rare quote captured by an Indianapolis reporter from an employer who hired many illegal immigrants suggested the unfairness of the finger pointing at the laborer: "The employer is more to blame than the alien, because if a job wasn't available here, then people wouldn't drive 1500 miles from Mexico to take it. We all come from immigrant backgrounds, so you can't blame the immigrants." Julie Goldsmith, State Faces Growing Problem of Undocumented Workers, INDIANAPOLIS STAR, Aug. 25, 1996, at E1. Of course, despite the official barriers, many employers know that they can hire illegals, and they will do so because quite frequently the terms they use to describe their employees are "loyal," "hard working," "fast learners," "enthusiastic," and "dependable" while many officials look the other way and make it possible for illegals to be hired in economic sectors where they are most needed (e.g., agribusiness). See DAVIS, supra note 14, at 68-93.

n37 The number of employers fined for violating immigration rules has fallen to 1427 in the fiscal year 1995, from 3547 in 1989. See Rodriguez, supra note 30, at 25A.

n38 A good example of how the studies fail to do this, and reduce the story of the INS raid to impersonal economic or statistical data which does not discuss the impact on people's lives, is a recent study of the impact of Immigration Reform and Control Act on reducing the flow of illegal immigration or the rise in apprehensions. See Jeffrey S. Passel et al., Undocumented Migration Since IRCA: An Overall Assessment, in UNDOCUMENTED MIGRATION TO THE UNITED STATES: IRCA AND THE EXPERIENCE OF THE 1980S, at 251 (Frank D. Bean et al. eds., 1990).

n39 See Obregon, supra note 27.

n40 For the numbers used for these informal calculations, see newspapers articles supra notes 27, 29, and 32. Formal studies suggest that the majority of undocumented immigrants are from Mexico, although the authors suggest that the non-Mexican component should not be overlooked. Passel, supra note 38, at 252. Other critics of INS policy and practice urge that the INS raids only serve publicity purposes and that they are intimately connected to racial violations of civil rights. See Joseph Torres, Rights Groups Say INS Increased Raids Merely for Publicity, IDAHO STATESMAN, Oct. 13, 1995, at A17.

n41 "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.

n42 8 C.F.R. § 274a.1(h) (1995) (providing exemption for "casual employment by individuals who provide domestic service
in a private home that is sporadic, irregular, or intermittent."). The irony of such terms as "sporadic" and "irregular" in the statute is that they obscure the socio-economic reality that some local economies could not survive without the dependable and regular maid service or live-in baby-sitters provided by immigrant women employed at poor wages for domestic service. See Ruiz, supra note 2.

n43 See Ruiz, supra note 2.

n44 See DAVIS, supra note 14.


n46 The violence surrounding the risks of crossing illegally have been noted. In California, the beatings of some immigrants was captured on camera, while a study by the University of Houston revealed that more than three hundred people die annually crossing the border. See Karen Fleshman, Public Forum: Illegal Immigrants Part of Our Society, AUSTIN-AM. STATESMAN, May 31, 1996, at A11. The American Friends Service Committee has also recently released a study called "Migrant Deaths at the Texas-Mexico Border, 1985-1994," which details the number, causes and characteristics of the deaths of undocumented migrants who die while trying to cross the U.S.-Mexico border. See Migrant Deaths at the Texas-Mexico Border, 1985-1994, AFSC NEWSLETTER (Am. Friends Serv. Comm., Texas-Arkansas-Oklahoma Headquarters, Austin, Tex.) Apr. 1996, at 6 (on file with author).

n47 "Mija" is a shortened version of "mi hija" which affectionately translates into "my daughter."
SUMMARY: ... My topic relates to terminology and specifically to the use of the word "alien," a term of art used extensively in discussing the legal rights of immigrants in the United States. ... Many have expressed general concerns with the alien terminology in immigration law. ... Many alternatives to the term alien exist, including "person," "immigrant," or "undocumented worker." ... Alexander Bickel perhaps said it best in the context of analyzing citizenship: "It has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a nonperson ... ." In Stephanie Wildman's words, "language veils the existence of systems of privilege." ... Many nuances of immigration law make it extremely difficult to distinguish between an "illegal" and a "legal" alien. ... The vaguely defined, but emotionally powerful, illegal alien terminology also fails to distinguish between the different types of undocumented persons in the United States. ... In focusing on the "illegal alien" as a Mexican immigrant, the U.S. Supreme Court decisions are replete with negative imagery about undocumented immigration from Mexico. ... Unlike past anti-immigrant eras, it is generally considered impermissible to expressly rely on race as a reason for restricting immigration. ... For example, Proposition 187 supporters claimed initially that, despite the anti-Mexican overtones to the campaign, they were not anti-immigrant but only anti-illegal alien and only wanted to limit benefits to "illegal aliens." ...

I. INTRODUCTION

International human rights issues in the United States obviously are shaped by many factors. My focus in this essay is on an issue that, at first glance, might appear insignificant. Nonetheless, it greatly influences thinking in the United States about acceptance of immigrants from other countries as well as this nation's response to refugees fleeing human rights abuses in their homelands.

My topic relates to terminology and specifically to the use of the word "alien," n1 a term of art used extensively in discussing the legal rights of immigrants in the United States. By definition, aliens are outsiders to the national community. Even if they have lived in this country for many years, have had children here, and work and have deep community ties in the United States, noncitizens remain aliens, an institutionalized "other," different and apart from "us."

The classification of persons as aliens, as opposed to citizens, has significant legal, social, and political importance. Citizens have a large bundle of political and civil rights, many of which are guaranteed by the U.S. Constitution; aliens have a much smaller bundle and enjoy far fewer constitutional and statutory protections. n2 Citizens can vote and enjoy other political rights, such as jury service. Aliens, no matter what their ties to the community, enjoy limited political rights. They cannot vote and risk deportation...
if they engage in certain political activities that, if they were citizens, would be constitutionally protected. n3 Noncitizens [*265] cannot sit on juries deciding the fate of fellow noncitizens charged with crimes, thereby ensuring that the jury most definitely will not reflect a cross section of the community. n4 Perhaps most importantly, aliens can be deported from the country while citizens cannot be. For example, under the immigration laws, an alien convicted of possession of more than thirty grams of marijuana may be deported, n5 while a citizen convicted of mass murder cannot be. n6

The concept of the alien has more subtle social consequences as well. Most importantly, it helps to reinforce and strengthen nativist sentiment toward members of new immigrant groups, which in turn influences U.S. responses to immigration and human rights issues. Aliens have long been unpopular in the United States, though the particular disfavored group has varied over time. Over two centuries ago, the courts of the various states were perceived as being unfair in the treatment of the British, especially British creditors. Consequently, Article III of the U.S. Constitution authorized the federal courts to hear disputes between noncitizens and citizens, known from its time of creation as "alienage" jurisdiction. n7 Demonstrating the artificiality of the construct, the British, who colonized and at one time ruled the region that became the United States, were socially transformed into aliens by loss of the Revolutionary War. The [*266] British, however, were not the only relevant aliens in this nation's early history. The Federalists in the late 1790s pressed for passage of the now infamous Alien and Sedition Acts in order to halt the migration of radical ideas from France and to cut off the burgeoning support for the Republican Party offered by new immigrants. n8

Animosity toward other groups of aliens has occurred sporadically in U.S. history. Irish immigrants in the 1800s were the subject of hostility. n9 Near the end of the nineteenth century, Chinese immigrants suffered violence and bore the brunt of a wave of draconian federal immigration laws. n10 Animosity directed at Japanese immigrants, as well as citizens of Japanese ancestry, culminated in their internment during World War II. n11

As this sequence of historical events suggests, race has influenced the social and legal construction of the alien. Although the British may have been one of the nation's first groups of unpopular aliens, the term increasingly became associated with people of color. Some restrictionist laws, such as those passed by Congress in the late 1800s barring almost all Chinese immigration, were expressly race-based. Others were more subtle in their impact. Before 1952, for example, the law barred most nonwhite immigrants from naturalizing to become citizens, n12 [*267] thereby forever relegating noncitizens of color to alien status and effectively defining them as permanent outsiders in U.S. society. This essay will explain how the word "aliens" today often is code for immigrants of color, which has been facilitated by the changing racial demographics of immigration. n13

Many have expressed general concerns with the alien terminology in immigration law. Hiroshi Motomura noted that the "term 'alien' is standard usage, but ... [has] a distancing effect and somewhat pejorative connotation." n14 Gerald Neuman has observed that "it is no coincidence that we still refer to noncitizens as 'aliens,' a term that calls attention to their 'otherness,' and even associates them with nonhuman invaders from outer space." n15 Gerald Rosberg acknowledged that "the very word, 'alien,' calls to mind someone strange and out of place, and it has often been used in a distinctly pejorative way." n16 Despite such concerns, the term is regularly used, often with some reluctance or at least the felt need for explanation, in immigration discourse. n17 This is the almost inevitable result of the fact that the alien is the nucleus around which the comprehensive immigration law, the Immigration and Nationality Act, n18 is built. 

[*268] Race as a social construction has been thoroughly analyzed. n19 However, surprisingly little has been written about how the alien is socially constructed as well. The alien is made up out of whole cloth. The alien represents a body of rules passed by Congress and reinforced by popular culture. It is society, often through the law, which defines who is an alien, an institutionalized "other," and who is not. It is society through Congress and the courts that determines which rights to afford aliens. There is no inherent requirement, however, that society have a category of aliens at all. n20 We could dole out political rights and obligations depending on residence in the community, which is how the public education and tax systems generally operate in the United States. Indeed, a few have advocated extending the franchise to noncitizen residents of this country, a common practice in a number of states and localities at the beginning of the twentieth century. n21

Many alternatives to the term alien exist, including "person," "immigrant," or "undocumented worker." My point in this essay, however, is not to offer an alternative terminology. Rather, my hope is to illustrate how the term alien masks the privilege of citizenship and helps to justify the legal status quo.
Similar to the social construction of race, which legitimizes racial subordination, the construction of the alien has justified the fact that our legal system offers noncitizens limited rights. Alien terminology helps rationalize the harsh treatment of persons from other countries. n22 Consider the terms of the public debate. [*269] Today's faceless "illegal aliens" are invading the nation and must be stopped or we shall be destroyed. n23 Such images help animate, invigorate, and reinforce the move to bolster immigration enforcement efforts and seal the borders.

The images that alien terminology creates have more farreaching, often subtle, racial consequences. Federal and state laws regularly, and lawfully, discriminate against aliens. It is sanctioned by the Constitution, which provides, for example, that the President must be a "natural born citizen." n24 Under certain circumstances, discrimination against aliens is legally permissible. n25 In contrast, governmental reliance on racial classifications generally are subject to strict scrutiny and ordinarily are unconstitutional. n26 Because a majority of immigrants are people of color, n27 alienage classifications all-too-frequently are employed as a proxy for race. Alienage discrimination, though overinclusive because it includes persons who are not minorities, allows one to disproportionately disadvantage people of color.

California's much-publicized Proposition 187 n28 is an example of this phenomenon at work. Although debate during the tumultuous campaign centered on aliens, specifically "illegal aliens," the Mexican-American leaders in California knew which specific group of aliens at which the measure was truly directed. With that in mind, it is not surprising that "white voters supported the proposition at about a two-to-one ratio while Latinos overwhelmingly [*270] opposed it by over a three-to-one margin." n29

My point is that the terminological issue is not simply a word game. Alien terminology serves important legal and social functions. Alexander Bickel perhaps said it best in the context of analyzing citizenship: "It has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a nonperson ... ." n30 In Stephanie Wildman's words, "language veils the existence of systems of privilege." n31 Lucinda Finley put it differently though with the same flavor: "language matters. Law matters. Legal language matters." n32

Let us investigate how this works. Keep in mind that it should not be surprising that law serves this legitimating function. Lawyers attempt to reconcile conflicting legal precedents to make persuasive arguments. In so doing, they attempt to rationalize that which may seem, and may well be, inconsistent. II. CITIZENS AND "ALIENS"

A popular, and important, topic in modern immigration law scholarship focuses on how immigration and alienage law defines "community membership." n33 The definition of aliens as a group distinct and apart from citizens assists in ensuring that noncitizens are only limited, conditional, or "partial members" n34 of the community. Importantly, these partial members of U.S. society are deportable if they violate the conditions of admission. We should not underestimate the severity of deportation, which the Supreme Court has emphasized "may result in the loss 'of all [*271] that makes life worth living.'" n35

Aliens are partial members of the community with limited membership rights, which includes the fact that they may be subject to treatment, such as deportation, that never could be afforded citizens. n36 An extreme example drives this point home. Aliens not convicted of any crime under certain circumstances may be detained indefinitely. n37 Citizens, of course, could never be subject to such treatment. n38

The value of citizenship is nothing new to American law. For example, long ago, the Supreme Court held that Dred Scott, a black man suing for his freedom, was not a "citizen" and therefore could not invoke the diversity of citizenship jurisdiction of the federal courts. n39 By denying citizenship to Dred Scott, the Court denied him a right--access to the federal courts--to which citizens are entitled, n40 thereby highlighting the fact that freed [*272] blacks, like slaves, generally were not full members of the community.

Consider the linkage between alien status and citizenship under the modern immigration laws. The comprehensive immigration statute, the Immigration and Nationality Act, rather blandly defines an "alien" as "any person not a citizen or national of the United States." n41 Despite the blandness of the definition, the word alien immediately brings forth rich imagery. One thinks of space invaders n42 seen on television and in movies, such as the blockbuster movie Independence Day. n43 Popular culture reinforces the idea that aliens may be killed with impunity and, if not, "they" will destroy the world as we know it. Synonyms for alien have included "stranger, intruder, interloper, ... outsider, [and] barbarian," n44 all terms that suggest the need for harsh treatment and self-preservation. In effect, the term alien serves to dehumanize persons. We have few, if any, legal obligations to alien outsiders to the community, though we have obligations to persons. n45 Persons have rights while aliens do not.
The term alien serves as a device that intellectually legitimizes the mistreatment of noncitizens and helps to mask human suffering. Cognitive dissonance theory from psychology, which posits that the human mind strives to reconcile inconsistent phenomena, helps to explain the utility of this intellectual device. Persons have dignity and their rights should be respected. Aliens have neither dignity nor rights. By distinguishing between aliens and persons, society is able to reconcile the disPte dignity nor rights. By distinguishing between aliens and persons, society is able to reconcile the disPte legal and social treatment afforded the two groups. To further rationalize the differential mistreatment, aliens may be "racialized," even if they are, at least by appearance, "white." If we consider these foreigners to be criminals who sap finite public resources and damage the environment, it is far easier to rationalize their harsh treatment. These different visions help us better understand the ongoing political debate about undocumented immigration.

Look at this phenomenon concretely. If we think that persons who come to the United States from another nation are hard-working and "good," it is difficult to treat them harshly. If we consider these foreigners to be criminals who sap finite public resources and damage the environment, it is far easier to rationalize their harsh treatment. These different visions help us better understand the ongoing political debate about undocumented immigration.

By obscuring the human tolls of utilitarian policy, alien terminology facilitates such policy choices. Consider the nation's schizophrenia about undocumented Mexican labor. Following World War II, a perceived labor shortage in agriculture provoked Congress to establish the Bracero Program, which allowed Mexican workers to enter the country temporarily. Even after the program's dismantling, the U.S. Border Patrol informally collaborated with growers in the Southwest to ensure ready availability of cheap undocumented labor.

For legal purposes, the distinction between legal and "illegal aliens" often proves to be important. Legal immigrants, the largest category being "lawful permanent residents," are viewed more positively in the eyes of the law than undocumented immigrants. Lawful permanent residents and others who entered through lawful channels are "good aliens" who receive more favorable treatment by the courts than undocumented noncitizens, "bad aliens," who are "uninvited guests, intruders, trespassers, law breakers." Whether "good" or "bad," aliens unquestionably possess fewer legal rights and protections than citizens.

The most damning terminology for noncitizens is "illegal alien." Illegal aliens unquestionably are the most unpopular group of aliens. Although alien is found repeatedly in the Immigration and Nationality
Act, illegal alien is not defined in this law. "Illegal alien" is a pejorative term that implies criminality, n63 thereby suggesting that the persons who fall in this category deserve punishment, not legal protection. n64 Nevertheless, it is common, if not standard, terminology in the modern debate in the Southwest if not the entire nation, about undocumented immigration.

[*277] The illegal alien label, however, suffers from inaccuracies and inadequacies at several levels. Many nuances of immigration law make it extremely difficult to distinguish between an "illegal" and a "legal" alien. For example, a person living without documents in this country for a number of years may be eligible for relief from deportation and to become a lawful permanent resident. n66 He or she may have children born in this country, who are citizens, n67 as well as a job and community ties here. It is difficult to contend that this person is an illegal alien indistinguishable from a person who entered without inspection yesterday.

The vaguely defined, but emotionally powerful, illegal alien terminology also fails to distinguish between the different types of undocumented persons in the United States. There are persons who cross the border without inspection; there are also noncitizens who enter lawfully but overstay their business, tourist, student, or other visas. n68 The illegal alien in public discussion often refers to a person who enters without inspection, often a national of Mexico. n69 This is not surprising because the furor over illegal aliens, at least in the Southwest, can be seen as an attack on undocumented Mexicans, if not on lawful Mexican immigrants and Mexican-American citizens.

History teaches that it is difficult to limit anti-alien sentiment to any one segment of the immigrant community, such as the undocumented. n70 This is evidenced by the slow reduction of public benefits to all categories of noncitizens in the 1990s. On the heels of the passage of Proposition 187, which focused on limiting benefits to undocumented persons, Congress enacted [*278] welfare "reform" legislation that greatly limited legal immigrants' eligibility for public benefit programs. n71 Later, more general attacks were made on racial minorities, such as California's so-called Civil Rights Initiative that, if implemented, would eliminate affirmative action. n72 Put simply, nativist outbursts fail to make the fine legal distinctions among members of outsider groups like those that legal academics proudly articulate.

My point is not that all distinctions between different types of aliens and between aliens and citizens should be discarded. Rather, we must recognize that difficult choices must be made in distinguishing between the groups that we create under the law and the rights afforded to persons in those groups. In so doing, we should not employ legal terminology as a tool to obfuscate the real impacts of our judgments. n73 As a society, we should instead be honest in making truly difficult decisions with an understanding [*279] that persons, not dehumanized, demonized aliens, are being affected, often in harsh and deeply personal ways.

C. Implications of the "Alien" Terminology

In many ways, the negative images of the alien, often fed by restrictionist groups and politicians seeking punitive immigration measures, carry the day in the political process. n74 Such images influence the courts as well. Not long ago, the Supreme Court manipulated alien terminology in a subtle manner to help justify harsh treatment of perhaps the most sympathetic group of noncitizens, children who come to the United States without their parents. In the 1980s, the Immigration and Naturalization Service (INS) adopted a regulation that limited the release of noncitizen children from custody to only their parents, close relatives, or legal guardians, rather than to responsible adults. All other children were detained. Problems with the detention policy, which allowed for detention in what many found to be deeply troubling conditions, were abundant. Undocumented children frequently come to the United States with extended family members, not their parents or legal guardians. Under the regulation, these children, if apprehended by the INS, could not be released to these family members. Undocumented parents also fear deportation if they appear at the INS to release their detained children.

In rejecting the constitutional challenges to the regulation, Justice Scalia wrote for the Supreme Court in sterile terms. The first paragraph of the opinion, in relevant part, reads: Over the past decade, the ... [INS] has arrested increasing numbers of alien juveniles who are not accompanied by their parents or other related adults. Respondents, a class of alien juveniles so arrested and held in INS custody pending their deportation hearings, contend that the Constitution and immigration laws require them to be released into the custody of "responsible adults." n75

[*280] The majority goes on to emphasize that: if we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles ... who are aliens. For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government ... . Over no conceivable subject is the legislative power of Congress more complete ... Thus, in the exercise of its broad power over immigration
and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens. n76

The Justice Stevens' dissent cut to the heart of the matter by considering the impact on children:How a responsible administrator could possibly conclude that the practice of commingling harmless children with adults of the opposite sex in detention centers protected by barbed-wire fences, without providing them with education, recreation, or visitation, while subjecting them to arbitrary strip searches, would be in their best interests is most difficult to comprehend. n77

Note the salient difference in language between the two opinions. On the one hand, Justice Scalia, who reads their constitutional rights restrictively, calls them "alien juveniles" something akin to juvenile delinquents. On the other hand, Justice Stevens, who would find in their favor, calls them "children." Although the regulation directly affected children, its diSpPte impact on undocumented children from Mexico and Central America generally went ignored. n78

[*281] The political process has responded to the encouragement of Supreme Court decisions like Reno v. Flores. n79 The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, n80 for example, expanded the categories of criminal aliens subject to mandatory detention without the possibility of bond. n81 Moreover, the Act eliminated judicial review of detention and bond decisions of aliens. n82 Detention of aliens, adults, and children, evidently is much easier to justify than detention of citizens or persons.

III. THE INFLUENCE OF RACE

Alienage status has not always been linked to race. As mentioned previously, the primary group of aliens that the framers of the Constitution had in mind in creating alienage jurisdiction in Article III were the British. n83 Over time, however, aliens have increasingly become equated with racial minorities. As Gerald Neuman has succinctly observed, "the discourse of legal [immigration] status permits coded discussion in which listeners will understand that reference is being made, not to aliens in the abstract, but to the particular foreign group that is the principal focus of current hostility." n84

An important first association between aliens and racial minorities can be seen in the foundational immigration cases allowing for the exclusion and deportation of Chinese persons in the late 1800s. n85 Not long after, in the early part of the twentieth century, some states passed laws known as the "alien land laws" that barred "aliens ineligible to citizenship" from owning certain real property. This facially-neutral phrase was taken from the immigration and naturalization laws, which barred most nonwhite persons from becoming citizens. n86 While incorporating a [*282] facially neutral phrase from the immigration laws into the land laws, the state effectively barred certain nonwhites from owning real property. These laws undisputedly were directed at persons of Japanese ancestry. n87 More recently, since 1965 when Congress repealed the national origin quotas system, there has been a sharp increase in racial minorities as a proportion of the immigrant stream to the United States. n88

The "alien" has increasingly become associated with racial minorities in the modern debate about immigration. The words "alien" and "illegal alien" today carry subtle racial connotations. The dominant image of the alien often is an undocumented Mexican or some other person of color, perhaps a Haitian, Chinese, or Cuban person traveling by sea from a developing nation. Treating racial minorities poorly on the ground that they are aliens or illegal aliens allows us to reconcile the view that "we are not racist" and the desire to insulate ourselves from certain groups of persons viewed as different, racially or otherwise. n89

A. Some Examples: Mexicans, Haitians, Cubans

As the century comes to a close, concern with illegal aliens in the United States dominates debate over immigration reform. "The illegal alien is said to sneak into the United States, insinuate himself into our midst, hide, remain without asking permission. The introjection language, language of overstepping, is both literal and unmistakable." n90

Though the term illegal alien is seemingly race neutral, it is relatively easy to discern which noncitizens are the ones that provoke concern. Study of the use of the terminology in context reveals that, particularly in the Southwest, the term refers to undocumented Mexicans and plays into stereotypes of Mexicans [*283] as criminals. n91 The terminology better masks nativist sympathies than the popular vernacular that it replaced--"wetbacks," which is even more closely linked to Mexican immigrants. n92

The link between "illegal aliens" and Mexican citizens often goes unstated. n93 The courts, with little explanation, often have approached the "illegal immigration problem" as an exclusively Mexican problem. For example, Justice Brennan, writing for the Supreme Court, suggests the equation in his mind between illegal aliens and Mexican immigrants.Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working
conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx of illegal aliens from neighboring Mexico. n94

The best estimate of the INS, however, is that, as of October 1992, less than forty percent of the undocumented population in the United States is of Mexican origin. n95 The public debate, however, fails to focus on undocumented white aliens. The INS estimated that three of the top ten sending nations for undocumented immigrants are Canada (97,000), Poland (91,000), and [**284**] Italy (67,000). n96 A study by the state of New York estimated that, despite the images of Chinese and Central Americans as the predominant illegal aliens in the state, the three largest undocumented groups in New York came from Ecuador, Italy, and Poland. n97

In focusing on the "illegal alien" as a Mexican immigrant, the U.S. Supreme Court decisions are replete with negative imagery about undocumented immigration from Mexico. n98 Such immigration, in the Court's view, is a "colossal problem" n99 posing "enormous difficulties" n100 and "formidable law enforcement problems." n101 One Justice observed that immigration from Mexico is "virtually uncontrollable." n102 Chief Justice Burger stated that the nation "is powerless to stop the tide of illegal aliens--and dangerous drugs--that daily and freely crosses our 2000-mile southern boundary." n103 Even renowned liberal Justice Brennan, in analyzing the lawfulness of a workplace raid in southern California, stated that "no one doubts that the presence of large numbers of undocumented aliens in the country creates law enforcement problems of titanic proportions." n104

[**285**] Ignoring the heated debate among social scientists about the contribution of undocumented immigrants to the economy, n105 the Supreme Court has stated unequivocally that undocumented Mexicans "create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services." n106 Such perceptions inspired Chief Justice Burger to include an extraordinary appendix to an opinion describing in remarkable detail "the illegal alien problem," n107 which focused exclusively on unauthorized migration from Mexico.

Similar concerns with illegal aliens from Mexico and other developing nations influence policymakers. For example, in arguing for an overhaul of immigration enforcement in 1981, then Attorney General William French Smith proclaimed that "we have lost control of our borders." n108 Around that same time period, the Reagan administration began interdicting Haitians fleeing political turmoil n109 and detaining all Central Americans seeking asylum in this country because of feared political persecution. n110 More recently, the public perception that "illegal immigration" is out of control motivated in President Clinton to increase enforcement efforts along the U.S.-Mexico border through military-style operations like Operation Blockade--later renamed Hold the Line--in El Paso, Texas. n111 This public perception also prompted congressional action designed to bolster border enforcement. n112 While the government fortifies the southern [**286**] border with Mexico, reports of smuggling of undocumented immigrants across the northern border with Canada fail to provoke significant public concern. n113

The use of "illegal alien" as code for Mexicans can be seen in the debate over Proposition 187. Consider the argument in favor of the measure in the pamphlet distributed to registered voters:

WE CAN STOP ILLEGAL ALIENS....

Proposition 187 will be the first giant stride in ultimately ending the ILLEGAL ALIEN invasion....

It has been estimated that ILLEGAL ALIENS are costing taxpayers in excess of 5 billion dollars a year....

Welfare, medical and educational benefits are the magnets that draw these ILLEGAL ALIENS across our borders....

Should our Senior Citizens be denied full service under Medi-Cal to subsidize the cost of ILLEGAL ALIENS?...

We are American, by birth or naturalization....

As a final slap on the face, they voted to continue free prenatal care for ILLEGAL ALIENS!

Vote YES ON PROPOSITION 187. ENOUGH IS ENOUGH! n114

Replace illegal aliens with "Mexicans" and the meaning probably would be more precise.

[**287**] The unfortunate treatment of Haitians fleeing political violence in their homeland demonstrates the powerful legal impact of alien terminology on racial minorities. President Bush issued an executive order in May 1992 entitled "Interdiction of Illegal Aliens," which authorized the extraordinary step of repatriating Haitians without inquiring, as required by international law, n115 into whether they had a well-founded fear of persecution if returned to Haiti. n116 Although the
order did not mention Haitians or Haiti, only "illegal aliens," President Bush, and later President Clinton, implemented the repatriation policies exclusively against persons fleeing Haiti. n117 The Supreme Court decision upholding this extreme policy is no less sterile than the executive order. In introducing the case, the Court emphasized that only the rights of aliens were at stake: Aliens residing illegally in the United States are subject to deportation ... . Aliens arriving at the border ... are subject to an exclusion hearing, the less formal process by which they, too, may eventually be removed from the United States ... . The alien may seek asylum as a political refugee... . When an alien proves that he is a "refugee," the Attorney General has discretion to grant him asylum ... . If the proof shows it is more likely than not that the alien's life or freedom would be threatened in a particular country because of his political or religious beliefs, ... the Attorney General must not send him back to that country. The [immigration laws] offer these statutory protections only to aliens who reside in or have arrived at the border of the United States. n118

The word alien is used six times in the paragraph. Notably absent from the Court's opinion is any discussion of the human suffering experienced by the Haitians. n119

[*288] As the Supreme Court has said on numerous occasions when upholding discrimination against aliens, "Congress regularly makes rules that would be unacceptable if applied to citizens." n120 The government's decision to detain some Cubans indefinitely is an extreme example. In 1980, Fidel Castro allowed many Cuban citizens to come to the United States in the so-called Mariel Boatlift. The INS tried to return some of the Cubans and later attempted to deport others who had initially been released. Cuba, however, refused to accept these persons. In response, the United States held these noncitizens in indefinite detention, often in maximum security federal penitentiaries. In one case challenging that detention, the court emphasized in the very first line of the opinion that "Alexis Barrera-Echavarria is an alien." n121 Not surprisingly, the court upheld the indefinite detention. n122

B. The Absence of Race From the Public Debate

Because the immigration laws do not facially discriminate on the basis of race, they can be defended as "color blind." Consistent with this, most modern restrictionists routinely deny that race is the reason for their objections to immigration. They point to other alleged impacts of illegal immigration, and immigration generally: that aliens take jobs from U.S. citizens, that aliens contribute to overpopulation that damages the environment, and [*289] that aliens overconsume public benefits and commit crime. n123 Such facially-neutral contentions deeply complicate the debate. n124

The fact that the race of immigrants ordinarily is not expressly offered as a reason for restricting immigration should not be surprising. Unlike past anti-immigrant eras, it is generally considered impermissible to expressly rely on race as a reason for restricting immigration. n125 Consequently, race ordinarily is submerged in the public discourse about immigration. However, the persistent reappearance of racist statements in the immigration debate, even if they do not dominate, suggests that race at some level influences restrictionist sentiments. n126

Though facially-neutral, restrictionist measures have disproportionate impacts on people of color. In many places in the country, Latinos/as, as well as persons of Asian ancestry, bear the brunt of heightened immigration enforcement efforts because they are perceived as "foreign" to the Anglo-Saxon mainstream. n127 Persons of Latin American ancestry are well-aware [*290] that the lashing out at aliens often is difficult to limit to noncitizens. A relationship exists between anti-immigrant and anti-Mexican sentiment. For example, Proposition 187 supporters claimed initially that, despite the anti-Mexican overtones to the campaign, they were not anti-immigrant but only anti-illegal alien and only wanted to limit benefits to "illegal aliens." n128 This anti-illegal alien contagion spread, however, and Congress later passed a law limiting public benefits to lawful immigrants. n129 Because Mexican nationals constitute the largest group of lawful permanent residents in the country, n130 they will be disproportionately affected.

Nothing in this essay should be read as suggesting that Mexican-Americans are the only racial minorities adversely affected by alien terminology. Indeed, "illegal alien" is an infinitely malleable term that may encompass the most feared outsider—often in modern times a person of color—in any region of the United States. In the Southwest, the term generally refers to persons of Mexican ancestry. In New York, it may refer to Chinese and Central Americans. n131 Consequently, the beauty (if one can call it that) of anti-illegal alien rhetoric is its ability to tap into the specific racial fears in a particular region and allow for consensus on national solutions to the "alien problem."

To complicate matters, alien terminology often works in combination with other racial code. Culture, for example, in certain circumstances is loosely linked to race. Restrictionists, while denying any racist sympathies, may claim that the cultural differences of non-Anglo Saxon immigrants, not their race per se, is
objectionable. n132 The overlap between culture and race may explain Latinos/as' more favorable attitude about immigration [*291] than other groups; n133 they generally are less concerned about non-Anglo Saxon peoples immigrating to the United States. In addition to cultural differences, language skills may also be employed as a proxy for national origin and used to support the exclusion of non-English speaking immigrants. n134

Though reform proponents might deny it, race is an undercurrent to the debate over birthright citizenship. The concern, as voiced by California Governor Pete Wilson n135 and the popular television show "60 Minutes," n136 is that undocumented Mexican women cross the border to have children, thereby bestowing U.S. citizenship on them. n137 Stereotypes of excessively fertile brown women serve as the underpinnings of such claims. n138 To counter the national threat, the 1996 Republican Party platform would have denied citizenship to children born in the United States to [*292] undocumented parents. n139 Not surprisingly in light of the racial impacts of a change in the citizenship law, Latino/a activists have been at the forefront of the opposition to the proposals to limit birthright citizenship. n140

Efforts to eliminate birthright citizenship dovetail with cries of naturalization fraud. In response to measures such as Proposition 187 and congressional limitations on benefits to lawful immigrants, petitions for naturalization were filed at a record pace. n141 The Clinton administration was charged with pursuing partisan political ends by encouraging naturalization and allowing criminals to become naturalized. n142 Noncitizens thus are placed in a no-win situation. If they do not naturalize, they are accused of refusing to assimilate. n143 But, if they naturalize in large numbers, they are accused of abusing the system.

IV. CONCLUSION

Critical analysis of immigration and human rights law, which today disPely affects people of color in particularly harsh ways, is much needed. In this realm, legal terminology is important. Legal construction of the "alien" has facilitated the rationalization of severe treatment of noncitizens. At times, "alien" has been used as a code word for racial minority. For too long, the racial impacts of legal rules and fictions have been obscured and ignored. We should remain vigilant of the use of language that masks the very human impacts of the immigration laws. Although difficult choices must be made, we should make them honestly with a full realization that persons, not faceless, nonhuman, demon "aliens," are affected in fundamental ways.

FOOTNOTE-1:

n1 For a sketch of some preliminary thoughts and concerns about this terminological issue, see Kevin R. Johnson, A "Hard Look" at the Executive Branch's Asylum Decisions, 1991 UTAH L. REV. 279, 281 n.5.

n2 Despite the disparities in rights between citizens and aliens, some contend that the steady expansion of the rights of noncitizens in recent years has "devalued" citizenship. See Peter H. Schuck, Membership in the Liberal Polity: The Devaluation of American Citizenship, 3 GEO. IMMIGR. L.J. 1 (1989).


n6 At various times in U.S. history, however, the deportation efforts of government have focused on persons of Mexican ancestry, citizens as well as noncitizens. See generally FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (1995) (analyzing governmental efforts of this type).


n10 See, e.g., The Chinese Exclusion Case, 130 U.S. 581 (1889) (upholding law expressly excluding most Chinese immigrants from United States). In some instances, hatred for the Chinese allowed for their harsh treatment in the immigration laws without resorting to the alien euphemism. However, alien terminology still was relied on to justify anti-Chinese laws. In rejecting challenges to one such law, the Supreme Court emphasized "the power of Congress ... to expel [and] exclude aliens." Fong Yue Ting v. United States, 149 U.S. 698, 713-14 (1893) (emphasis added).

n11 See Korematsu v. United States, 323 U.S. 214 (1944). This demonstrates how anti-alien sentiment may translate into animosity toward citizens who share ancestry with the disfavored immigrant group of the day. See infra text accompanying notes 70-72, 127-29.

n12 See Act of March 26, 1790, ch. 3, 1 Stat. 103 (providing that only a "free white person" could naturalize). See generally IAN F. HANEY LOPEZ, WHITE BY LAW (1996) (analyzing history of this legal requirement). This Act was later amended to allow persons of African descent to naturalize as well. See Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256. For analysis of the political dimension to the construction of race in the context of naturalization rules, see George A. Martinez, The Legal Construction of Race: Mexican-Americans and Whiteness, 2 HARV. LATINO L. REV. (forthcoming 1997).


n14 Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545, 547 n.4 (1990). Professor Motomura also "admit[s] to some hypersensitivity on this point as a former 'alien.'" Id.


n22 See ROY L. BROOKS ET AL., CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES 976 (1995) (noting that the term "illegal aliens" seems to dehumanize the 'undocumented alien' and to desensitize the reader [and that the word] 'illegal' creates an inference that the person has done something wrong to justify a restriction of rights"). For example, in one egregious case, the Supreme Court emphasized that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (emphasis added).

For an analysis of the use of rhetoric in the constitutional law decisions of the U.S. Supreme Court, see L.H. LaRUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY (1995).
n23 See infra text accompanying notes 62-69 (describing imagery surrounding term "illegal alien").
n24 U.S. CONST. art. II, § 1, cl. 5.


n34 I base this term on Michael Scaperlanda's idea that noncitizens are afforded "partial membership" rights under U.S. law. See Scaperlanda, supra note 33.

n35 Bridges v. Wixon, 326 U.S. 135, 147 (1945) (citation omitted). See also JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (1888) (notes of James Madison) (noting that "if banishment [of an alien from the country] be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied").

n36 Some have argued for change in this regard. See e.g., Aleinikoff, supra note 33 (arguing that lawful permanent residents should be treated as full-fledged members of community).

n37 See infra text accompanying notes 121-22 (discussing case law surrounding indefinite detention of Cuban nationals).

n38 Citizens generally are entitled to bail and can only in limited circumstances be detained without bail until trial on an alleged crime. See e.g., United States v. Salerno, 481 U.S. 739 (1987) (upholding detention before trial under Bail Reform Act of person charged with serious crime).

n39 See Scott v. Sanford, 60 U.S. 393 (1857). In so holding, the Court emphasized that, at the time of the framing of the Constitution, blacks were: 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. at 404-05. See also id. at 407 (stating that blacks "had no rights which the white man was bound to respect").

n40 Language was employed to justify denial of full citizenship rights to freed blacks, who were classified as "denizens" rather than citizens, before the Civil War. See JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 319-23 (1978). See, e.g., Scott, 60 U.S. at 562 (1857) (McLean, J. dissenting) ("Free people of color in all the States are, it is believed, quasi citizens, or, at least, denizens. Although none of the States may allow them the privilege of office and suffrage, yet all other civil and conventional rights are secured to them ... "). (citation omitted). Interestingly, the courts at times equated aliens with "denizens." See Fong Yue Ting v. United States, 149 U.S. 698, 723-24 (1893) ("It appears to be impossible to hold that a Chinese laborer acquired, under any of the treaties or acts of congress, any right, as a denizen, or otherwise, to be and remain in this country, except by the license, permission, and sufferance of Congress, to be withdrawn whenever, in its opinion, the public welfare might require it.") (emphasis added). In England, a "denizen" was a foreign-born person whom the King designated as an English subject; a denizen possessed a legal status somewhere between an alien and citizen. See id. at 736 (Brewer, J. dissenting) (citing authority).


n42 See Hiroshi Motomura, Whose Alien Nation? Two Models of Constitutional Immigration Law, 94 MICH. L. REV. 1927, 1929 n.12 (1996) (noting that movie Alien Nation told of unsuccessful efforts of aliens from another planet to assimilate). Others have analyzed how science fiction, replete with aliens from other planets,

n43 See Jonathan Freedland, Aliens are Coming Home, OBSERVER, July 7, 1996, at T7 (discussing popularity of movie in which United States thwarted attack of aliens bent on destroying human race by attacking major cities). The comments of one movie viewer reflected the anti-immigrant sentiment that some saw in the movie: "the aliens [in Independence Day] only want to immigrate and take over. That's what all immigrants want: To come in and get power ... " Gregory Freeman, Superheroes, Schools Fill Columnist's Mailbox, ST. LOUIS POST-DISPATCH, July 9, 1996, at 13B (letter to columnist).

n44 ROGET'S POCKET THESAURUS 18 (1969 ed.).

n45 See Scaperlanda, supra note 33, at 713 n.16 ("Personhood denotes constitutional status. Persons have constitutional rights, nonpersons do not.") (citations omitted).

n46 I acknowledge that the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect not just citizens, but "persons." See U.S. CONST. amend. XIV ("Nor shall any State 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.") (emphasis added). See, e.g., Plyler v. Doe, 457 U.S. 202, 210 (1982) (holding that undocumented immigrants present in United States are "persons" entitled to Fourteenth Amendment protections). Nonetheless, Congress and the courts have allowed aliens to be treated much less favorably under the laws than citizens. See infra text accompanying note 120 (citing authority).

n47 See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957). We see this phenomenon in the archetypal tale of the racist who claims that his "best friend is black." See Alex M. Johnson, Jr., Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties, 1992 U. ILL. L. REV. 1043, 1049 n.40 (noting "oft-expressed sentiment of the seventies and eighties, 'some of my best friends are blacks, but I certainly would not want one of my [sons or] daughters to marry one' ... ").

n48 See HIGHAM, supra note 9, at 131-57 (analyzing nativism directed at southern and eastern European and Jewish immigrants and how they were classified as being of another "race"); RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 149-51 (1993) (describing how Irish immigrants in 1800s were classified as a nonwhite "race").

n49 See infra text accompanying notes 60-73 (discussing influence of "good" (legal immigrant) "alien" and "bad" (undocumented) "alien" characterization on Supreme Court decisions).


n51 For a story about one undocumented person (Jose Serrano) with whom I worked years ago, 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, 1233-34.


n54 See JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954, at 139 (1980).

n55 For analysis of the intricacies of undocumented migration from Mexico, see Gerald P. Lopez, Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy, 28 UCLA L. REV. 615 (1981).

n56 The Illegal Immigration Reform and Immigrant Responsibility Act of 1996
[72x756]28 U. Miami Inter-Am. L. Rev. 263


n57 Compare Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States ... has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.") (citations omitted), with The Japanese Immigrant Case, 189 U.S. 86 (1903) (holding that noncitizens in deportation proceedings enjoy Due Process protections).

n58 See T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY 629-38 (3d ed. 1995). This, however, is not necessarily the case. Some persons who leave the country and return may have more community ties than someone who has only briefly been within the borders. See, e.g., Landon, 459 U.S. 21 (1982) (describing noncitizen who lived in United States five years, briefly left country, and upon return was placed in exclusion proceedings by the INS).


n60 See INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (1994) (providing that "lawfully admitted for permanent residence [is] the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws").


n62 Despite the wrath often directed at illegal aliens in the political process, the Supreme Court has rejected the claim that undocumented persons constitute a "suspect class" for equal protection purposes, which would subject classifications based on undocumented status to strict scrutiny. See Plyler, 457 U.S. at 219 n.19.

n63 See GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 177, 270 n.62 (1996). The term is found in a few places in the laws. See, e.g., 8 U.S.C. § 1365 (mentioning "illegal aliens" in the context of providing for federal reimbursement of states for costs incurred in incarcerating "illegal aliens" convicted of felonies).

n64 See Marc Cooper, The War Against Illegal Immigrants Heats Up, VILLAGE VOICE, Oct. 4, 1994, at 280 (quoting sponsor of Proposition 187: "'The ... mindset on the part of illegal aliens, is to commit crimes. The first law they break is to be here illegally. The attitude from then on is, I don't have to obey your laws.'").


n66 See INA § 240A, 8 U.S.C. § 1230A (added by Immigration Reform Act § 304(a)(3)) (providing for relief from
deportation known as "cancellation of removal"). The Immigration Reform Act modified relief previously known as suspension of deportation, see INA § 244, 8 U.S.C. § 1254 (repealed by Immigration Reform Act § 304(b)) and eliminated relief known as § 212(c) waiver. See INA § 212(c), 8 U.S.C. § 1282(c) (repealed by Immigration Reform Act § 308(8)(A)(i)) by creating the more restrictive cancellation of removal relief. See Immigration Reform Act § 304.


n68 See INS 1994 STATISTICAL YEARBOOK, supra note 27, at 178 (estimating that about one-half of undocumented persons fall into each of the two categories).

n69 See infra text accompanying notes 91-107, 111-14 (analyzing treatment of undocumented persons from Mexico).


n71 See infra text accompanying notes 128-29 (summarizing legislative expansion of noncitizen categories ineligible for public benefits).


This is not to suggest that all those who oppose affirmative action or support restrictionist immigration measures are racist. Concerns about race, however, influence the support for such measures. As I have emphasized in a different context it is difficult to isolate the precise role of race in shaping public opinion on such volatile issues. See Johnson, supra note 29, at 650-61 (analyzing role of race in passage of California's Proposition 187).

n73 A somewhat similar, though perhaps more controversial, terminological question surrounds abortion. See Roe v. Wade, 410 U.S. 113, 156-59 (1973) (stating that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment" and accepting the proposition that a "fetus" is not a "person" for Fourteenth Amendment purposes); Ronald M. Dworkin, The Great Abortion Case, in PHILOSOPHY OF LAW 191 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991) (analyzing use of the word "fetus" in abortion debate); Naomi Wolf, Our Bodies, Our Souls, NEW REPUBLIC, Oct. 16, 1995, at 26 (noting that use of term "fetus" in debate over abortion hides real-life impacts of abortion procedure). Some have argued that, even assuming that the fetus is a person for constitutional purposes, the right to abortion is constitutionally protected. See, e.g., Jed Rubenfeld, On the Legal Status of the Proposition that "Life Begins at Conception," 43 STAN. L. REV. 599 (1991); Donald H. Regan, Rewriting Roe v. Wade, 77 MICH. L. REV. 1569, 1641-42 (1979). But Cf. Alan E. Brownstein & Paul Dao, The Constitutional Morality of Abortion, 33 B.C. L. REV. 689, 743-45 (1992) (summarizing these claims and questioning their persuasiveness).

n74 See generally Johnson, supra note 51 (analyzing political dynamics of immigration law and policy).

n76 Id. at 305-06 (emphasis added) (citations omitted) (quotation marks in original deleted).

n77 Id. at 327-38 (Stevens, J., dissenting) (emphasis added) (footnotes omitted).


n81 See INA § 236(c), 8 U.S.C. § 1226(c) (amended by Immigration Reform Act § 303(a)).

n82 See INA § 236(e), 8 U.S.C. § 1226(e) (amended by Immigration Reform Act § 303(a)). For a thorough analysis of the detention provisions of the new immigration laws, see Margaret H. Taylor, The 1996 Immigration Act: Detention and Related Issues, 74 INTERPRETER RELEASES 209 (Feb. 3, 1997).

n83 See supra text accompanying note 7.

n84 Neuman, supra note 15, at 1429 (emphasis added).

n85 See supra text accompanying note 10.

n86 See supra text accompanying note 12 (noting racial requirements for naturalization).

n87 See Oyama v. California, 332 U.S. 633, 658-59 (1948) (Murphy, J., concurring). See also Neuman, supra note 15, at 1429 n.17 (acknowledging that states employed phrase "alien ineligible to citizenship" in land laws to discriminate against Japanese noncitizens).

n88 See supra text accompanying note 27.

n89 See FESTINGER, supra note 47, at 7 (noting how inconsistencies between perceived racial sensibilities and reality generate conflict that persons strive to reconcile).


n92 See, e.g., Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1395 (1953) (lamenting Supreme Court dicta "saying, in effect, that a Mexican wetback who sneaks successfully across the Rio Grande is entitled to the full panoply of due process in his deportation") (emphasis added) (footnote omitted).


n95 INS 1994 STATISTICAL YEARBOOK, supra note 27, at 178-79.

n96 Id. at 179.

Mario Cuomo, "I love immigrants. Legal, illegal--they're not to be despised," and Mayor Rudolph Giuliani, "Some of the hardest-working and most productive people in this city are undocumented aliens.").


n103 United States v. Ortiz, 422 U.S. 891, 899 (1975) (Burger, C.J., concurring in judgment) (emphasis added) (footnote omitted).


n107 Ortiz, 422 U.S. at 900 (Burger, C.J., concurring in judgment) (excerpting United States v. Baca, 368 F. Supp. 398, 402-08 (S.D. Cal. 1973)).


n110 See Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 559-67 (9th Cir. 1990) (outlining various detention and related policies implemented by INS directed at Central Americans in early 1980s).

n111 See U.S. COMM’N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 11-19 (1994) (endorsing increased border enforcement efforts such as Operation Hold the Line).


n114 CALIFORNIA BALLOT PAMPHLET, supra note 28, at 54 (Argument in Favor of Proposition 187).


n117 Sale, 509 U.S. at 164 n.13.

n118 Id. at 159-60 (emphasis added) (footnotes omitted).


n121 Barrera-Echavarria v. Rison, 44 F.3d 1441, 1442 (9th Cir.) (en banc), cert. denied, 116 S. Ct. 479 (1995).


n125 But see PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995) (arguing that immigration should be restricted in part because of its impact on changing racial demographics of United States).

n126 See, e.g., Douglas Jehl, Buchanan Raises Specter of Intolerance, Critics Say, L.A. TIMES, March 17, 1992, at A1 (quoting Patrick Buchanan, Republican Presidential candidate: "If we had to take a million immigrants in say, Zulus, next year, or Englishmen, and put them up in Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia?"").

n127 See Kevin R. Johnson, Some Thoughts on the Future of Latino Legal Scholarship, 2 HARV. LATINO L. REV. (forthcoming 1997) (analyzing significance of treatment of Latinos/as as "foreigners," even those whose ancestors have been in the United States for generations). This may begin to explain why Latinos/as generally have a different perspective on immigration than the majority. Another reason might be that many Latinos/as themselves immigrated to this country, or have loved ones that have done so. In addition, because Latinos/as are ethnically distinct, they may not share Anglos' anxiety about the increased immigration of non-Anglo Saxons. See infra text accompanying note 133. Moreover, Catholicism, still the dominant religion among Latinos/as, may affect the community's collective view on immigration. See, e.g., Larry B. Stammer & John J. Goldman, Pope Exhorts U.S. to Welcome the 'Stranger,' L.A. TIMES, Oct. 6, 1995, at A1 (reporting that the Pope promoted generosity toward immigrants at public mass); Ted Rohrlich, Mahony Calls

n128 See, e.g., Vote Wasn’t Anti-Immigration, OMAHA WORLD HERALD, Nov. 18, 1994, at 22 (contending that Proposition 187 was not anti-immigrant but anti-illegal immigration).


n130 See 1994 INS STATISTICAL YEARBOOK, supra note 27, at 22 (Table D), 134 (Chart T) (presenting statistical data indicating that, for certain time periods, Mexican citizens constituted largest immigrant group in the United States and immigrant group with lowest naturalization rate).

n131 See Sontag, Study Sees Illegal Aliens In a New Light, supra note 97 (noting that many New Yorkers thought of undocumented immigrants as persons from China and Central America).

n132 See, e.g., BRIMELOW, supra note 125.

n133 See Thomas Epenshade & Katherine Hempstead, Contemporary American Attitudes Toward U.S. Immigration, 30 INTL MIGRATION REV. 535, 543 (1996) (summarizing conclusion of study showing that Hispanics were more likely to voice pro-immigration attitudes than non-Hispanic whites).


n135 See Stephen Chapman, Trading a Birthright for a Mess of Pottage, CHI. TRIB., Aug. 11, 1996, at 25 (reporting Governor Wilson’s support for changes in birthright citizenship).

n136 See Dan Walters, Wilson is a Nonperson to ’60 Minutes’, SAN DIEGO UNION TRIB., Jan. 27, 1994, at B13 (mentioning episode).


n138 See, e.g., LINDA CHAVEZ, OUT OF THE BARRIO 91-92 (1991) (recounting incident in which the founder of an English-only group distributed memorandum stating in crude fashion that fertility rates of Latinos/as were excessive). Not all critical examinations of the birthright citizenship rule, of course, expressly play on racial stereotypes. See, e.g., PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985).


n140 See id.


n143 See, e.g., BRIMELOW, supra note 125, at 272-74.
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SUMMARY: My comments will focus on LatCrit theoretical perspectives on identity as they relate to debates about the declining role of state sovereignty in international law and the role of international advocacy strategies in promoting international civil and political rights in the United States. n1 If we accept the notion that the struggle to secure fundamental civil rights is essentially a domestic struggle, but that international law and relations can have an impact in the local struggle, then this should propel us to form alliances with international advocacy groups. n2 Active Senate obstruction of the application of international law in the United States through the use of treaty reservation authority, as well as the Supreme Court's willingness to jettison international law principles, especially international human rights obligations in pursuit of asserted U.S. government interests, have rendered legal strategies relatively ineffective. n3

TRANSNATIONAL IDENTITY AND STATE SOVEREIGNTY ... Latino/a transnational identity may have a further impact on the declining importance of state sovereignty. n4

[293] I. INTRODUCTION

My comments will focus on LatCrit theoretical perspectives on identity as they relate to debates about the declining role of state sovereignty in international law and the role of international advocacy strategies in promoting international civil and political rights in the United States. n1 I have chosen the idea of transnational identity--an idea that may be common to many Latinos/as--to address these two issues.

As Rina Benmajor noted in Crossing Borders: The Politics of Multiple Identity: [294] The child of the Americas is forged not only from the history of conquest but from global migration, thus incorporating the experience of being Puerto Rican or Latin in the United States, of "third world" in the "first." From this vantage point, the strategy for collective empowerment implies a recognition of transnational cultural citizenship rooted in but moving beyond strictly national terms of identity. n2

A transnational identity is typically evidenced by recent immigrants who maintain close ties with their home country, including frequent travel, visits by friends and family members from the home country, and other ties. I use the term transnational identity in a broader sense, which includes those members of the Latino/a community who maintain physical or less tangible ties to their ancestral home countries which may or may not include frequent travel to that country. For many Latinos/as, there may be a sense of possessing a home country other than the United States, regardless of the actual ties to that home country, which may provide for a world view that is less tied to parochial U.S. interests. For example, Caribbean immigrants are noted for possessing a transnational dual identity because of frequent travels to and from their ancestral home countries. It has been asserted that there must be a recognition of this transnational identity and, thus, some form of transnational multiculturalism that operates within the borders of the United States and across permeable borders. n3

It is this transnational identity, which many Latinos/as and other "immigrant" or "migrant" groups may possess, that could aid in the development of a more inclusive view of pluralism. n4 Professor Mari Matsuda refers to the notion of radical pluralism as a constitutional entitlement in the United States. n5 Radical pluralism finds an entitlement to cultural diversity that is mandated by the U.S. Constitution and principles of democracy. This entitlement would include self-determination in making and promoting one's culture and sharing it with other politically equal cultures. n6 Professor Matsuda asserts a need for radical pluralism in the context of accent discrimination where there would be a right to "keep" one's accent even if it is changeable with the

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A transnational identity is typically evidenced by recent immigrants who maintain close ties with their home country, including frequent travel, visits by friends and family members from the home country, and other ties. I use the term transnational identity in a broader sense, which includes those members of the Latino/a community who maintain physical or less tangible ties to their ancestral home countries which may or may not include frequent travel to that country. For many Latinos/as, there may be a sense of possessing a home country other than the United States, regardless of the actual ties to that home country, which may provide for a world view that is less tied to parochial U.S. interests. For example, Caribbean immigrants are noted for possessing a transnational dual identity because of frequent travels to and from their ancestral home countries. It has been asserted that there must be a recognition of this transnational identity and, thus, some form of transnational multiculturalism that operates within the borders of the United States and across permeable borders. n3

It is this transnational identity, which many Latinos/as and other "immigrant" or "migrant" groups may possess, that could aid in the development of a more inclusive view of pluralism. n4 Professor Mari Matsuda refers to the notion of radical pluralism as a constitutional entitlement in the United States. n5 Radical pluralism finds an entitlement to cultural diversity that is mandated by the U.S. Constitution and principles of democracy. This entitlement would include self-determination in making and promoting one's culture and sharing it with other politically equal cultures. n6 Professor Matsuda asserts a need for radical pluralism in the context of accent discrimination where there would be a right to "keep" one's accent even if it is changeable with the
The U.S. constitutional basis for radical pluralism could be supported by what has been termed the international right to personal self-determination. This international right to personal self-determination allows for individual choice regarding loyalty to country, ethnic or racial groups, or any other common bond. The existence of this right to personal self-determination is evidenced by the growing international practice recognizing dual nationality. The deterioration of the nation-myth that defines the United States as a tribal community with a shared white, Christian, and Western European heritage is further accelerated by increased economic and trade integration and transnational migration.  

II. TRANSNATIONAL IDENTITY AND INTERNATIONAL ADVOCACY STRATEGIES

What is the potential role of individuals with a transnational identity in the development of international advocacy strategies? It is the establishment of working relationships with international civil rights groups. The Latino/a connection to Latin America, however temporal it may be, may be critical to forming a more integrated advocacy approach to advancing international civil rights and political rights agenda in the United States and in the Western Hemisphere in general. If we accept the notion that the struggle to secure fundamental civil rights is essentially a domestic struggle, but that international law and relations can have an impact in the local struggle, then this should propel us to form alliances with international advocacy groups.  

There is a significant history of appealing to international civil rights norms as a means of prompting the advancement of civil rights in the United States. Civil rights groups in the United States were among the first in the world to petition the United Nations for relief from abusive conduct by a member state. In 1947, the National Association for the Advancement of Colored People filed a petition before the United Nations denouncing race discrimination in the United States; this led to international approbation and ultimately aided in the civil rights revolution in this country. The international exposure of the civil rights hypocrisy that existed in the United States, after this country had successfully fought genocide in Europe, influenced both foreign policy and domestic civil rights.  

Latinos/as can lead an international advocacy effort that links struggles in the United States with those of other oppressed groups in the Western Hemisphere and worldwide. Since the 1950s, U.S. civil rights groups have lacked a working relationship with international civil rights groups. These relationships are important as vehicles to expand the understanding of the application of international law within states.

U.S.-based civil rights groups have not maintained ties to international groups until recently. For example, in 1993, Human Rights Watch and the American Civil Liberties Union (ACLU) released a joint report that documented the United States failure to comply with the International Covenant on Civil and Political Rights. This joint effort yielded concrete results. The publication of the joint Human Rights Watch-ACLU report led the United Nations Human Rights Committee to question the United States about sex and race discrimination and about the treatment of juvenile and other offenders.

Integrated relationships between U.S. civil rights groups and international groups may be critical because of the effective limits on the application of international law in the United States. Active Senate obstruction of the application of international law in the United States through the use of treaty reservation authority, as well as the Supreme Court's willingness to jettison international law principles, especially international human rights obligations in pursuit of asserted U.S. government interests, have rendered legal strategies relatively ineffective.

A regional community of advocacy groups has begun to form in the Caribbean to deal with transborder women's issues. For example, Women and Development United, founded in Barbados in 1978, and the Caribbean Association for Feminist Research and Action, founded in the mid-1980s, have promoted research and action on women's issues throughout the entire Caribbean region. Moreover, these organizations have promoted contact among different local and national groups within the Caribbean and have helped establish a more regional view of women's issues. This growing regionalism in the Caribbean is viewed as a challenge to the traditional role of state actors and as an opportunity to transcend the historical fragmentation that characterizes the Caribbean Basin.

III. TRANSNATIONAL IDENTITY AND STATE SOVEREIGNTY

The traditional view of sovereignty is premised on the inviolability of a state's borders and is recognized as one of the few pre-emptory norms in international law. One challenge to the static notion of sovereignty offers the perspective that state sovereignty is not an intrinsic
value or autonomous principle in international law, but rather is tied to human rights and respect for individual autonomy. n22 Others have criticized the concept of state sovereignty as enhancing the integrity of nations, which are lacking in human rights standards. n23 Sovereignty is also described [*299] as a barrier to international governance, the growth of international law, and the realization of human values. n24

Louis Henkin points out that international human rights over the past fifty years have had a significant impact on the deconstruction of state sovereignty as a preeminent principle in the international system. n25 He asserts that the international system, although a system of independent states, has moved beyond state values to human values and towards a commitment to human welfare, that human rights law has penetrated the state entity and addresses the condition of human rights within every state, that human rights law consists of important norms to which some states have not consented, that the international system has developed institutions for enforcing human rights law against "sovereign" states and on occasion has encouraged states to "intervene" in other states to support human rights, and that international law has importantly influenced and been influenced by national constitutions and constitutional systems. n26

The corresponding principle of nonintervention tied to state sovereignty has also been criticized as leaving women vulnerable to discrimination and abuse. n27 The nonintervention principle, which has been the cornerstone of the Organization of American States, is considered weakened by the Organization of American States 1991 adoption of the Santiago Commitment to Democracy and the Renewal of the International System. This commitment requires consultation by Ministers of Foreign Affairs of the American Republics when a military coup takes place or when the democratic stability of a country is threatened in some way. n28

The principle of nonintervention and state sovereignty may be weakened by the increased prominence of nongovernmental organizations in the world's international policymaking institutions. [*300] Some have suggested that the increased role of nongovernmental organizations in conference planning and participation may lead to their involvement in the formulation of customary international law; this would be another affront to traditional notions of sovereignty, such as the notion that only the state can consent to be bound by custom. n29 Thus, PIIel institutional structures, including international advocacy groups, might play a significant role in the constitutive process of decisionmaking.

Latino/a transnational identity may have a further impact on the declining importance of state sovereignty. Thomas Franck posits the theory that there is a new development in international law--a right to personal self-determination. n30 This right to personal self-determination explicitly acknowledges the right of the individual to possess multiple loyalties. The example he uses is the increasing recognition among states of dual nationality, which permits dual loyalties of the individual to separate states. n31

This recognition of a possible international law right to personal self-determination, which would recognize dual or multiple nationality or at minimum multiple loyalties, is instructive for the development of a truly pluralist society in the United States. Thomas Franck has opined that the state-defined either as a tribe sharing common genealogy or culture or as a civil society based on shared civic values--has become increasingly less significant as the source of personal identity. n32 What is unique about the decline of the state as a source of personal identity for citizens is the new opportunities for individual choice of personal identity, which did not previously exist in the nation-state system where identity is traditionally prescribed according to one's country of residence, one's relationship to the monarch, the language one's family spoke at home, the education one may have received or the career one has followed; all of which were factors usually perceived in a hierarchical harmony. n33

[*301] This increasing recognition by states of a multilayered identity, evidenced by a tolerance for an individual's layered and textured loyalty in the form of dual nationality, may be as strong an emerging trend as the ethnic conflict we see in the situations in Bosnia-Herzegovina, Sri Lanka, and Rwanda. This change in the relationship of the individual to the state, resulting from an increased recognition of dual nationality, may be a key step toward true global pluralism in which the ties that bind us are based on our own choice of a singular citizenship-based identity or a more multilayered transnational identity. n34 As a concept, this layered loyalty, or transnational identity, need not threaten the sovereignty or the structure of a society that calls itself a nation. It is in this area that LatCrit theory, with a focus on international law, could offer some solutions to what are perceived as intractable racial and ethnic group tensions in the United States.

There is also recognition among scholars of a right to democratic governance, which has been interpreted as a right to representative democracy. n35 International advocacy strategies linking a transnational identity to a right of representative democracy and participation in a radical pluralist society could offer a critical link among Latinos/as in the Western Hemisphere. In
addition, the transnational movement of people, capital, and labor further affect regional economic agreements, sovereignty, and citizenship as well as human rights issues. The transnational identity of many of the objects of multilateral trade agreements such as NAFTA create greater imperative for international strategies, both political and legal.

In conclusion, LatCrit theory may offer new ways to interpret the declining importance of state sovereignty in international law. There are many factors affecting the erosion of sovereignty as the defining attribute of states. Latino/a critiques of the monodimensional view of citizenship, as well as international advocacy strategies which link U.S. movements with broader hemispheric concerns, should be a propelling force toward a multilayered understanding of Latino/a identity.

FOOTNOTE-1:

n1 We have been asked to address three main issues in our talks about international civil and political rights: 1) LatCrit theoretical perspectives on identity as these relate to traditional themes and concerns; 2) whether LatCrit theory offers new perspectives on recent trends toward regional economic cooperation, such as NAFTA, and the impact of these regimes on Latinos/as; and 3) whether LatCrit theory has anything to offer to key international law debates such as the role of sovereignty in international law, the appropriate scope of state intervention in civil society, and the status of international human rights in regional integration agreements.

n2 Rina Benmajor, Crossing Borders: The Politics of Multiple Identity, 2 CENTRO DE ESTUDIOS, PUERTORRIQUENOS BULL. 72, 74 (1988).


n4 This transnational identity is shared by others who possess roots in the Western Hemisphere, such as persons with links to the non-Spanish-speaking Caribbean. Id. It has also been asserted that this transnational, postcolonial identity is shared by Asian/Pacific Islanders as well. See Neil Gotanda, Chen the Chosen: Reflections on "Unloving," (pending publication) (manuscript at 13, on file with author).


n7 Matsuda, supra note 5, at 1400.

n8 Kevin R. Johnson, Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States, 27 U.C. DAVIS L. REV. 937 (1994). This migration and increased economic integration occurs in the Western Hemisphere despite the active attempts of the United States to avoid labor and other forms of human migration from the South.

n9 Dorothy Q. Thomas, Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy, 9 HARV. HUM. RTS. J. 15 (1996). Thomas notes that local rights activists worldwide have recognized that most serious domestic rights problems have an international dimension and that domestic groups in a growing number of countries have successfully drawn upon international human rights law and have used global pressure and scrutiny to challenge and ameliorate adverse domestic conditions. Id. at 17.

n10 Id.

n11 Id. In addition, the Civil Rights Congress filed a second petition in 1951, charging the United States with genocide under the 1948 Convention on the Prevention and Punishment of Crimes of
Genocide; however, neither petition resulted in formal denunciation or charges against the United States.

n12 See Mary Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61 (1988); Thomas, supra note 9, at 18.

n13 Thomas, supra note 9, at 18. The National Association for the Advancement of Colored People Legal Defense Fund and the American Civil Liberties Union have only recently begun to actively work with international organizations. Thomas explains the lack of connection to the obstruction by the Supreme Court and Congress, in particular, to the application of international law in the United States. Id. at 20.

n14 Id. at 19.


n16 See also Thomas, supra note 9, at 19.


n18 Reservations to treaties may exempt the United States from the obligations of specific treaty provisions, stipulate that treaty obligations will not abrogate domestic law, and stipulate that the treaty is non-self-executing and, therefore, requires implementing legislation before treaty obligations become enforceable in domestic courts. For example, ratification of the Convention on the Elimination of Racial Discrimination was conditioned on the statement that the United States need not alter its domestic laws in any way to conform to the treaty, known as the Helms Proviso. See also Thomas, supra note 9, at 20 n.23.

n19 See, e.g., Stanford v. Kentucky, 492 U.S. 361 (1989) (refusing to apply international law limitations on the use of the death penalty for minors under the age of 18); United States v. Alvarez-Machain, 504 U.S. 655 (1992) (finding that the U.S. government abduction of a Mexican national in Mexico did not violate the terms of the U.S.-Mexico extradition treaty because the treaty did not prohibit abduction). The resistance to the incorporation of human rights law into U.S. law has been attributed to several factors including: 1) a fear of diluting the Bill of Rights protections which may be more expansive than some human rights protections; 2) the fear of creating an affirmative duty on the part of the state to ensure social equality rather than a duty not to deprive an individual of their rights; 3) the fear of U.S. officials being held accountable in foreign countries for actions against minorities if an affirmative duty exists; and 4) the fear of too many cases clogging the U.S. judicial system with foreign plaintiffs suing their home country governments and United States citizens suing U.S. officials. Christenson, supra note 17.

n20 Andres Serbin, Transnational Relations and Regionalism in the Caribbean, 533 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 147 (1994).

n21 Id. at 150.

n22 Fernando R. Teson, International Abductions, Low-Intensity Conflicts and State Sovereignty: A Moral Inquiry, 31 COLUM. J. TRANSNAT'L L. 551, 553 (1994) (criticizing the traditional positivist proposition as extreme and resting on antiquated and rigid notions of sovereignty); Karen Knop, Re/Statements: Feminism and State Sovereignty in International Law, 3 TRANSNAT'L & CONTEMP. PROBS. 293, 298 (1993) (pointing out that there is a particular focus on the respect for political rights that are central to notions of classical liberal democracy).
Anderman suggests that the news media, as a force that shapes ideas and ideology in the United States, should be studied to fully understand international law. In addition, Anderman points out the disjunction between respect for sovereignty and adherence to minimal human rights standards. \textit{Id.} at 294.

\textit{Id.} at 32.

\textit{Id.} at 32-33.

Knop, \textit{supra} note 22, at 299.


Knop, \textit{supra} note 22, at 308-10 (citing IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 259 (1990)).


\textit{Id.} at 378.

\textit{Id.}

\textit{Id.} at 377.

\textit{Id.} at 383. The Foreign Minister of Bosnia, Muhamed Sacirbey, is a U.S. citizen who stated publicly that he was not renouncing his U.S. citizenship upon taking office in Bosnia. This was one of many examples of U.S. citizens who assumed prominent policymaking roles in their other countries of nationality. \textit{Id.}

COLLOQUIUM PROCEEDINGS: PANEL TWO: CRITICAL THEORY AND THE NORTH AMERICAN FREE TRADE AGREEMENT'S CHAPTER ELEVEN

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SUMMARY: ... I will limit my remarks to an examination of the North American Free Trade Agreement's (NAFTA) Chapter Eleven governing foreign direct investment (FDI). ... At the same time, the NAFTA investment chapter is a much strengthened version of prior U.S. bilateral investment treaties as well as bilateral investment treaties now in force between other countries; it is, in many ways, a U.S. bilateral investment treaty on steroids--a dream come true for the U.S. foreign investor. ... The predictable consequences of investment liberalization within Mexico were scarcely considered, much less addressed, by the negotiators of the investment chapter. The social, cultural, and political costs of investment liberalization were not factored into the economists' models that produced this treaty. ... Why are we content to assume that this fifth Mexican oscillation--this time in favor of the market--will be permanent or constitute the end of Mexico's history? ... But, if viewed as the human rights treaty that, in fact, it is, the NAFTA investment chapter is the most bizarre human rights treaty ever conceived. ... Seen from this perspective, the NAFTA investment chapter is a human rights treaty for a special-interest group. ... The challenge for race critics, as well as other critics of the NAFTA, is to help construct alternative models for "sustainable investment liberalization." ... 

[*303] The application of critical race insights to issues involving U.S. foreign relations is likely to benefit both international lawyers and traditional race critics, albeit for different reasons. In critical race theory, international lawyers will find liberation from the prevailing state-centric and positivist modes of analysis that now dominate our field. Traditional race critics, who have usually stopped at the water's edge, may discover that U.S. foreign policy decisions replicate some of the familiar patterns of many domestic U.S. laws. Race critics may find it illuminating that what the U.S. government does, by way of treaty, serves to entrench or even exacerbate racial and ethnic divides within other nations--as well as within our own.

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I will limit my remarks to an examination of the North American Free Trade Agreement's (NAFTA) Chapter Eleven governing foreign direct investment (FDI). ... NAFTA's investment chapter is a direct descendant of the U.S. model bilateral [*304] investment treaty as well as the nearly 900 similar bilateral investment treaties that now exist throughout the world. ... At the same time, the NAFTA investment chapter is a much strengthened version of prior U.S. bilateral investment treaties as well as bilateral investment treaties now in force between other countries; it is, in many ways, a U.S. bilateral investment treaty on steroids--a dream come true for the U.S. foreign investor. ... The NAFTA investment chapter is also significant as it is likely to represent the starting position for U.S. negotiators in other forums addressing FDI issues. Absent a radical shift in the U.S. approach to foreign investment, it is likely that our government will seek the replication of the NAFTA investment provisions through a hemisphere-wide Free Trade Agreement for the Americas or through global arrangements within the Organization of Economic Cooperation and Development or the World Trade Organization. ... 

The rhetorical power of the NAFTA investment chapter--its perceived legitimacy among traditional international lawyers--needs to be compared to some troublesome realities on the ground. The rhetoric of the NAFTA investment chapter is that of scrupulous neutrality and equal protection. Its text is grounded in symmetrical and reciprocal rights as between the NAFTA parties and their investors. This befits the treaty's claim that it is a "fair" contract between "sovereign equals." The reality is quite different. There is no actual symmetry of direct benefits to the national investors of all three NAFTA parties--at least not for the foreseeable future. As few Mexican investors are likely to be in the position to penetrate the U.S. market, it is almost exclusively U.S., not Mexican, nationals that get the benefit of the investment chapter. In reality, U.S. firms, not Mexican companies,
will be demanding national and most-favored-nation treatment; they, not Mexican firms, will be the ones relying on the NAFTA to renge on their prior promises to litigate in local courts; they, not small- or medium-sized Mexican firms, will be reaching for supposedly "impartial" international arbitration to resolve investor-state disputes; they, not Mexican nationals, will be able to challenge local ordinances as de facto confiscatory measures or as breaches of the NAFTA prohibition on performance requirements. U.S. firms will be the ones claiming the direct benefits of free unencumbered repatriation of profits. Thanks to guaranteed arbitration, U.S. multinationals, who have been largely responsible for the promulgation and entrenchment of the doctrine of state responsibility to aliens, will henceforth be in a strengthened position to claim the benefits of that doctrine as well as the growing body of "lex mercatoria" so favorable to their interests.

The rhetoric of the NAFTA investment chapter suggests that all three NAFTA parties assume the "same" duties and take the same risks. The reality is a world in which U.S. laws and risk-taking remain essentially the same while Mexican policymakers are expected to complete and institutionalize an economic revolution without the resources needed to alleviate the inevitable adjustment pains. The predictable consequences of investment liberalization within Mexico were scarcely considered, much less addressed, by the negotiators of the investment chapter. The social, cultural, and political costs of investment liberalization were not factored into the economists' models that produced this treaty. Yet, in the unmodelled real world, the Mexican people, especially those on the bottom of Mexican society, are now facing severe economic dislocations, which range from sectorial unemployment to a rising tide of bankruptcies for small- and medium-sized Mexican firms. For now, what the vast majority of the Mexican population has witnessed are the social costs of investment liberalization and not its presumed longer term benefits.

Moreover, even over the longer term, when the presumptive positive effects of the theory of competitive advantage are to emerge, investment liberalization will produce a Mexican economy increasingly dominated by multinationals from one country--the United States. Few have asked what the political consequences of such domination are likely to be for a country whose history, as Amy Chua has most recently reminded us, consists of repeated oscillations between periods of market openness punctuated by cycles of reaction and nationalization. After all, this is a country whose history consists of cycles of often violent reactions to domination by "ugly anglos" intent on achieving their "manifest destiny." Why are we content to assume that this fifth Mexican oscillation--this time in favor of the market--will be permanent or constitute the end of Mexico's history?

The economic models that produced the NAFTA investment chapter focus on Mexican GNP, not equity. Even assuming that the sanguine estimates of economists prove correct with respect to the growth of the Mexican economy as a whole, no one knows whether the widening gap between Mexican elites and the desperately poor, along racial and ethnic lines, will only be exacerbated by FDI nor what the resulting social and political costs will be if the gap increases. Furthermore, investment liberalization, NAFTA-style, has been pursued without regard for the need to legitimize FDI to the Mexican people, and not merely to those in Chiapas. In Mexico and elsewhere, investment liberalization has been pursued without a vision of social justice, without real democratic legitimacy, and without concern for the historical record of FDI. NAFTA negotiators from all sides pretended that free trade and free investment were interchangeable phenomena--as if the import of a Sony television and the sale to a foreign investor of a treasured cultural icon are as indistinguishable politically as they are under economic theory.

Many real world effects of incoming FDI flows were not addressed, at least not for Mexico.

No one engaged in story-telling about foreign investors of old; instead, the rhetoric of the NAFTA investment chapter suggests that all foreign investors, regardless of their bargaining power or the histories of particular companies, are all "innocents" abroad, equally needful of protection from all-powerful government interests bent on their destruction. Instead of addressing the likely consequences of a tide of FDI in the 1990s and beyond, U.S. negotiators insisted on using the NAFTA investment chapter to address the concerns of the Cold War. Instead of looking forward, Chapter Eleven of the NAFTA looks back: it insists on protecting foreign investors from the last wave of Third World nationalizations, without much attention to the factors that produced those waves or the possible backlash that may accompany future incoming FDI flows.

The rhetoric of the investment chapter suggests a narrow economic treaty dealing with a limited set of protections for a defined group. The drafters of the NAFTA, as well as the commentators who have addressed it, tend to see it as a treaty within the self-contained sphere of "private" international law or, even more narrowly, "international economic law." In reality, this is a treaty that has an impact on the civil, political, economic, and social rights of a variety of
individuals—from national investors driven out of business to those employed and unemployed by the changing fortunes and preferences of foreign multinational enterprises, especially in those sectors of the Mexican economy most likely to be dominated by foreign investors such as commercial agriculture and export manufacturing. But, if viewed as the human rights treaty that, in fact, it is, the NAFTA investment chapter is the most bizarre human rights treaty ever conceived.

Under the NAFTA investment chapter, corporate and natural investors have gained direct access to binding denationalized adjudication of any governmental measure that interferes with their ample rights. Many of the NAFTA investor protections echo human rights contained in the Universal Declaration of Human Rights and the principal human rights conventions, including rights against discrimination, to security, to recognition as a legal person, to nationality, to freedom of movement, and to own property and not be arbitrarily deprived of it. n14 Interestingly, the United States has only managed to agree on such a potentially effective regime for human rights enforcement in the context of one type of legal person, the foreign investor, and not for any other human being. n15

Seen from this perspective, the NAFTA investment chapter is a human rights treaty for a special-interest group. Except for relatively weak side agreements, which deal with environmental and labor issues, this is a treaty that is effectively silent with respect to the rights of others, who may be affected by FDI flows, and that ignores many of the other rights also contained in the Universal Declaration of Human rights. In the chapter protecting the rights of businesses, there is no mention of a human being's right to "economic" rights "indispensable for . . . dignity and the free development of . . . personality." n16 Similarly, there is no mention of a right to work, of free choice of employment, of just and favorable conditions of work, or of protection against unemployment. Neither is there mention of rights of "equal pay for equal work" and "just and favourable remuneration ensuring ... an existence worthy of human dignity," or of the "right to form and to join trade unions." n17 No one, not even the foreign investor's employees, are given enforceable rights to "rest and leisure, including reasonable limitations of working hours and periodic holidays with pay." n18 No one is given a right to an "adequate" standard of living n19 or a "right to education," n20 and, of course, there is no discussion of a "social and international order" in which all of these human rights can be fully realized for all persons, not merely foreign investors. n21 What is perhaps most striking in a treaty whose essential goal is economic development is that there is no attempt to connect the rights it so lavishly bestows on its investors to the needs of the collective; there is no real attempt to put flesh on concepts such as a "right to development" or "sustainable development." n22

It might be said that the comparison between the NAFTA and human rights instruments is, in itself, a rhetorical stance that is as questionable as the NAFTA's invocation of "equal rights." Nonetheless, the idea that NAFTA advocates would find comparisons with human rights instruments inapposite or absurd, at a minimum, shows the limited frame of reference in which that treaty was negotiated.

Furthermore, the NAFTA investment chapter does not purport to impose any corresponding duties on the U.S. multinationals it privileges. The NAFTA chapter contains scarcely one word about the many duties that multinationals should owe host states under international law. These duties have been canvassed, for example, in the Draft Code on the Conduct of Transnational Corporations, which has been under discussion at the United Nations for years. n23 There is no mention of duties to respect the national sovereignty of the states in which they operate; to contribute towards the achievement of national economic goals and development objectives; to implement contracts in good faith and to renegotiate contracts subject to a fundamental change in circumstances; to adhere to socio-cultural objectives and values; to respect human rights; to abstain from corrupt practices; to cooperate in the allocation of decisionmaking powers among their entities such as to enable them to contribute to economic development, local equity participation, and the managerial and technical training of nationals; and to give priority to the employ of nationals. Moreover, there is no mention of duties to avoid transfer pricing practices, which have the effect of modifying the tax base on which their entities are assessed or of evading exchange control measures; to cooperate with host state's transfer of technology goals; to perform their obligations in good faith; and to disclose financial information. n24 While many of these duties are not regarded as controversial in the abstract, the prospect of making them as enforceable as the rights recognized in the NAFTA would have seemed heretical to NAFTA negotiators.

The bottom line is that instead of the comprehensive, balanced, and truly reciprocal investment regime that it purports to be, the NAFTA investment chapter is merely a short-sighted, one-way ratchet to reward and attract U.S. capital. Even those who assume that the
attraction of foreign capital provides its own reward ought to be concerned should this treaty's imbalances undermine its promise to supply stable and enduring rights for foreign investors.

But if the investment chapter is not as color-, class-, and ethnicity-blind as its rhetoric suggests, are there consequences for Latinos within the United States as well? Others have already suggested the possibility that racial and ethnic minorities within the United States are likely to experience a disproportionate share of any adverse environmental and labor effects of that treaty and I need not dwell on that possibility here. n25 I would suggest that race critics explore another question as well: namely, the possible connections between FDI flows and immigration flows into the United States.

NAFTA's proponents argue that FDI flows into Mexico will reduce the pressures on Mexicans to emigrate. n26 Those who have examined the history of FDI flows and their impact on U.S. immigration, [*311] such as Saskia Sassen, would suggest otherwise. n27 Sassen argues that U.S. investments abroad actually encourage greater emigration to the United States through:(a) the incorporation of new segments of the population into wage labor and the associated disruption of traditional work structures both of which create a supply of migrant workers;

(b) the feminization of the new industrial workforce and its impact on the work opportunities of men, both in the new industrial zones and in the traditional work structures; and

(c) the consolidation of objective and ideological links with the highly industrialized countries where most foreign capital originates, links that involve both a generalized westernization effect and more specific work situations wherein workers find themselves producing goods for people and firms in the highly industrialized countries. n28

If Sassen is correct and FDI encourages Mexican immigration, the NAFTA investment chapter is directly implicated in many of the core issues that now preoccupy LatCrit theorists, as much of their work--consisting of critiques of initiatives such as English-only statutes or proposals to deny government benefits to legal and illegal aliens--address the backlash to immigration. The NAFTA investment chapter may have a causal link to proposals that pose risks to the rights of all Latinos, legal and illegal, within the United States. Moreover, if FDI promotes Mexican immigration, it is yet one more reason why Mexican immigration cannot, morally, be seen as "Mexico's" problem. If its investors help create the plight of Mexican immigrants, the United States is morally obligated to do more than simply build "fortress America" in reaction.

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There are many other promising avenues of inquiry that race critics might pursue in connection with the NAFTA investment [*312] chapter. Some of these may clarify the past. Critical race perspectives may have much to say about how the NAFTA investment chapter came about. They may help explain the "naive" faith of its negotiators in facially neutral rules and forums that ignore North/South power differentials. Critical insights may pose issues for the future, suggesting, for example, that there are risks should FDI flows encourage the "harmonization" of laws between sending and receiving countries. n29 While many have assumed that such harmonization is desirable, race critics may not be quite as sanguine, especially if harmonization should proceed, as has investment liberalization, on U.S. terms.

Once we use critical insights to "deconstruct" and "reconstruct" the NAFTA investment chapter, we may become aware that investment liberalization, NAFTA-style, is not what it appears to be: a manifestation of neutral or impersonal "market" forces. We may realize just how much the NAFTA investment chapter reflects U.S. laws and perspectives.

At the same time, it is important that race critics not be seen as mere naysayers. The challenge for race critics, as well as other critics of the NAFTA, is to help construct alternative models for "sustainable investment liberalization." As the United States strives for hemisphere-wide investment liberalization through a Free Trade Agreement for the Americas, or even globally, through negotiations in the Organization of Economic Cooperation and Development and the World Trade Organization, race critics may usefully remind government negotiators of the need to keep investment liberalization responsive to the desperate plight of the underclass in both FDI sending and receiving states as only this kind of liberalization is likely to survive the pressures of representative government. What everyone, on both sides of the North/South divide, should want are investment rules of the road that endure because they are perceived as, and are, fair.

FOOTNOTE-1:

n1 Adrien Wing is one of the rare counter-examples. See, e.g., Adrien Katherine Wing, Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America, 25 COLUM. HUM. RTS. L. REV. 1 (1993).

n3 For a summary of bilateral investment treaties, see RUDOLF DOLZER, BILATERAL INVESTMENT TREATIES (1995).


n7 For an overview of some of these consequences, see Alejandro Nadal, Mexico: Open Economy, Closed Options (working paper on file with author); Elvia A. Quintana Adriano, The North American Free Trade Agreement and its Impact on the Micro-, Small-and Medium-Sized Mexican Industries, 39 ST. LOUIS U. L.J. 967 (1995).


n9 Id. at 228-38.


See also Calvin D. Siebert & Mahmood A. Zaidi, Employment, Trade and Foreign Investment Effects of NAFTA, 5 MINN. J. GLOBAL TRADE 333 (1996).


n12 Cf. North American Agreement on Labor Cooperation, Sept. 8-14, 1993, U.S.-Mex.-Can., 32 I.L.M. 1499. The labor side agreement emerged from concerns within the United States that its laws relating to these issues would be disregarded or avoided.


n15 The category of "foreign investor" that the investment chapter singles out for special treatment tends to render others, including national investors, invisible. It also focuses on only one aspect of the foreign investor--nationality--at the expense of the whole, including the history of the sector in which the foreign investor plans to invest or the history of the multinational corporation. Cf. Stephanie M. Wildman & Adrienne D. Davis, Language and Silence: Making Systems of Privilege Visible, in CRITICAL RACE THEORY: THE CUTTING EDGE 573, 578 (Richard Delgado ed., 1995).

n16 Universal Declaration, supra note 14, art. 22.

n17 Id. art. 23.

n18 Id. art. 24.
n19 Id. art. 25(1).

n20 Id. art. 26.

n21 Cf. id. art. 28. Of course, it does not need to be said that the NAFTA investment chapter does not attempt to lend its considerable legitimacy and enforcement tools to making real the promises contained in the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (1967).

n22 "Sustainable development" includes the concept that economic growth and environmental protection are neither discrete nor inherently contradictory goals, but are structurally related and may be mutually supportive. See, e.g., Kenneth W. Abbott, "International Economic Law": Implications for Scholarship, 17 U. PA. J. INT'L ECON. L. 505, 509 (1996).


n24 Id. See also Jose E. Alvarez, Remarks, 86 AM. SOC'Y INT'L L. 532, 550 (1992).

n25 See, e.g., Xavier Carlos Vasquez, The North American Free Trade Agreement and Environmental Racism, 34 HARV. J. INT'L L. 357, 367 (1993)(arguing Mexican-Americans are most likely to be affected by NAFTA-induced environmental racism).


n28 Id. at 120.

COLLOQUIUM PROCEEDINGS: PANEL TWO:
OPPOSITION, JUSTICE, STRUCTURALISM, AND
PARTICULARITY: INTERSECTIONS BETWEEN
LATCRIT THEORY AND LAW AND
DEVELOPMENT STUDIES

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BIO:

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SUMMARY: ... This type of scholarship has been characterized as "structural determinism" because it focuses "on ways in which the entire structure of legal thought ... influences its content, always tending toward maintaining the status quo." ... 

[*314] I. INTRODUCTION

This essay explores how emerging LatCrit theory can inform efforts to critically assess and monitor global neoliberalism. My discussion is premised upon two persistent and striking dualities throughout the world. One relates to liberalism's promise of prosperity. Just over fifty years ago, a post-war liberal order was created to promote global prosperity. If one looks solely at the increase in world income from $4 trillion in 1950 to over $20 trillion in the 1990's, one would likely conclude that liberalism has performed admirably. 

Yet the distribution of that income is highly skewed. Today, the richest twenty percent of the global population captures eighty-five percent of global income, while the remaining portion is shared by three-quarters of the world's population living in developing countries. Distributive disparities within countries, especially in South Asia, Latin America, and the Caribbean, are likely to increase in the future. These disparities do not exist solely in developing countries, however. Distributive inequality has been steadily increasing in the United States. The gap between the very rich and all other segments of society is wider today than at any other period since World War II. Recent data indicates that Latinas/os disproportionately occupy the low end of the economic spectrum. Another closely related duality relates to liberalism's opportunity principle. The creators of post-war liberalism spoke eloquently of freedom of opportunity, a foundational freedom that would enable "the people of every nation ... through their industry, their inventiveness, their thrift, to raise their own standards of living and enjoy, increasingly, the fruits of material progress" on an earth infinitely blessed with natural riches. 

Little progress has been made on this front either. Relatively few people today can find meaning in the opportunity principle. Rampant economic discrimination on the basis of ethnicity, race, gender, and religion prevails in nearly every region of the world. As the World Bank has noted, "certain groups systematically do worse than others. For example, unstable employment and lower earnings are more common among the indigenous than the nonindigenous people of Guatemala, among blacks than whites in Brazil, among the members of scheduled castes and tribal groups than the upper castes in India." More women than men are trapped in a degrading life of absolute poverty, and they are disproportionately affected by related problems: social disintegration, unemployment, environmental degradation, and war. Once again, we need not look outside of the United States for pervasive manifestations of this duality. 

These dualities have not dissuaded many countries today from supporting an updated or "neoliberal" version of what was viewed in the 1940s as a universal principle--that an open, market-based, interdependent, international economy combined with democratic governance is the best prescription for global peace and prosperity. Policymakers realize, however, that neoliberalism cannot flourish over the long-term in the face of massive social inequalities. Equitable "development" is, thus, as necessary today as it was after World War II. Yet "law
and development" efforts have addressed this need with only moderate success.

The question is, therefore, whether LatCrit theory can help those of us dealing with law and development issues to think of ways to promote "a political, economic, ethical and spiritual vision for social development ... based on human dignity, human rights, equality, respect, peace, democracy, mutual responsibility and cooperation, and full respect for the various religious and ethical values and cultural backgrounds of people." n12

Given the incipiency of the LatCrit "movement," my response is cautiously optimistic. LatCrit theory's emphasis on opposition, justice, structuralism, and particularity--animated in part by concepts of ethnicity n13 --may help scholars explore and articulate a socio-legal framework that will give rise to an enabling environment for social development, n14 especially in Latin America. In particular, these concepts may enable development scholars and activists to engage in a careful and nuanced criticism of neoliberalism.

[*318] II. LATCRITS' TOOLS OF CRITICISM

LatCrit theory, which is emerging from Critical Race Theory, n15 is complex and thematically broad. n16 In this essay, I will address opposition, justice, structuralism, and particularity, four basic concepts of LatCrit theory that can inform our thinking about social development. As the discussion below will indicate, these concepts reflect both modern and postmodern views of law and society, to the extent that they reveal a hopeful quest for enlightenment leading eventually to liberation while at the same time rejecting modernism's epistemological foundations. n17

As to opposition, LatCrit theory, like Critical Race theory, seeks to continue the "long tradition of human resistance and liberation." n18 History has taught Latinas/os that engaging in la lucha (struggle) is both honorable and inevitable. Struggling for justicia (justice) is almost a teleological "given" in the Latina/o community. LatCrits engaged in la lucha por la justicia (the fight for justice) thus seek to understand and change a U.S. socio-legal system that presents a disabling environment for social development of Latinas/os via new nativism and racism. n19

Importantly, [*319] the inspiration and strength needed to wage la lucha por la justicia comes not from an intellectual construct, but rather from a communitarian ethic diasporically linked to Latin America.

LatCrit theory's structural critique of U.S. society and its preference for particularity or perspectivism over universalism can also be useful for social development. Structuralist criticism of law and society was first formulated by legal realists and subsequently refined by Critical Race Theorists. Derrick Bell, for example, has used structural theory to show how civil rights reform has been tied to the long-term interests of whites. n20 Similarly, Kendall Thomas has explored questions of race, power, and culture in the context of popular constitutional historiography ("popular memory") in order "to challenge the conceptual order or hierarchy that subtends the exclusion of the common run of human beings and their concerns from the historical study of constitutional law." n21

Structural analysis is also evident in Ian Haney Lopez's examination of the social construction of the white race n22 and Juan Perea's exploration of how hierarchy and whiteness adversely affect the Latina/o population in the United States. n23 This type of scholarship has been characterized as "structural determinism" because it focuses "on ways in which the entire structure of legal thought ... influences its content, always tending toward maintaining the status quo." n24

LatCrits seek to enrich structural critiques with scholarship emphasizing particularity, through the use of storytelling techniques to examine embedded racism, power, and ideology. n25 Particularity is the deconstructive companion of structuralism inasmuch as "stories, Pbles, chronicles, and narratives are powerful means for destroying mindset--the bundle of presuppositions, received wisdoms, and shared understandings against [*320] a background of which legal and political discourse takes place." n26 Well-known illustrations of this technique in the LatCrit context include Richard Delgado's The Rodrigo Chronicles, in which his alter ego, Rodrigo, explores racism in the United States, n27 Margaret Montoya's piece on Latina stories and legal discourse, n28 Michael Oliva's article weaving his grandfather's stories into a commentary on immigration law, n29 and Leslie Espinosa's reflections on how her background affects her work in legal academia. n30

Taken together, opposition, justice, structuralism, and particularity appear to be useful analytical tools for scholars addressing what amounts to social development in the United States. Nevertheless, those of us who have been working in the international law and development field may view the tools with a bit of weary skepticism. For we are well aware that opposition, justice, structuralism, and particularity have also been important elements in our field. Unfortunately, as described below, they have not been very effective in the international context.
III. OPPOSITION, JUSTICE, STRUCTURALISM AND PARTICULARITY IN THE INTERNATIONAL CONTEXT

The "story" of social development in the international context commonly begins with post-war liberalism. After World War II, the Allied Powers believed that an international economy was the best prescription for global prosperity, which, in turn, would help maintain international peace. n31 Development issues that demanded contextual analysis, such as structural impediments facing developing countries, were marginalized as a result of the discourse of universal liberalism. n32 After decolonization, frustrated developing countries claimed the prevailing global order perpetuated economic inequality among nations. n33 However, as the examples below illustrate, efforts to promote progressive change were based on incomplete or otherwise flawed notions of opposition, justice, structural critique, and particularity. Hence, these analytical tools failed to make any significant changes in the global order.

A. The New International Economic Order

Conceived as a broad critique of post-war liberalism, the New International Economic Order (NIEO) was perceived as radically oppositional. In the name of global justice, developing countries called for negotiations with industrialized countries to modify the philosophical, juridical, and institutional structures comprising post-war liberalism. n34 The broad agenda for structural change included issues ranging from official development assistance from the North, to international trade and finance, to health, education, and welfare. n35

The NIEO's oppositional vision was not all that radical, however. The strategy was premised on a fundamental construct of liberalism--the nation state. n36 Because the NIEO's goal was to give true meaning to the principle of sovereign equality among states, particularly with respect to economic matters, n37 developing countries avoided discussion of justicia within their own borders. They argued that domestic inequalities could not be remedied without first transforming relations among nations. n38 They also claimed that the principle of sovereign equality among states gave developing countries the right to shield their domestic policies from international scrutiny. n39

The NIEO agenda was hopelessly contradictory because it insisted upon radical and contextual change within liberalism's moderate, state-centered, and universal framework. Not surprisingly, much debate addressed the legal significance of the NIEO. While supporters asserted that the NIEO reflected customary international law, n40 critics argued that the non-binding United Nations resolutions were merely moral or political statements, n41 at best constituting "soft law." n42 Deep divisions between the North and South continue to this day over much of the NIEO's substance. n42

B. Import Substitution

Import substitution was another strategy developing countries adopted (particularly in Latin America) to challenge postwar liberalism. In the 1950s and 1960s, development economists articulated a structural and particularized critique of the international economy, grounding their theory on a bias in the global trading system against developing countries which export primary commodities. n43 Import-substitution policies encompassed high tariffs and nontariff barriers that protected infant industries, laws that controlled foreign investment, and favorable financing that subsidized state-guided investments. n44 Despite considerable efforts, the import-substitution model of development yielded mixed results in terms of economic growth in Latin America. n45 More importantly, the model provided little justicia. Supporters of import substitution assumed the welfare state would distribute the fruits of growth on an equitable basis. Yet populists redistributive policies only widened the gap between the rich and the poor. n46

C. The Rise and Fall of Oppositional Voices

The increasing gap between the rich and the poor in developing countries undermined development models emphasizing capital accumulation and import substitution. n47 This gave rise to radical critiques of global liberalism that caused as much controversy as LatCrit/Critical Race Theory's current critique of domestic liberalism. In the late 1960s, for instance, neo-Marxists argued that "peripheral" (developing) countries were stuck in a state of underdevelopment and unequal exchange with the "center" (advanced capitalist countries). A socialist revolution was needed to capture the economic surplus for development. n48

These critiques, though provocative, were ineffectual. Other voices in development claimed that neo-Marxist solutions, such as autarky, were unrealistic. n49 Much of neo-Marxist theory proved to be incomplete or empirically incorrect. n50 Moreover, the theory itself was too grand and fatally formlalistic. n51 Co-optation also stifled oppositional voice in international development. For example, the preoccupation in the 1970s with inequitable development led some economists to reject the notion that growth in per capita income alone could be used to
[*326] By the early 1970s, scholars began to doubt the utility of the "liberal legalist model." n60 In a soul-searching article titled Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States, David Trubek and Marc Galanter despairingly observed: Law and development studies are in crisis because some scholars have come seriously to doubt the liberal legalist assumptions that "legal development" can be equated with exporting United States institutions or that any improvement of legal institutions in the Third World will be potent and good. They have come to see that legal change may have little or no effect on social economic conditions in Third World societies and, conversely, that many legal "reforms" can deepen inequality, curb participation, restrict individual freedom, and hamper efforts to increase material well-being. n61

Having identified disadvantages associated with "pragmatic problem solving" and "positivistic pure science" approaches to law-and-development studies, the authors advanced an "eclectic critique" that "transforms the central assumptions underlying the law and development enterprise into critical standards." n62 The call for critical analysis by these and other authors n63 failed to ameliorate the crisis. The law and development "movement" subsequently subsided. n64

The clearest indication of the broadening crisis in the development field came from the "law and development" movement. During the Cold War, funding from the U.S. government, private foundations such as the Ford and Rockefeller Foundations, and international organizations enabled scholars to write about and advise on non-communist strategies to modernize "Third World" nations through legal reform. n57 Inspired by the work of Max Weber, n58 scholars believed that an autonomous, consciously designed, and universal legal system could help replicate the development path of Western industrialized societies. n59

The World Bank took a similar approach to the controversial "basic human needs" approach to development n55 and avoided radical redistributive policies of that model by focusing on cost-effective, targeted expenditures on the poor. n56

The call for critical analysis by these and other authors n62 failed to ameliorate the crisis. The law and development "movement" subsequently subsided. n63

The World Bank soon declared there could be redistribution with growth. n53 The Bank's approach, however, avoided radical redistributive policies, advocating instead a moderate, incremental strategy of redirecting investment to raise the productivity and incomes of the absolute poor.

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[**327**] IV. POTENTIAL INTERSECTIONS BETWEEN LatCRIT THEORY AND LAW AND DEVELOPMENT

The story I have recounted does not bode well for the creation of an enabling environment for social development. Those who work in the law and development field are likely to conclude that the tools of opposition, justice, structuralism, and particularity are worn and of little utility today.

The apparent triumph of neoliberalism in the face of glaring dualities in the global order breeds cynicism about the future of social justice. Along with the disintegration of the Soviet Union and the socialist bloc in Eastern Europe, n65 the debt crisis of the 1980s has led policymakers in developing and transitioning countries to abandon import substituting and statists approaches to development in favor of economic law and policy based on an open, privatized, market-based economy. Although the former policies failed to empower vulnerable groups, there is no guarantee that neoliberal policies alone will effectively address these groups either. n66

Is there no hope, then, for a progressive approach to law and development? I believe there is, provided we reconstitute opposition, justice, structuralism, and particularity by examining potential intersections between LatCrit theory and concepts relating to law and development. n67 This process may help us find new ways of looking at the process of development, especially in Latin America. It may also reveal "domestic" aspects of LatCrit/Critical Race Theory that can be strengthened.

A. Opposition and Justice

As to intersections relating to opposition and justice, we should consider the following proposition: A critical approach to development based on LatCrit theory should avoid waging a frontal assault on global neoliberalism in the name of la lucha [*328] por la justicia (fight for justice). The story recounted above suggests that a grand counter-hegemonic strategy risks the production of flawed scholarship. Moreover, policymakers would not take our work seriously were we to adopt such a strategy. n68 Instead, we should develop a careful, cautious, and constructively critical position supporting neoliberalism.

This proposition is not as shocking as it first seems. If we want to reconstitute opposition and justice effectively in the international sphere, strategic positioning is crucial. n69 In an article dealing with the plight of the nonwhite poor in the United States, Richard Delgado asks, "In a society with power divided almost equally between two political groups, one conservative, one liberal, which is the more likely
source of aid for the nonwhite poor?” n70 After concluding that the moderate left and communitarians would unlikely provide significant long-term support for the poor, Delgado concludes that "conservative principles may be a better source of succor for the poor than has hitherto been thought, perhaps even superior to that available from the left." n71 He reasons that conservatives are more likely to provide the poor with job training and other forms of "cultural capital" in order to strengthen the legitimacy of conservative thought emphasizing "self-reliance, the free marketplace, and as little governmental intervention as possible.” n72 Thus the poor should seek alliance with the right, albeit with a strident or radical voice. n73

A similar strategy may be useful in the international realm. Statist-oriented development policies amply demonstrate that governments have often been indifferent to the plight of the poor, many of whom are women, children, black, Indian, and members of minority ethnic groups. n74 When governments have paid attention [*329] to the poor for political reasons, the resulting populist policies have not been sustainable and have ultimately hurt the poor. n75

LatCrits with an interest in development should therefore cautiously support the neoliberal policies of the International Monetary Fund (IMF) and the World Bank. This strategy is promising because unlike the situation fifty years ago, developing countries today are the major constituencies of these two multilateral institutions. Moreover, in order to respond to critics and thus bolster the legitimacy of the neoliberal development Pdigm, n76 both the Bank and the Fund are attempting to address many of the economic, social, and cultural issues relating to today's human rights regime.

At the World Bank, for example, labor-intensive growth, investment in human capital (e.g., education and health), safety nets for the poor during market-based transitions, n77 and, increasingly, good governance (e.g., accountability, transparency, participation) are the primary components of development policy. n78 In an effort to persuade critical observers of its commitment to the "growth-with-equity" approach to development, the Bank has highlighted its increases in social spending and initiatives aimed at poverty reduction. n79

[*330] The Bank also uses conditionality to address human rights. Responding to observations that governments facing adjustment have chosen expenditure reductions that hurt the poor, the Bank has relied upon charter provisions n80 to "increasingly include conditionalities in its structural adjustment operations to ensure that public expenditures on the activities and subsectors that benefit the poor disproportionately such as primary education, basic health care, nutrition, and water supply and sanitation are protected, and in many cases, even increased." n81

The IMF believes it promotes human rights, albeit indirectly, by insisting upon "high quality" economic growth. This approach embraces (i) macroeconomic stability, (ii) market-based trade and investment policies, (iii) good governance, and (iv) sound social policies that create social safety nets for the poor, increased employment, and cost-effective social spending. n82 Moreover, Fund missions now regularly discuss distributional consequences of adjustment with borrowing countries. n83

All of these developments in the human rights field are welcome and necessary, but they are not sufficient for the realization of meaningful social development. LatCrit scholars along with other activists deben luchar por la justicia (should fight for [*331] justice) by ensuring, at the very least, that multilateral and regional financial institutions actually comply with their own policy and rhetoric relating to economic, social, and cultural matters. n84 This does not require Delgado's stridency tactic as much as careful and precise observation and criticism--what can be called "radically rigorous monitoring."

LatCrit/Critical Race Theory, however, provides little guidance for the development of the analytical aspects of such monitoring, at least with respect to the intersections between race/ethnicity and financial/economic matters. This is partly due to the type of scholarship produced to date, which has focused on other pressing issues and problems relating to racism and identity in a liberal order. n85 In addition, important pieces in Critical Race Theory reflect the view that "law and economics" analysis is conservative, formalistic, and ultimately inconsistent with Critical Race Theory. n86 Thus, the argument goes, economic or financial analysis cannot effectively address systemic distortions in society. n87

Although the rich LatCrit and Critical Race scholarship produced thus far can be usefully applied to social development issues, increased economic globalization will compel critical scholars to abandon their defensive posture regarding economic and financial analysis. Fortunately, recent writings suggest an expansion of critical analysis into the commercial/economic realm. Steven Bender, for example, has proposed comprehensive reform [*332] of U.S. consumer protection regulation to ensure that Latina/o consumers and other language minorities can "strike informed bargains." n88 Beverly Moran's and William Whitford's critical examination of the U.S. Internal
Revenue Code suggests that the Code treats blacks more harshly than similarly-situated whites. n89 And Anthony Taibi has used Critical Race Theory to explore how economic globalization disempowers local communities. n90 These and other writings n91 may eventually lead to a corpus of literature that can be used as a springboard for radical and rigorous monitoring of economic and financial institutions in the increasingly interconnected domestic and international spheres of today's world.

B. Structuralism and Particularity

Radically rigorous monitoring cannot occur without structural criticism. n92 Although the structural critique of liberalism described above has helped change the global order in favor of developing countries, n93 progress in this regard has been marginal. [*333] LatCrit and Critical Race Theory may be able to broaden and invigorate the critical project by ungrounding institutionalized discrimination against communities and peoples.

Reconstituting structuralism along these lines should be premised on a proposition of LatCrit/Critical Race Theory that has begun to make inroads into scholarship relating to law and development--namely, that law is a constitutive element of race, gender, culture, and ethnicity itself. n94 Applying this type of structural analysis to international economic law and policy n95 may provide very useful insights into complex problems of development.

One of the hardest problems relates to the accountability of multilateral institutions governing the international economic order--the IMF, the World Bank, and the World Trade Organization (WTO). Progressive change does not come easily to these entities. An analogy to the Critical Race Theorists' criticism of the civil rights movement is instructive. Characterizing the civil rights movement of the late Sixties and early Seventies as "tragically narrow and conservative," Critical Race Theorists have noted that the whites who perpetrated segregation retained their positions of authority during the era of integration, making reform exceedingly difficult. n96

The same can be said of the transnational elite inhabiting the IMF, the Bank, and the WTO. Although decolonization forced these institutions to recognize the needs and demands of [*334] developing countries (e.g., the NIEO), reform has occurred slowly and in small increments. This is because policymakers in the international economic arena, whether from developed or developing countries, by and large have gone to the same schools and/or undergone similar doctrinal training. Universalism and orthodoxy pervade their thinking, which, of course, is reflected in and reinforced by institutional policy. n97

Preservation of the status quo is compounded by the fact that policymakers in these institutions are not likely to view the institutions as constitutive elements of global discrimination. Rather, in their view, discrimination exists "out there somewhere," and it is up to member states to eradicate it. These problems can be attacked through radically rigorous monitoring and equally rigorous and sound research regarding structural discrimination.

Particularity, the final intersection to be addressed in this essay, can also be used to promote a critical approach to development. As noted above, both the NIEO and the import-substitution model of development as well as development "radicals" of the 1960s and 1970s relied on particularity. However, the particularity of that era frequently lacked a human face. Much of the analysis was woodenly formalistic and exceedingly grand.

Although theory and models continue to be vital to tackling problems of development, policymakers today favor a pragmatic approach. Yet the danger with pragmatism in the realm of development is that it misleadingly suggests that programs and projects are or can be divorced from the hegemonic ideology produced by international institutions such as the IMF, the World Bank, and the WTO.

The risk of false consciousness in development calls for counter-hegemonic development stories "from the bottom." n98 [*335] Such stories should be constructed from the reverberations in local communities resulting from cavalier applications of neoliberal law and policy. n99 This will require analytically rich, n100 contextual scholarship produced in conjunction with grassroots activists, members of non-governmental organizations, and academics in Latin American and Caribbean communities. n101 The goal of this type of particularity should be to monitor neoliberalism critically and radically, exposing weaknesses and contradictions in the dominant story that ultimately can be exploited to ensure a more equitable development process. n102

V. CONCLUSION

This essay has provided only preliminary thoughts and ideas regarding connections between newly evolving LatCrit theory and development in the international sphere. Future research must, among other things, address various complications that may arise from a LatCrit approach to development, especially in Latin America. For example, openness and sensitivity may require LatCerts to reassess Critical Race Theory's
reliance on "rights," n103 given that the popular justice movement in the region has favored collective over "liberal/individualistic" notions of justice. n104 LatCrit theory's explicit reliance on ethnicity (and Critical Race Theory's reliance on U.S. concepts of race and racism) may also need readjustment to properly assess complex conceptions of race and racism in Latin America. n105

Nevertheless, I am hopeful that LatCrit theory can help development scholars construct a socio-legal framework that will promote an enabling environment for social development. A reconstituted application of opposition, justice, structuralism, and particularity may help reinvigorate critical thinking regarding development and the role of law in the development process. Moreover, LatCrit theory may be especially useful vis-a-vis development in Latin America, given increasing regional integration and the cultural/linguistic connections between "Latinas/os" in the United States and "Latin Americans."

**FOOTNOTE-1:**

n1 LatCrit theory (signifying "Latina/o" and "critical") is an outgrowth of Critical Race Theory. The former is "more openly, directly, and unabashedly Latina/o in content and focus." 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, 11 (1996).

n2 James Gustave Speth, Foreword to UNITED NATIONS DEVELOPMENT PROGRAMME, 1995 HUMAN DEVELOPMENT REPORT, at iii (1995)[hereinafter 1995 HUMAN DEVELOPMENT REP.]. See WORLD BANK, POVERTY REDUCTION AND THE WORLD BANK, at vii (1996)[hereinafter POVERTY REDUCTION REPORT] ("More than 1.3 billion people in the developing world still struggle to survive on less than a dollar a day, and the number continues to increase."); id. at 2-9 (examining worldwide trends in poverty from late 1980s to mid-1990s).


tax system); PAUL R. KRUGMAN, PEDDLING PROSPERITY: ECONOMIC SENSE AND NONSENSE IN THE AGE OF DIMINISHED EXPECTATIONS (1994) (advocating that the United States should diminish problem of slow growth and poverty by less government regulation, more innovative ideas); PAUL R. KRUGMAN, THE AGE OF DIMINISHED EXPECTATIONS: U.S. ECONOMIC POLICY IN THE 1990S (1990) (looking at future of economic policy relating to income distribution); NANCY G. LEIGH, STEMMING MIDDLE-CLASS DECLINE: THE CHALLENGES TO ECONOMIC DEVELOPMENT PLANNING (1994) (analyzing widening gap in individual earnings of middle class and advocating investment in social infrastructure); NAN L. MAXWELL, INCOME INEQUALITY IN THE UNITED STATES, 1947-1985 (1990) (analyzing income polarization and declining middle class in context of shifts in employment, population age, income-receiving unit composition, macroeconomy, and government spending); TAX PROGRESSIVITY AND INCOME INEQUALITY (Joel Slemrod ed., 1994) (discussing who bears burden of taxation); TIMOTHY M. SMEEDING ET AL., POVERTY, INEQUALITY AND INCOME DISTRIBUTION IN COMPARATIVE PERSPECTIVES: THE LUXEMBOURG INCOME STUDY (1990) (analyzing distribution and redistribution of economic well-being through cross-country comparisons); EDWARD N. WOLFF, TOP HEAVY: A STUDY OF THE INCREASING INEQUALITY OF WEALTH IN AMERICA (1995) (showing that wealth inequality has been increasing but proposing to ignore growing inequality and to exclude tax policy options).


n6 UNITED STATES DEPARTMENT OF STATE, 1 PROCEEDINGS AND DOCUMENTS OF THE UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE 80 (1948) (remarks of Henry Morgenthau Jr., U.S. Treasury Secretary) [hereinafter PROCEEDINGS].


n10 See, e.g., CHRISTOPHER EDLEY, Jr., NOT ALL BLACK AND WHITE 42-52 (1996) (Special Counsel to President Clinton appointed to review affirmative action policy) (reviewing evidence of pervasive discrimination against minorities in the United States and concluding that "the pattern of racial disparities in economic and social conditions remains painfully stark."). The Texaco case is the most recent example of blatant and egregious discrimination litigation against Texaco, where plaintiffs' counsel discovered audio tapes recording racist remarks by high corporate officials. Texaco recently settled the case for $176.1 million. Jack E. White, Texaco's White Collar Bigots: Top Executives, Confronting A Discrimination Suit, Talk About Shredding Documents, TIME, Nov.
18, 1996; Peter Fritsch et al., Texaco to Pay $ 176.1 Million in Bias Suit, WALL STREET J., Nov. 18, 1996, at A3.

n11 See WORLD BANK, 1991 WORLD DEVELOPMENT REPORT 1. Neoliberal economic policies comprise noninflationary growth, fiscal discipline, high savings and investment, trade and foreign investment liberalization, privatization, and domestic market deregulation. They have become collectively known as "the Washington consensus." See JOHN WILLIAMSON, THE PROGRESS OF POLICY REFORM IN LATIN AMERICA (1990) (discussing ten areas of market-based policy reforms in debtor countries that "could arguably muster a fairly wide consensus ... in Washington").

n12 This definition of development was articulated at the 1995 World Summit for Social Development in Copenhagen, Denmark. Social development is based in part on human rights. The Copenhagen Declaration thus pledges to strive for the realization of rights set out in various international instruments and declarations, including Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights, as well as the Declaration on the Right to Development. See generally World Summit for Social Development 1: An Overview, Report of the Secretary-General, U.N. Doc. A/CONF. 166/PC/8 (1994). Social development focuses on specific social sector issues, such as health, education, and welfare, as well as on broader concepts relating to human societies, such as equal opportunity and citizen participation. Id. at 3.

n13 See generally supra note 1.


n17 See Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 CAL. L. REV. 741, 760 (1994) (proposing "jurisprudence of reconstruction" and suggesting Race-Crits are compelled "to live in the tension between modernism and postmodernism, transforming political modernism in the process.").


n19 See Juan F. Perea, Los Olvidados: On the Making of Invisible People, 70 N.Y.U. L. REV. 965 (1995) (discussing how the U.S. historical and statutory concepts reveal "white nation," causing "symbolic deportation" by making Latinas/os invisible or stigmatizing them for their "foreignness"). Latina/o scholars also note that even when structuralism is addressed, it is done so in black and white terms which still largely ignore the Latina/o population. See also Juan F. Perea, Ethnicity and the Constitution: Beyond the Black and White Binary Constitution, 36 WM. & MARY L. REV. 571 (1995) (noting Supreme Court and legal academia exclude many minorities from Constitutional protection by largely ignoring discrimination based on ethnic characteristics, like bilingualism); Rodolfo O. De la Garza & Louis DeSipio, Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Right Act Coverage, 71 TEX. L. REV. 1479 (1993) (explaining 1975, 1982, and 1992 registration and voting rights protection debates in Congress left out Latinas/os). See generally IAN F. HANEY LOPEZ,
WHITE BY LAW (1996) (examining the "structuring and content of Whiteness as a legal and social idea").


n22 See LOPEZ, supra note 19.

n23 See generally supra note 19.

n24 THE CUTTING EDGE, supra note 15, at 205.


n27 RICHARD DELGADO, THE RODRIGO CHRONICLES (1995). Rodrigo was born in the United States of an African-American father and Italian mother. In the first chronicle, Delgado's fictional professor tries to describe Rodrigo: "His tightly curled hair and olive complexion suggested that he might be African-American. But he could also be Latino, perhaps Mexican, Puerto Rican, or any one of the many Central American nationalities . . . ." Id. at 1. For another example of using narrative to address racism in the United States, see DERRICK BELL, AND WE ARE NOT SAVED (1987).


n30 See Leslie G. Espinoza, Masks and Other Disguises: Exposing Legal Academia, in THE CUTTING EDGE,

supra note 15, at 451; see also 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) (exploring the meaning of the role model in Latino culture by using a cuento--a type of narrative found in Latino culture); Ian F. Haney, The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice, 29 HARV. C.R.-C.L. L. REV. 1, 10 (1994) (telling of the author's Irish and Latino background, and how he and his brother looks similar, but identify differently with their Latino heritage and social constructs).

n31 PROCEEDINGS, supra note 6, at viii (1948) (stating "the proposal for ... the Fund ... was based on the premise that international financial cooperation and the establishment of conditions conducive to international trade are imperative to the economic welfare of the peoples of the world and to world peace ... . Proposals for the establishment of the Bank were based on the premise that postwar reconstruction and development would aid political stability and foster peace among all nations.").

n32 See HAROLD JAMES, INTERNATIONAL MONETARY COOPERATION SINCE BRETTON WOODS 120 (1996); Richard N. Gardner, Establishing a Vision for Promoting Development, in FIFTY YEARS AFTER BRETTON WOODS: THE FUTURE OF THE IMF AND THE WORLD BANK 63, 65 (James M. Boughton & K. Sarwar Lateef eds., 1995) ("There was simply no conception of the vast needs of the developing countries and of the role of the Bank should play in meeting them."); Victor L. Urquidi, Reconstruction vs. Development: The IMF and the World Bank, in THE BRETTON WOODS-GATT SYSTEM: RETROSPECT AND PROSPECT AFTER FIFTY YEARS 47-48 (Orin Kirshner ed., 1996) (noting that White and Keynes "did not seem to have a clear idea of the unusually quite different structural problems of the less developed countries").

n33 Robert S. Jordan, Why A NIEO? The View from the Third World, in THE EMERGING INTERNATIONAL
ECONOMIC ORDER 59, 63 (Harold K. Jacobsen & Dusan Sidjanski eds., 1982).


n37 Jordan, supra note 33, at 70-72.

n38 LASZLO, supra note 35, at xxii.

n39 See id. at 239-40 (recording India's position that national governments have sovereign right to determine development needs).


n42 FERGUSON, supra note 34, at 41.


n46 ROBERT R. KAUFMAN, THE POLITICS OF DEBT IN ARGENTINA, BRAZIL, AND MEXICO 62 (1988) (noting that import substitution in Mexico "provided extensive protection and subsidies for favored industrial and agro-commercial elites"); id. at 11 (noting that import substitution in Brazil benefited "military elites, coffee exporters, industrialists, and rural bosses"); id. at 71 (noting the Mexican working class maintained its share of expanding economy, whereas, in Brazil increases in income were limited to the top ten percent); id at 92 (noting that Mexican "import-substituting firms ... were the most important group opposing trade liberalization"); Enrique R. Carrasco, Chile, Its Foreign Commercial Bank Creditors, and Its Vulnerable Groups: An Assessment of the Cooperative Case-by-Case Approach to the Debt Crisis, 24 LAW & POL'Y INT'L BUS. 273, 294-95 (1993) (noting that Chile's rich and relatively wealthy middle class benefited...
from import substitution); Alejandro Foxley, Stabilization Policies and Their Effects on Employment and Income Distribution: A Latin American Perspective, in ECONOMIC STABILIZATION IN DEVELOPING COUNTRIES 191, 195-96 (William R. Cline & Sidney Weintraub eds., 1981) ("After a short initial success in redistributing income toward wage earners and in moderating the rate of inflation, the imbalances generated by the [populist] policy result in accelerating inflation and a regression in the initial distributive gains.").

n47 DIANA HUNT, ECONOMIC THEORIES OF DEVELOPMENT: AN ANALYSIS OF COMPETING PARADIGMS 64 (1989).

n48 Id. at 64-67, 163-95.

n49 Id. at 189.

n50 Id. at 67, 217-19, 220-21. Bill Warren, an "Orthodox Marxist" critiquing neo-Marxist theory, noted "empirical observations suggest that the prospects for successful capitalist economic development of a significant number of major underdeveloped countries are quite good; that substantial progress in capitalist industrialization has already been achieved ... that the imperialist countries' policies and their overall impact on the Third World actually favor its industrialization ... " Id. at 190.

n51 Id. at 189.

n52 See Dudley Seers, What Are We Trying to Measure?, in MEASURING DEVELOPMENT 21 (Nancy Baster ed., 1972).


n54 Id. at 47-49.

n55 See Carrasco & Kose, supra note 45, at 21 & nn. 116-17 (noting inter alia that basic needs stressed autonomous development through considerable investment in human capital and access to employment).


n58 See MAX WEBER, ECONOMY AND SOCIETY 641, 900 (Geunther Roth & Claus Wittich eds., 1978) (addressing the sociology of law).


n60 See Trubek & Galanter, supra note 57; Merryman, supra note 57. See generally JAMES GARDNER, LEGAL IMPERIALISM (1980).

n61 See Trubek & Galanter, supra note 57 at 1080.


n63 See GARDNER, supra note 60; Merryman, supra note 57; Abelardo Lopez Valdez, Developing the Role of Law in
Social Change: Past Endeavors and Future Opportunities in Latin America and the Caribbean, 7 LAW. AM. 1 (1975); Abelardo Lopez Valdez, Law and Socio-Economic Change in Latin America and the Caribbean, 10 J. INT'L L. & ECON. 553 (1975).

n64 Merryman, supra note 57, at 481 ("The mainstream law and development movement, dominated by the American legal style, was bound to fail and has failed."). See also David M. Trubek, Back to the Future: The Short, Happy Life of the Law and Society Movement, 18 FLA. ST. U. L. REV. 1 (1990) (describing 25-year evolution of "law and society" movement, which began in mid-1960s, and critically assessing related "law and development" movement).


n66 See Carrasco & Kose, supra note 45, at 28-34 (discussing mixed impact of stabilization and adjustment programs on income distribution in developing countries).

n67 See Trubek, supra note 64, at 41-55 (describing post-modern emerging "countervision" based in part on Critical Race Theory, that rejects ideas prevailing in earlier stages of law and society movement).

n68 This proposition is especially important with respect to international economic/financial policy. Policymakers in this realm are likely to be economists, many of whom presume that non-economists and their criticisms are irrelevant.

n69 See SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 229-39 (Quintin Hoare & Geoffrey Nowell Smith, eds. & trans., 1971)(hereinafter PRISON NOTEBOOKS](describing "war of positions" in which intellectuals engage in protracted political struggle).


n71 Id. at 1940.

n72 Id.

n73 Id. at 1947-48.

n74 As Claude Ake has argued, the state's indifference may be the product of colonialism, at least in Africa: Although political independence brought some changes to the composition of the state managers, the character of the state remained much as it was in the colonial era. It continued to be totalistic in scope, constituting a statist economy. It presented itself as an apparatus of violence, had a narrow social base, and relied for compliance on coercion rather than authority ... Political independence ... was often a convenience of deradicalization by accommodation, a mere racial integration of the political elite.CLAUDE AKE, DEMOCRACY AND DEVELOPMENT IN AFRICA 3-4 (1996).

n75 See supra notes 43-46 and accompanying text (discussing impact of populist policies during import substitution period).


n77 See generally WORLD BANK, 1990 WORLD DEVELOPMENT REPORT; POVERTY REDUCTION REPORT, supra note 2.

n78 THE WORLD BANK, ADVANCING SOCIAL DEVELOPMENT: A WORLD BANK CONTRIBUTION TO THE SOCIAL SUMMIT, at ix (1995) [hereinafter ADVANCING SOCIAL DEVELOPMENT].

n79 POVERTY REDUCTION REPORT, supra note 2, at 29. See generally

n81 POVERTY REDUCTION REPORT, supra note 2, at 33-34. See James H. Weaver, What Is Structural Adjustment?, in STRUCTURAL ADJUSTMENT: RETROSPECT AND PROSPECT 1, 13-14 (1995) (noting that all bank adjustment loans must include "upfront" analysis of adjustment's impact on poor and measures to address impact). The Bank also addresses the poor through "poverty-focused" adjustment operations. Incorporated into SALs, SECALSs, or rehabilitation import loans (RILs), these programs help governments implement anti-poverty measures ranging from reallocation of public expenditures to gathering data on poverty and monitoring the impact of adjustment on the poor.

n82 The Fund pursues the fourth element through its policy advice, technical assistance, and collaboration with other agencies, particularly the World Bank.

n83 TONY KILLICK, IMF PROGRAMMES IN DEVELOPING COUNTRIES 20 (1995).

n84 See Carrasco & Kose, supra note 45, at 45-46 (proposing various measures to monitor programs of World Bank and IMF with respect to income distribution); Daniel D. Bradlow, The World Bank, the IMF, and Human Rights, 6 TRANSNAT'L L. & CONTEMPP. PROBS. (proposing that IMF and World Bank articulate human rights policy that can be effectively monitored).

n85 See generally KEY WRITING, supra note 15; THE CUTTING EDGE, supra note 15.


n91 See Linz Audain, Critical Cultural Law and Economics, the Culture of Deindividualization, the Paradox of Blackness, 70 IND. L.J. 709 (1995) (outlining a framework that will incorporate culture into law and economics analysis). See also id. at 712 n.4 (citing articles by Cheryl Harris, Robert Cooter, and Richard McAdams as examples of Critical Cultural Law and Economics); Andre Sole, Official English: A Socratic Dialogue/Law and Economics Analysis, 45 FLA. L. REV. 803 (1993).

n92 Emphasizing structural critique may seem contradictory in light of post-modern aspects of Critical Race Theory. See KEY WRITING, supra note, at 440 (describing race and postmodernism); Trubek, supra note 64, at 50 (noting "critical empiricism's" contradiction between appropriation of post-structuralist concepts and reliance upon structural causes and explanations). The contradiction may be more apparent than real, however. See R.B.J. Walker, INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY 3 (1993) (characterizing "rigid division between modernity and postmodernity" as misleading). In any event, an extended discussion of this issue is beyond the scope of this article.

n93 Several of Lance Taylor's works address this issue. See generally THE ROCKY ROAD TO REFORM; ADJUSTMENT, INCOME DISTRIBUTION AND GROWTH IN THE DEVELOPING WORLD (Lance Taylor ed., 1993); SOCIALLY RELEVANT POLICY ANALYSIS: STRUCTURALIST COMPUTABLE GENERAL EQUILIBRIUM MODELS FOR THE DEVELOPING WORLD (Lance Taylor ed., 1990); LANCE TAYLOR, STRUCTURALIST MACROECONOMICS (1983); Sustainable Development: Macroeconomic, Environmental, and Political Dimensions, in WORLD DEVELOPMENT 215 (Special Issue No. 24, 1996).

n94 See Trubek, supra note 64, at 41-52 (citing Critical Race Theory movement as example of "post-imperial legal culture" in law and society movement that sees "law as fragile, contradictory, fragmentary, and dispersed"); AFTER IDENTITY: A READER IN LAW AND CULTURE 187-270 (1995) (containing essays examining "the often contradictory roles that legal rules have played in the construction of 'new identities'" in postcolonial culture); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 490-501 (1989) (contemplating "the possibilities of re-establishing the identity of international law by re-establishing that of the international lawyer as a social agent."). For literature relating to Post-Colonial Theory's treatment of race, gender, culture, and ethnicity, see COLONIAL DISCOURSE AND POST-COLONIAL THEORY: A READER (Patrick Williams & Laura Chrisman eds., 1994); CULTURAL STUDIES (Lawrence Grossberg et al., 1992); EDWARD W. SAID, ORIENTALISM (1978); SAID, supra note 18.

n95 See generally AKE, supra note 74; ARJUN MAKHIJANI, FROM GLOBAL CAPITALISM TO ECONOMIC JUSTICE (1992).

n96 Introduction to KEY WRITING, supra note 15.

n97 Enrique R. Carrasco, Chile, Its Foreign Commercial Bank Creditors and Its Vulnerable Groups: An Assessment of the Cooperative Case-by-Case Approach


n102 Antonio Gramsci described a process of differentiation and change in the relative weight that the elements of the old ideologies used to possess. What was previously secondary and subordinate...is now taken to be primary [and] becomes the nucleus of a new ideological and theoretical complex.PRISON NOTEBOOKS, supra note 69, at 195.

n103 See KEY WRITING, supra note 15, at xxiii ("Race crits realized that the very notion of a subordinate people exercising rights was an important dimension of black empowerment"); Patricia J. Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

n104 Fernando Rojas, A Comparison of Change-Oriented Legal Services in Latin America with Legal Services in North America and Europe, 16 INT'L J. SOC. L. 203, 208-09, 219, 225 (1988).

n105 See TESSA CUBITT, LATIN AMERICAN SOCIETY 57-84 (addressing ethnicity and race relations in Latin America); Adrienne D. Davis, Identity Notes, Part I: Playing in the Light, 45 AM. U. L. REV. 697 (1996) (describing impact on author of Nicaragua's "complex map of racial relations and domination"); cf. Valdes, supra note 1, at 27 (noting possibility that LatCrit theory could be based on politicized identities based on common struggles rather than "traditional fault lines like race and identity").
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COLLOQUIUM PROCEEDINGS: PANEL TWO: CRITICAL RACE FEMINISM AND THE INTERNATIONAL HUMAN RIGHTS OF WOMEN IN BOSNIA, PALESTINE, AND SOUTH AFRICA: ISSUES FOR LATCRIT THEORY

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SUMMARY: ... The context for these suggestions are publications on the international human rights of women in three societies: Bosnia, Palestine, and South Africa. ... It attacks the notion of the essential woman, i.e., white middle class, and explores the lives of those facing multiple discrimination on the basis of their race, gender, and class, thereby revealing how all of these factors interact within a system of white male patriarchy and racist oppression. ... My first attempt to use CRF analysis in the international women's rights context was in my article Rape, Ethnicity and Culture: Spirit Injury From Bosnia to Black America. The article examined the intersection of gender, ethnicity, religion, and culture in the systemic, wide-spread rapes of Bosnian women as part of Serbian ethnic cleansing. ... The rapes are "pollution" of Bosnian culture because the Serbs were deliberately impregnating the Muslim women to create non-Muslim children. ... South Africa's culture of the outsider violence of apartheid has contributed to the fact that many women and men accept domestic violence in the private sphere as a fact of life. South African women have experienced a great deal of abuse as a result of both rape and domestic violence. ... There are several potential international legal remedies for the situation of violence against women in South Africa and Palestine, including CEDAW. ... [*337] I. INTRODUCTION

This Article introduces Critical Race Feminism to the symposium theme of "International Law, Human Rights, and LatCrit theory" and attempts to raise some potential issues for LatCrit research. The context for these suggestions are publications on the international human rights of women in three societies: Bosnia, Palestine, and South Africa. I have never written on the subject of Latin American women, n1 so I will leave it up to LatCrit [*338] feminists such as Celina Romany, n2 Berta Hernandez-Truyol, n3 and Jenny Rivera n4 to determine if any of my suggestions have relevance.

This Article will describe Critical Race Feminism, a new offshoot of both Critical Race theory and feminism, in Part II. Part III will apply a Critical Race Feminist analysis to the raping of Bosnian women and introduces the concept of "spirit injury." I will extrapolate how the concept of spirit injury might be used in the Latin American context. Part IV utilizes Critical Race Feminist principles to examine the situation of Palestinian women and explores the multiple levels of discrimination they face on the basis of custom, religion, and gender. Suggestions are made for examining the multiple levels of discrimination in Latin America, including the role of the Catholic religion. Part V compares the legal status of black South African women and looks at the role of ethnicity and color, as well as custom, which impedes their achievement of human rights. Color is a topic that has received little recognition in the Latin American context, and I call for new attention to this dimension. Part VI builds upon [*339] the research I have done on Palestinian and South African women and analyzes a specific area--violence, which remains an area where more research is needed concerning Latinas.

II. CRITICAL RACE FEMINISM n5

While many are now familiar with Critical Race theory, few have heard of Critical Race Feminism (CRF). CRF joins LatCrit theory as the latest offshoot in the jurisprudential framework that began with Critical Legal Studies n6 and includes feminism n7 and Critical Race theory. n8 The Critical Legal Studies theorists have been a group of predominantly progressive or radical white male academics who have critiqued traditional positivist or realist legal jurisprudence. The premises embraced include post-modern critiques of the inviolability of laws and hierarchy in Western society. A primary method of analysis is deconstruction, which involves the critique of allegedly neutral concepts to expose the actuality of the socially constructed contingent power relationships.

Many progressive scholars, including white women and people of color, were attracted to Critical Legal Studies because it exposed various aspects of the
nature of domination through [*340] law within American society. However, the analysis was incomplete as there was a lack of attention to the sexual and racial aspects of legal domination.

Critical Race theory embraces the Critical Legal Studies deconstruction methodology to challenge racial orthodoxy. Additionally, it draws from intellectual traditions such as liberalism, law and society, Marxism, postmodernism, pragmatism, and cultural nationalism. Critical Race theory is skeptical of traditional legal theories that support hierarchy, and so-called neutrality, objectivity, color-blindness, meritocracy, and ahistoricism. In areas as wide ranging as hate speech, affirmative action, and federal Indian law, Critical Race theory questions the ability of traditional legal strategies to deliver racial and social justice.

Women of color within the legal academy noted that there was insufficient attention within Critical Race theory and traditional feminist jurisprudence to the legal and social plight of the most oppressed groups within American society--African-American, Latina, Asian, and Native American women. Traditional rights jurisprudence seemed to be based on white middle class "reasonable man" standards, while traditional feminism was based upon "reasonable white middle class woman" standards. Even much of Critical Race theory seemed to present the essentialist term "minority," when it really meant African-American men. Women began writing to fill the gap. A recent search of the literature found that there were more than one hundred law review articles dealing with the intersection of race, class, and gender. Many of these appear in an anthology I edited, entitled Critical Race Feminism (a term borrowed from Richard Delgado).

[*341] Jurisprudentially, CRF has much in common with Critical Race theory. It regards racism as an ordinary and fundamental part of American society, rather than an aberration. It utilizes the well-known narrative technique to construct alternative visions of reality and identity. CRF also adopts feminist notions focusing on the oppressed status of women within society.

CRF adds to Critical Race theory and feminism by placing women of color at the center, rather than in the margins or footnotes, of the analysis. n10 It attacks the notion of the essential woman, i.e., white middle class, and explores the lives of those facing multiple discrimination on the basis of their race, gender, and class, thereby revealing how all of these factors interact within a system of white male patriarchy and racist oppression. n11 It seeks to explore and celebrate the differences and diversity within women of color and to articulate how the law might improve their status. n12 Thus, while CRF is concerned with theoretical frameworks, it is very much centered on praxis and attempts to identify ways to empower women through law and other disciplines.

CRF goes beyond the U.S. domestic focus typical of most scholarship on Critical Legal Studies, feminism, and Critical Race theory. It embraces a global analysis as well n13 by taking the narrow United States notion of race and expanding it to look at the legal treatment of women of color, whether they are living in the developing world or in the developed world. After all, women of color in the United States originate in and often have [*342] continuing links with developing world societies, which also play a subordinate role within a post-Cold War unipolar world in which the United States dominates.

CRF also enhances the development of twentieth century international law, which is a field that has developed based upon principles first enunciated by American and European white male power elites. Men of color from the developing world did not become involved in entities like the United Nations until their respective nations gained independence or sufficient collective clout. Their voices are still muted, but often rise in discussions of cultural relativism and international human rights. European and American women have only very recently become involved in attempting to reconceptualize international law from a feminist perspective. n14 Once again, the viewpoints of women of color have been absent--a manifestation of their continued legal and social subordination on multiple grounds, including ethnicity, class, religion, and gender, both within and outside the developing world. n15 CRF adds to the development of international law by focusing on women of color in a theoretical and practical sense. The analysis may center on international human rights law, such as the Convention to Eliminate Discrimination Against Women (CEDAW), n16 but may also target the domestic law of a particular nation.

Now that I have provided a brief overview of CRF, I will discuss my efforts to use this type of analysis in three different international contexts.

[*343] III. SPIRIT INJURY IN BOSNIA

My first attempt to use CRF analysis in the international women's rights context was in my article Rape, Ethnicity and Culture: Spirit Injury From Bosnia to Black America. n17 The article examined the intersection of gender, ethnicity, religion, and culture in the systemic, wide-spread rapes of Bosnian women as part of Serbian ethnic cleansing. Bosnia was not the first place where rape was used as a war tactic,
but it was the first place where the world community took notice of the violations as they were occurring.

n18 These rapes constitute, not only a physical injury to the individual women affected, but a spirit injury to the women, their families, and their entire culture. The notion of spirit injury is derived from CRF Professor Patricia Williams' concept of "spirit-murder." Williams characterizes the psychological impact of racism as a murder which is "as devastating, as costly, and as psychically obliterating as robbery or assault."  n19 I had used the concept of spirit injury in the domestic context to refer to the combined impact of racism and sexism.  n20 In the instance of rape, spirit injury is a combination of the impact of physical and psychological assaults. In the Bosnian example, the injuries are exacerbated because the attacks were ethnically motivated as well. The Bosnian women were raped because they were Bosnian. On the group level, spirit injury is the cumulative effect of individual injuries, "which leads to the devaluation and destruction of a way of life or of an entire culture."  n21 While criminal or tort law may compensate victims for physical assault, the law does not address the spiritual assaults.

After a review of the history of the Bosnian, Serbian, and Croatian people, my article analyzed the rapes as constituting a war crime under the Geneva Convention and a violation of the Genocide Convention.  n22 The article also discussed the effect of the rapes as spirit injury in the patriarchal Muslim culture, which requires women's sexuality to be controlled and limited to marriage. The article called for the law of rape, both internationally and domestically, to address the individual and group spirit injuries as well as the physical injuries in Bosnia.

To demonstrate how systemic injuries affect an entire ethnic group, we developed a model of the symptoms of the spirit injury of rape. These symptoms include defilement, silence, sexuality, emasculation, trespass, and pollution.  n23 Women feel defiled and shamed by the rapes, and thus keep silent in many cases, internalizing their pain. The rapes are an assertion of Serbian male "sexuality" and constitute a deliberate attempt to trespass on Bosnian males, and thus, emasculate them. To the Serbians, the Bosnian men are not real "men" since they could not protect their own women from being defiled. The rapes are "pollution" of Bosnian culture because the Serbs were deliberately impregnating the Muslim women to create non-Muslim children. Since a Muslim woman is not permitted to marry a non-Muslim man, impregnation by a non-Muslim is an impossibility, which the women and culture are now forced to confront. The resulting children are in limbo since their religion is determined by the father. They are unwanted "Serbians," shunned by Bosnians and languishing in orphanages. How will these children react when they reach puberty and come to fully understand the horror that their existence represents to the Bosnian people?

In constructing the model, we drew upon the experience of black Americans during and after slavery. We theorized that the history of rape and forced miscegenation that was committed on black American women by their masters and other white men has led to a long term spirit injury on the African-American culture, which still remains untreated, more than one hundred years after the end of slavery.  n24 The impact of this spirit injury is evidenced by the continuation of color consciousness, which still values light skin over dark skin in the black culture, and which also manifests itself in the myth of black matriarchy and welfare queens dominating emasculated criminalized unemployable black men. Although it will undoubtedly manifest in different ways in Bosnia, the effect of the spirit injury on black America provides a worst case scenario with which to evaluate the potential future effect of long term spirit injury in the Bosnian context. The unfortunate end result in Bosnia will probably be shunned, defiled Bosnian women, who are unmarriageable; parentless and rebellious "Serbian" children acting out their rage as living symbols of the trespass on Bosnian culture; and emasculated Bosnian men unable to resume their customary roles as heads of the family.

The article concludes with my proposition to treat the long term Bosnian spirit injuries through a combination of law, rehabilitative, and preventive measures in the fields of education, counseling, and employment training. These efforts must be fully financed through a joint effort by the Bosnians, Serbians, and the rest of the international community. The legal solutions include actions brought in the War Crimes Tribunal n25 as well as in the Bosnian local courts. The United States has served as a venue for suit under the Torture Victim Protection Act of 1992  n26 and the Alien Tort Claims Act.  n27

Now that I have outlined my Article, let us examine how its principles could be applied in LatCrit theory. Latin America has been plagued by civil wars and military dictatorships, which viciously oppressed civilian opposition. The El Salvadoran and Nicaraguan civil wars come to mind as does the ongoing Peruvian conflict with the Shining Path guerrillas. Rape flourishes in such environments but remains an undiscussed topic. It took the Japanese nearly fifty years to admit the kidnapping of 70,000 to 200,000 Korean, Chinese, and Filipino women during
World War II for the purpose of sexual servitude as "comfort women." n28 It should not take fifty years for these Latin American rapes to be brought to light and the victims compensated for both their physical and spiritual injuries.

[*346] In addition to the area of rape, the civil wars and oppression have led to many "disappeared" persons, whose bodies have never been found and whose torturers, jailers, and murderers have never been identified, tried, or convicted. Remedies need to be found to assist the families, including the mothers, daughters, and wives, of these disappeared. Internal attempts to convene tribunals to either forgive or hold some small group of people accountable are not sufficient to deal with a spirit injury of this magnitude.

Another area where the concept of spirit injury could be used in Latin America is the forced sterilization of Puerto Rican women. It has been estimated that one-third of the childbearing age females have been sterilized, at the average age of twenty-eight. n29 Could an international law remedy be crafted? What are the remedies under domestic tort law? Are any of these women and their families, as part of the pronatalist Catholic culture, receiving counseling for such spirit injuries?

There are many Mexican women, who have left their families to work in U.S.-owned factories called maquiladoras on the Mexican side of the Texas border. The wages and conditions in these factories are horrendous, and many women are exposed to environmental hazards that can cause genetic damage. The women and their children ingest these toxic substances thereby causing permanent harm, but U.S. labor, employment, and environmental laws do not apply to these maquiladoras in Mexico. Where are the remedies for these sorts of physical and spirit injuries?

On the U.S. side of the border, Latina immigrants and their descendants are stereotyped as illegal lazy women, waiting to plop out babies in the United States on the U.S. side of the border. Where are the repositories of family honor. Female chastity and purity must be maintained at all costs. Further, there is the ongoing tradition of honor killings, where male family members are authorized to kill errant sisters. An honor killing might be infracted for dating, premarital sex, leaving home without permission, marrying without approval, or other "Western" conduct. A bride price (mahar) is paid by the groom's family to the new bride. n34 If divorce occurs, she must return to the legal jurisdiction of her father or another male relative.

Islamic law (shari'a) constitutes an additional source of discrimination in several ways. Men are permitted four wives, who can be Muslim, Christian, or Jewish, while women may only have one husband, who must be a Muslim. n35 The husband has the authority to beat his wife at will, whereas a woman must have worthy grounds to get a divorce. n36 A man can divorce his wife at will, whereas a woman must have worthy grounds to get a divorce. n37 She will get custody of the children only if they are very young; however, at a certain age, custody automatically switches to the father. n38 A woman only inherits half what a male does even though they may be of the same degree of relationship to the deceased. n39 In the West Bank, the Islamic practices have been codified in the Jordanian Personal Status Code. n40

After discussing the multiple levels of discrimination in my article, I then proposed three interrelated possibilities for legal reform. Such reforms must be undertaken carefully because of opposition from Islamic fundamentalist groups like Hamas and other
traditionalists. First, Islamic reinterpretation can be undertaken based upon the work of progressive Islamic scholars. Such thinkers have espoused ending polygamy, the male unilateral right to divorce, and male guardianship of women. Tunisia is an example of a country that abolished polygamy based upon Islamic reinterpretation. A second alternative for legal reform is the adoption of revised personal status and other codes based upon Islamic reinterpretation or international human rights laws such as CEDAW. Additionally, the proposed Basic Law (9th Draft) contains fundamental rights and freedoms that apply to both men and women. The equality clause prohibits discrimination "because of race, sex, color, religion, political opinion, or disability." Another article in the draft, however, indicates that "sharia" is "a main source of legislation," thus continuing the conflict between women's rights and religious practices.

Legal reforms can only be successful if accompanied by societal change; thus, the final method to combat discrimination is to build upon societal changes wrought by the uprising known as the intifada, which lasted from 1987 to 1993. During this period, many more women were politically active and some shifts occurred in family relationships, such as bride price. At the same time, there was also a fundamentalist backlash that hindered women's gains. This backlash is most exemplified by the Gaza hijab campaign, in which almost all women had to wear a head-scarf or face being pelted by rocks, vegetables, or acid. My overall research in the area leads me to conclude that Palestine may have the best chance in the Arab world to adopt and enforce human rights norms that will enhance the current legal status of women. However, only time will tell.

The CRF analysis of Palestinian women, with its emphasis on the multiple discriminations they face, has several implications for LatCrit research. Unwritten customary practices exist in other parts of the world besides the Middle East and Africa. The entire patriarchal machismo concept leads to customary discrimination against Latinas, in both the United States and in Latin America. Despite the existence of equality norms in the various constitutions, machismo limits women in their ability to attend school, get married, raise families, and have careers. Islam is not the only religion that affects the human rights of women and men. Most Latinas are Catholic, and consequently, are limited in their ability to get divorced, remarried, or become clergy. Marianismo, the cult of the Virgin Mary, requires women to aspire to a level of chastity and purity that is similar to that required by Palestinian custom. Additionally, the spirit of chivalry that result from these multiple discriminations could also be explored. Such research would enhance our understanding of Latina lives. Viable legal and social reforms could then be designed to assist them.

V. SOUTH AFRICA

The final international topic to which I have applied CRF analysis involves Africa. In an article entitled Black South African Women: Towards Equal Rights, multiple discrimination on the basis of race, class, and gender was explored. Black South African women constitute the most oppressed group within the new democracy. Although apartheid officially ended a few years ago, black women are still de facto discriminated against on a racial and class basis by all whites (the group which still constitutes the bulk of employers). A few years of democracy is not enough to overcome decades of legal discrimination in all areas of life, including housing, land ownership, education, health care, employment, judicial administration, freedom of speech and association, public accommodations, and marriage.

These women are also discriminated against by men in general. White men are the bulk of employers, followed by Asian and colored men. Black men dominate black women based on customary or "tribal" norms that resemble the Palestinian case. The customary law of the black ethnic groups, primarily Zulu and Xhosa, affects personal status areas such as marriage, divorce, guardianship, succession, contractual power, and property rights. Women are literally and figuratively male property and cannot marry, acquire property, or engage in contracts without permission. Further, inheritance is a right granted to males only. As is the case in Palestine, men pay a bride price or lobolo, but this amount goes to the father of the bride, not the woman herself, as in Palestine. Some South Africans have characterized this practice as buying a bride, while others regard it as insurance, symbolism or reaffirmation of their status in the community. As in Palestine, there is polygamy, but the number of wives a man may have in South Africa is unlimited. Since most black women still marry under customary law, they are not covered by the protections of civil law, which forbids polygamy and grants women the right to inherit and make contracts.

This article discussed the impact of the 1993 Interim Constitution on historical patterns of gender and race inequality. The human rights chapter binds the executive and legislative branch. In it, there is an equal protection clause which states, "every person shall have the right to equality before the law and to equal
protection of the law." n52 This antidiscrimination clause is one of the most comprehensive in the world, covering "race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, and language." n53 Another clause permits, but does not require, affirmative action for disadvantaged groups. n54 A Gender Commission is created under the constitution as well. n55

Significantly, the protections afforded in the constitution are limited to the public sphere; however, most women live their lives in the private sphere of the family. In addition, the constitution provides a role for customary law; however, this creates potential contradictions with the equality provisions. n56

While these provisions are promising and exemplary on the global scene, our analysis indicates that insufficient attention was paid to the intersection of race and gender in the constitutive process. As a result, our fear was that the blacks who will advance the most will be black men and not black women. The women who will likely benefit from government and private sector affirmative action will be white women. Without special public and private efforts, black women are likely to languish at the bottom. Perhaps the new parliament, which is one-quarter women, will be able to plug the gaps in the constitution.

A permanent constitution was adopted in December 1996 and will take effect in 1997. n57 The Bill of Rights provisions will soon be binding on private parties as well as on the government. n58 Additionally, a revised article on freedom and security of the person now indicates that people have a right to be free from domestic violence, a major societal problem. n59 The revised article on culture and language indicates that while everyone has the right to participate in the culture of their choice, such culture must not be inconsistent with the Bill of Rights. n60 These revisions should enhance women's rights in the new South Africa.

How could this focus on race, class, and gender in the South African context apply to LatCrit theory? I have already mentioned how the machismo aspect of Latino custom could be explored. While Latin America does not place the same emphasis on race as does South Africa or the United States, there is the issue of ethnicity and color. Those with higher percentages of Spanish blood and whiter color are privileged over the darker "Indians." To say that one looks or acts like an "Indian" is an epithet. What situation then do darker Indian women face in various Latin American countries? How does the white/black dynamic play itself out in Puerto Rico and Cuba, in particular? n53

Critical Race theory analysis focusing on the culturally-constructed meaning of identity would be interesting in the Latin American context, as would detailed investigations of the lives of black Brazilian women who live in the Bahia province. In Nicaragua, there is a group of black English speakers who live on the remote Atlantic coast. How are these women treated compared to the white Spanish-speaking majority or to the dark indigenous-speaking Indians in an area that was recently the location of civil war between the Sandinistas and the Contras?

VI. PALESTINIAN AND SOUTH AFRICAN WOMEN: VIOLENCE AGAINST WOMEN

My most recent use of CRF analysis builds upon my prior publications on Palestinian and South African women and extends the research in one specific area--violence against women. In this field, one can explore the intersection of gender, ethnicity, custom, and religion in a subject where little has been written outside the U.S. context. n61 In A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women, n62 I examine violence against women under both international and foreign law. It is only very recently that such violence has been thought of as a proper subject for international human rights law. Traditional notions of state responsibility have typically excluded the private sphere of family and home where most such violence occurs. There are also profound misconceptions and ignorance about the prevalence of the violence. n63

For the purposes of my article, violence against women is defined according to the 1993 United Nations Declaration on the Elimination of Violence Against Women as "any act of gender based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life." n64 Therefore, the notion includes what many call domestic violence n65 as well as violence from external sources, such as the State or enemies, as in the Bosnia situation.
Feminism has defined five traditional categories of violence against women: battering, sexual harassment, rape, prostitution, and pornography. n66 CRF enhances our understanding of violence by focusing on the racial aspect of the sexualized violence as well as the sexualized aspect of racial violence. n67 In the international context, articles have begun to focus on the plight of women in several countries. n68

[*355] In conceptualizing violence, I used two notions: the Outside/Inside dichotomy and the previously discussed spirit injury. With respect to the first concept, I posit that under conditions of the "outside" violence of colonialism, neocolonialism, apartheid, or occupation, the men of an oppressed group are not allowed to be "men" in the culturally-constructed sense of the term. In effect, they are not allowed to dominate in the outside public sphere of government and business because of the influence and control of outsider men. One of the few areas where the oppressed men can exert some limited expression of their maleness is through oversight of their own women in the "inside" or private sphere. The only sphere where the "emasculated" men can take out their frustration is the private one affecting their own women and children; thus, their families are going to be disproportionately subject to domestic violence because the family members bear the brunt of the oppressed men's frustration due to high unemployment and political impotence. Ironically, the oppressed male's ability to dominate even in the private sphere may be further limited since the oppressor's police or army can intrude in this realm as well.

Custom, culture, and religion become psychological refuges for the oppressed against foreign penetration. n69 Ancient, and in many cases, repressive patriarchal traditions may be glorified in order to restore and maintain a sense of manhood for the embattled men. Many women, as well as men, view these customs as desirable. Indeed, it is an area in which their culture is reaffirmed, even though it can lead to female subordination. Most women, subject to the multiple burdens of their ethnicity and gender, would not even think of going to the outsiders, i.e., police or other officials, to seek relief from repressive practices or to report their own men for abuse. This would make the women collaborators or traitors. n70

[*356] The multiple effect of the violence on the women, simultaneously coming from outside and inside their culture, constitutes a "spirit injury" on the women, and thus on the entire culture. The symptoms of spirit injury discussed in Part III apply to Outside/Inside violence in this context as well: defilement, silence, sexuality, trespass, and emasculation.

South Africa's culture of the outsider violence of apartheid has contributed to the fact that many women and men accept domestic violence in the private sphere as a fact of life. n71 South African women have experienced a great deal of abuse as a result of both rape and domestic violence. While ninety-five percent of rapes are estimated to be unreported, it is believed that ninety-five percent were committed against black women. n72 While the high prevalence of rape and abuse may be partially attributable to the outsider violence of apartheid, there is a role played by customary law as well. Since customary beliefs include the idea that women are male property, it follows that men have the right to batter and rape women. n73 These patterns have continued despite the adoption of the 1993 Constitution. Women who are victimized by domestic violence are unable to obtain much assistance from doctors, counselors, police, or the legal system.

The combination of the Outsider/Insider violence of apartheid and customary practices constitutes a massive spirit injury for black South African women. Women are defiled by the multiple levels of abuse--abuse from the outsider violence of the apartheid legacy, insider violence by their own men, and injury from a legal system that rerapes them if they attempt to seek [*357] justice. The women may prefer to suffer in silence as their men attempt total control over their lives, including their sexuality.

The symptoms of spirit injury resulting from violence manifest themselves among the Palestinians as well. Unfortunately, the silence of spirit injury is so profound that there are no reliable statistics on domestic violence or other violence against women, and public discussion on such issues is still relatively muted. n74 Alarming rates of domestic violence have been found in the West Bank and Gaza. Wife beating continues due to patriarchy, i.e., the way males are socialized to view women from an early age, and the custom of noninterference in domestic disputes. Custom and religion dictate that it simply is not a crime to beat one's spouse.

There are several potential international legal remedies for the situation of violence against women in South Africa and Palestine, including CEDAW. n75 South Africa has ratified it. However, the Committee on the Elimination of Discrimination Against Women (Committee), which is the body charged with oversight of CEDAW, endorsed an explicit resolution on this point in 1992 since CEDAW is rather vague on the issue. This resolution recognized that violence against women is a form of discrimination. n76 CEDAW was interpreted as explicitly making gender-based violence a violation of several articles. The Committee's action
was followed up in 1993 when the General Assembly of the United Nations adopted the Declaration on the Elimination of Violence Against Women, which defines violations of women's human rights to equality.

With respect to Palestine, the Basic Law (9th draft) explicitly states, "the Palestinian National Authority shall work, without delay, to join the regional and international declarations and covenants that protect human rights." n77 This should include CEDAW. While the Authority, as an autonomous entity does not [*358] have the status of independent statehood, and thus cannot join these agreements, it is highly significant that it is committing itself to these principles.

The Article next looked at the domestic law of the jurisdictions. As discussed in Part V, a positive step forward is the new South African Constitution, which will come into effect in 1997. It has a revised article on freedom and security of the person. Article 12 now specifies that everyone has a right to be "free from all forms of violence from either public or private sources as well as the right not to be tortured in any way." n78 The revised article on language and culture now makes clear that while everyone has the right to participate in the culture of their choice, no one can do so if participation in that culture is inconsistent with the Bill of Rights. n79 These revised articles should augment the constitutional protections available to abused women.

I conclude by suggesting some legal and policy recommendations. With respect to the legal arena, both South Africa and Palestine could seek to implement some of the proposals of the United Nations Declaration on the Elimination of Violence Against Women, including the development of adequately funded national plans of action to promote the protection of women. n80

Additionally, in Palestine, specific constitutional provisions could be drafted. Two Latin American countries provide models for future drafters. Brazil has a provision that states, "the state should assist the families in the person of each of its members, and should create mechanisms so as to impede violence in the sphere of its relationships." n81 Colombia's constitution is also exemplar: "Family relations are based on the equality of rights and duties of the couple and on the reciprocal rights of all of its members. Any form of violence in the family, is considered destructive of its harmony and unity and will be sanctioned according to law." n82

Equality between men and women cannot remain a paper right found only in the constitution. As a result, changes in the various personal status laws are required in both societies to put [*359] these laws in conformance with the new constitutions. Additionally, changes in penal laws are needed to ensure that domestic abuse is a crime and that batterers are arrested, tried, convicted, and sentenced. The South Africa Prevention of Family Violence Act is a step in the right direction, and Palestine should consider enacting similar provisions at some future point.

In addition to law, other areas are ripe for change. With respect to education, there is a profound need to train police, judges, lawyers, teachers, medical personnel, and professionals in both societies. Community education is also needed in schools, religious places and women's centers so that men, women, and children learn that violence against women is inappropriate in the twenty-first century. There is also a need for sensitive individual and family therapy in societies that shun this Western approach. The batterer must not be left out of the counseling loop. Anonymous hot lines and shelters are also essential, so that women may leave violent situations. All of these suggestions though will be merely "band aid" solutions unless women are given sufficient economic and educational opportunities to enable them to have realistic options if they do decide to leave abusive relationships.

There also must be programs that focus, not only on domestic violence, but on the legacy of outsider violence that affects women who have been the mothers, wives, and daughters of prisoners and martyrs as well as prisoners themselves during the liberation struggle. The controversial Truth Commission of South Africa is an attempt to deal with the cultural spirit injury caused by outsider violence. The Commission permits human rights violators from the apartheid era to confess all their crimes. If their cooperation and remorse are viewed as genuine, the result may be a pardon. At some far future point, Israel and Palestine might also consider creating such a Commission as an attempt at mutual healing.

Violence against Latinas in the United States and Latin America is a subject which deserves additional LatCrit research. Part III of this paper discusses rape and spirit injury as potential areas in need of greater consideration. The Outside/Inside dichotomy could be utilized to examine domestic abuse among Indian women or other minority groups in Latin America. Do their men exhibit increased tendencies to batter their women? It would also be interesting to explore how domestic violence manifests [*360] itself in U.S. immigrant communities where machismo practiced in Latin America carries over in the new country. The Latino men must transform from majority group dominant culture to minority group subordinated
culture. They lack the supportive surroundings or outlets for the frustration they face due to oppression on the job. Their women need to be exposed to educational and career options that did not exist in their home country. Do the men react to their "emasculcation" by lashing out even more at their wives and children? Additionally, the men have to deal with American laws that criminalize partner abuse and rape. Conduct that was legal or customary in their home country may now be penalized.

VII. CONCLUSION

In conclusion, CRF is a relatively young untapped jurisprudential addition to the various critical frameworks. I hope that fruitful collaboration between CRF and LatCrit theorists will create energizing scholarship in the future. I will be grateful if my ideas provide some food for thought and make a small contribution to our mutual theoretical and practical endeavors.

FOOTNOTE-1:

n1 My experience with Latin America is based upon trips I have made to Mexico, Puerto Rico, Nicaragua, Cuba, and Brazil. As an international lawyer for two firms in New York City from 1982 to 1987, part of my practice involved Latin American clients. In 1985, while in practice, I co-authored a presentation with Manuel Juaregui for the World Trade Institute entitled Countertrade in Mexico: Legal Aspects. As an international and competitive law professor, I have focused primarily on Africa and the Middle East.


n5 This Section is drawn from the introduction to CRITICAL RACE FEMINISM: A READER (Adrien Wing ed., 1997).


n9 See THE CUTTING EDGE, supra note 8, at 477. The seven units featured in the work Critical Race Feminism are: anti-essentialism, life in the academy, mothering, sexual harassment, criminality, working, and international issues. The featured authors include: Lani Guinier, Anita Hill, Kathleen Cleaver, Angela Harris, Patricia Williams, and Anita Allen. Latinas featured in CRITICAL RACE FEMINISM, supra note 5, include: Celina Romany, *Ain't I a Feminist*, at 19; Trina Grillo & Stephanie Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons between Racism and Sexism (or Other Isms)*, at 44; Margaret Montoya, *Mascaras, Trenzas, y Grenas: Un/masking the Self While Un/Braiding Latina Stories and Legal Discourse*, at 57; Rachel Moran, *Full Circle*, at 113 (discussing how it felt to be teaching at UC Berkeley when the Regents ended affirmative action); Maria Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, at 188; Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, at 259; Maria Ontiveros, *Rosa Lopez, Christopher Darden, and Me: Issues of Gender, Ethnicity, and Class in Evaluating Witness Credibility*, at 269; Elizabeth Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!, at 317.


n14 See, e.g., WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES (Julie Stone Peters & Andrea Wolper eds., 1995); HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (Rebecca Cook ed., 1994); FROM BASIC NEEDS TO BASIC RIGHTS: WOMEN'S CLAIM TO
HUMAN RIGHTS (Margaret A. Schuler ed., 1994).

n15 It has been noted that in the international women's rights movement, the voices of middle class European and American women are the loudest. Adetoun O. Ilumoka, African Women's Economic, Social and Cultural Rights--Toward a Relevant Theory and Practice, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (Rebecca Cook ed., 1994) at 307, 320; Celina Romany, On Surrendering Privilege: Diversity in a Feminist Redefinition of Human Rights Law, in FROM BASIC NEEDS TO BASIC RIGHTS: WOMEN'S CLAIM TO HUMAN RIGHTS 543 (Margaret A. Schuler ed., 1994); Julie Mertus & Pamela Goldberg, A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct, 26 N.Y.U. J. INT'L L. & POL. 201 (1994) (critiquing the hegemony of women from the North).


n18 Rapes have probably occurred in every war. They were recorded during the battles of ancient Greece, the Crusades, the United States Civil War, the Vietnam War, and World War II. Id. at notes 18-25 and accompanying text.


n20 Adrien Katherine Wing, Brief Reflections Toward a Multiplicative Theory and Praxis of Being, 6 BERKELEY WOMEN'S L.J. 181 (1990-91).

n21 Wing & Mercham, supra note 17, at 1.


n23 Wing & Mercham, supra note 17, notes 134-177 and accompanying text.

n24 For more on rape in African-American culture, see Jennifer Wriggins, Rape, Racism and the Law, 6 HARV. WOMEN'S L.J. 103 (1983).


n30 I use the term Palestine to refer to the West Bank, Gaza Strip, and East Jerusalem (areas formerly known as the Occupied Territories).

n31 In the area of Palestinian rights, my publications include: Legal Decision-making During the Palestinian Intifada: Embryonic Self Rule, 18 YALE J. INT'L L. 95 (1993); Legitimacy and Coercion: Legal Traditions and Legal Rules for the Intifada, MIDDLE EAST POLY. Fall 1993, at 87; The Intifada: The Emergence of Embryonic Legal Mechanisms for Palestinian Self-Determination, ARAB STUD. Q., Winter, 1993, at 63; Prospects for a Democratic Palestine: Assets and Impediments, in STATEHOOD 13 (Center for Policy Analysis on Palestine, 1994); Palestinian Women: Their Future Legal Status, ARAB STUD. Q., Winter, 1994, at 55; DEMOCRACY, CONSTITUTIONALISM AND THE FUTURE STATE OF PALESTINE (PASSIA Institute, Jerusalem, 1994); The New South African Constitution: An Example for Palestinian Consideration, 7 PALESTINE Y.B. INT'L L. 105 (1992-94); Palestinian Women: Beyond the Basic
Law, THIRD WORLD LEGAL STUD. 141 (1994-95) (with Shobhana Kasturi);
JUDICIAL REVIEW FOR PALESTINE (Birzeit Law Center, Palestine 1996) (with Qais Abdelsattah & Sonya Braunsweg);


n33 Proclamation of the Independent Palestinian State, issued by the 19th Session of the Palestine National Council, Algiers, Nov. 15, 1988, reprinted in INTIFADA: THE PALESTINIAN UPRISING AGAINST ISRAELI OCCUPATION 395 (Zachary Lockman & Joel Beinin eds., 1989). The Preamble to this symbolic declaration declared equality between the sexes. The most recent drafts of the constitution also call for such equality. See infra notes 43-45 and accompanying text.

n34 ABDUL RAHMAN I. DOI, WOMEN IN SHARI'AH 154 (1989).


n36 KORAN, Verse 4:34.

n37 An-Naim, supra note 35, at 39.

n38 Mayer, supra note 35, at 144.


n41 For more discussion, see Wing, Custom, Religion, and Rights, supra note 32, at 164.

n42 CEDAW, supra note 16.

n43 Palestinian Basic Law (9th Draft) (on file with author). I assisted with the sixth draft during summer 1996. As of this writing, the Basic Law is still not finalized.

n44 Id. art. 9.

n45 Id. art. 4(b).

n46 For more on the hijab campaign, see Rema Hammami, Women, the hijab and the Intifada, MIDDLE EAST REP., May-Aug. 1990, at 24, 25-26.


n48 Adrien Katherine Wing & Eunice de Carvalho, 8 HARV. HUM. RTS. J. 57 (1995).

n49 Id. at 60.

n50 Id. at 64: For more on customary law, see T.W. BENNETT, A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA (1991); J.C. BEKKER, SEYMOUR'S CUSTOMARY LAW IN SOUTHERN AFRICA (1989).

n51 Wing & de Carvalho, supra note 48, at 64.

n52 S. AFR. CONST. art. 8(1).

n53 Id. art. 8(2).

n54 Id. art. 8(3)(a).

n55 Id. art. 119.
n56 Id. ch. XI.


n58 Id. art. 8(2).

n59 Id. art. 12. For more on domestic violence, see infra Part VII; Wing, A Critical Race Feminist Conceptualization of Violence, supra note 31.

n60 S. AFR. CONST. art. 30 (1996)(on file with author).

n61 For U.S. sources, see generally BEVERLY BALOS & MARY LOUISE FELLOWS, LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION (1994); Romany, Killing the Angel in the House, supra note 2; DOMESTIC VIOLENCE LAW: A COMPREHENSIVE OVERVIEW OF CASES AND SOURCES (Nancy K.D. Lemon ed., 1996).


n63 For a discussion of the reasons why so little attention has focused on domestic violence as a proper subject for international human rights law, see Michele E. Beasley & Dorothy Q. Thomas, Domestic Violence as a Human Rights Issue, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 323 (Martha Fineman & Roxanne Mykitiuk eds., 1994).


n65 Some authors have called for new terminology, such as "domestic terrorism" to more adequately capture the true nature of the harm. Isabel Marcus, Reframing "Domestic Violence": Terrorism in the Home, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 11 (Martha Fineman & Roxanne Mykitiuk eds., 1994).

n66 BALOS & FELLOWS, supra note 61, at 183.


n70 Jenny Rivera has written about this "double bind" in the context of U.S. Latina women abused by Latino men. The women


n73 Id. (quoting Lloyd Vogelman, head of the Project for the Study of Violence at the University of Witswatersrand).


n75 CEDAW, supra note 16.


n77 Palestinian Basic Law (9th Draft) (on file with author).

n78 Id. art. 12.

n79 Id. art. 30.

n80 United Nations Declaration on the Elimination of Violence Against Women, supra note 64, art. 4.

n81 C.F. [Constitution] art. 226, § 8 (Braz.).

n82 COLOM. CONST. art. 42.
My comments today are designed to map a preliminary field of analysis through which to begin articulating a LatCrit perspective on international law. These four models are reflected in (1) U.S. statutes imposing labor rights conditionality on developing countries seeking preferential access to U.S. markets; (2) the regional arrangement embodied in the North American Agreement on Labor Cooperation (NAALC), otherwise known as the NAFTA Labor Side Accord; (3) the U.S. embargo of Cuba, read as an effort to promote the so-called right to democratic governance; and (4) proposals to link the enforcement of international human rights to the decision-making processes of the World Bank. Viewed as an example of the fourth linkage model, the proposal offers yet another perspective on the way human rights linkages may impact and be affected by the concept of state sovereignty. The substantial incursions on sovereignty, already apparent in the current international legal order, suggest that the concept of sovereignty operates primarily to retard the struggle to promote the enforcement of international human rights through the development of international economic law, and the focus of LatCrit scholars interested in promoting human rights enforcement must shift from a defense of sovereignty to other alternatives suppressed by dependency discourse. 

I would like to focus on four models for linking the enforcement of international human rights to the development of international economic law. After briefly describing each linkage model, I explore some of the difficulties involved in attempting to locate Latinas/os in the debates over these linkages or, more precisely, the difficulties involved in identifying a critical perspective from which to evaluate these alternative linkage regimes. Through the discussion of the four models, you will see why this can be a very difficult task. These four models are reflected in (1) U.S. statutes imposing labor rights conditionality on developing countries seeking preferential access to U.S. markets; (2) the regional arrangement embodied in the North American Agreement on Labor Cooperation (NAALC), otherwise known as the NAFTA Labor Side Accord; (3) the U.S. embargo of Cuba, read as an effort to promote the so-called right to democratic governance; and (4) proposals to link the enforcement of international human rights to the decision-making processes of the World Bank.

The difficulties begin with the observation that each linkage regime offers a different legal trajectory for the future world order, spanning an imaginary continuum of possibilities. At one end, the failure to devise effective linkages may contribute to or reflect, or both, a complete capitulation of international law and the nation-state to the processes of anarcho-capitalism. At the other end, the struggle for increasingly effective and comprehensive linkages may promote processes that might eventually produce a one world government. The contest between these alternative trajectories for global governance, in turn, bears directly on the prospects for eliminating Latina/o poverty as well as for the continued viability of many Latin cultural traditions and identities, both in the United States and Latin America.

These difficulties are further exacerbated by the concerns and commitments LatCrit scholars have inherited from the RaceCrit movement--most
Proposing to read these differences as artifacts of the incommensurable Latina/o interests and identities by proceeding into this quagmire of multiple (and apparently controversial) political alignments among Latinas/os depending on the discourse through which these linkages are represented. My approach is designed to bring to the foreground the relations of privilege and oppression that would be reinforced by adopting the critical perspective expressed in each of the three discourses I examine given the priorities each discourse establishes. Two things follow. The first is that understanding how to maneuver through these various discourses is a crucial step in combating the manipulation of common interests and differences that might otherwise prevent LatCrit scholarship from developing an effective critique of the international processes that are reconstructing the world we inhabit. The second is a call to conscience. One of the most important contributions LatCrit scholarship can make is to keep reminding us that after all the discourse and debate, the critical perspectives we assume are simply reflections of the priorities we embrace.

II. FOUR MODELS FOR ENFORCING HUMAN RIGHTS THROUGH INTERNATIONAL ECONOMIC LAW

Each linkage model would be a good point of departure for a more comprehensive analysis of the relationship between human rights enforcement, development objectives, interstate relations, and international economic law. Nevertheless, because my primary purpose here is to illustrate how different linkage models would be analyzed through the discourses of development, dependency, and...
neoliberalism, my discussion of these four regimes will be general and schematic.

A. Labor Rights in United States Trade Preference Regimes: Unilateral Conditionality

The United States has various statutes conditioning trade relations on foreign compliance with unilaterally designated labor rights. Most of these statutes are aimed at developing countries seeking preferential access to U.S. markets. \[*367\] The first preference scheme to incorporate labor rights conditionality was the Caribbean Basin Economic Recovery Act (CBERA), enacted in 1983 to implement President Reagan's Caribbean Basin Initiative (CBI). \n11 In 1984, the General System of Preferences Renewal Act added labor rights provisions to the General System of Preferences (GSP). \n12 More recently, in 1991, labor rights conditionality was incorporated into the Andean Trade Preference Act of 1991. \n13

These trade preference programs are designed to promote investment and economic growth in developing countries by granting designated articles from beneficiary countries duty-free entry into the U.S. market. The theory is that duty-free entry will provide exports from beneficiary countries significant cost-advantages over competing articles from non-beneficiary countries, thus generating greater sales in the United States and increased production and investment in the beneficiary countries. Because the labor conditionality provisions in these trade preference statutes are defined by reference to the GSP Renewal Act of 1984 provisions, I will limit my discussion to the labor rights provisions and enforcement mechanisms established by the GSP. \n14

\[*368\] The General System of Preferences Renewal Act conditions country eligibility, among other things, on a presidential certification that the beneficiary country is "taking steps" to enforce five "internationally recognized worker rights." \n15 The Act defines "internationally recognized workers rights" to include the following five labor rights: 1) the right of association; 2) the right to organize and bargain collectively; 3) prohibitions on the use of forced or compulsory labor; 4) a minimum age for employment; and 5) acceptable conditions of work, including minimum wages and hours, and occupational safety and health. \n16 Although these five rights are designated "internationally recognized," the list excludes such fundamental labor rights as the right to be free from employment discrimination and includes other worker rights not deemed fundamental, at least not by the International Labor Organization (ILO). \n17

The GSP statutory scheme sets up complaint and review procedures administered by the United States Trade Representative (USTR). \n18 The GSP enforcement mechanism is organized primarily around an Annual Review process conducted by the GSP Subcommittee, an interagency committee constituted by representatives from the Departments of State, Commerce, Agriculture, and Treasury. The Subcommittee accepts petitions from interested parties seeking removal of beneficiary countries because of their worker rights violations. It reviews these petitions \[*369\] in two phases. The first phase involves a preliminary determination whether the petition meets the regulatory standards for review. \n19 The second phase involves a review of the merits of the petition and an investigation of the labor practices of the country at issue. \n20 Following review, the Subcommittee makes recommendations to the full Trade Policy Staff Committee, which in turn makes recommendations to the President. \n21 Significantly, these review proceedings are not conducted pursuant to the Administrative Procedure Act nor are the President's final decisions subject to judicial review. \n22


The North American Agreement on Labor Cooperation (NAALC) is the labor accord portion of the NAFTA. \n23 In the debate over alternative models for linking human rights to enforcement of international economic law, the GSP model of labor conditionality is often compared to the labor rights regime established \[*370\] by the NAALC. \n24 This is, in part, because the NAALC may eventually replace the GSP labor rights regime, particularly if and when other countries in the region begin to accede to the NAFTA. \n25 Equally important, the GSP and the NAALC are worth comparing because they represent two very different linkage models.

In the GSP model, the linkage is effected through the imposition of labor standards that have been unilaterally defined by the U.S. Congress and are interpreted and enforced through the nonjusticiable determinations of the U.S. executive branch. The NAALC, by contrast, is an international agreement among the three state parties to the NAFTA which, in deference to state sovereignty, begins by "affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards," \n26 and ends by establishing a nonenforcement mechanism, whose sanctions can be invoked in cases involving only three of the eleven labor standards the parties have agreed to promote "to the maximum extent possible." \n27
The NAALC identifies eleven "labor law matters" and sets up a three-tiered system of review. The first tier establishes procedures limited to review and consultation. Three of the eleven labor rights cannot progress beyond this initial tier. These three rights are the right of association, the right to organize and bargain collectively, and the right to strike. Viewed as a linkage regime, the first tier of the NAALC provides minimal enforcement for these fundamental labor rights. Violations can be reviewed by another party's National Administrative Office and are subject to consultation by the Labor Ministers upon the request of a state party; however, there is no authority established to sanction such violations. These limitations reflect the operative impact of the concept of sovereignty in the negotiation of the NAALC linkage regime.

The other eight labor rights are designated "technical labor standards" and concern forced labor, child labor, minimum wage and hour standards, employment discrimination, equal pay for men and women, job health and safety, workers' compensation for occupational injuries and illnesses, and protection of migrant workers. Technical labor standards are subject to evaluation and recommendations by an Evaluation Committee of Experts (ECE).

Although the NAALC provides for fines or suspension of trade benefits under NAFTA, these penalties can only be imposed after dispute resolution procedures, involving extensive consultation, have failed. Moreover, of the eight labor standards that can proceed beyond the first tier of review, only three of the standards, child labor, health and safety, and minimum wage and hour standards, can proceed to dispute resolution and possible sanctions.

C. The U.S. Embargo of Cuba: The Human Right to Electoral Democracy and a Market Economy

If a comparison of the GSP model of labor rights conditionality and the NAALC regime provides a useful point of reference for examining the pros and cons of unilaterally imposed versus multilaterally negotiated linkage regimes, the U.S. embargo of Cuba adds a few more perspectives on the debate. The U.S. embargo against Cuba might be viewed as a model for linking trade and investment policies to the enforcement of human rights generally and the right to democracy in particular. Certainly, that is the embargo's stated purpose and objective. Viewed from this perspective, the U.S. embargo highlights many of the broader issues and concerns LatCrit theory must address in determining whether and how to link human rights enforcement to the processes and institutional arrangements of international economic law. This is precisely because even as the U.S. embargo reflects the unilateralism of the GSP labor conditionality model, it vastly exceeds the scope of labor conditionality, both in terms of the conditionality it imposes and the enforcement mechanism it deploys.

In the most recent manifestation of the U.S. embargo, the Cuban Liberty and Democratic Solidarity Act of 1996 conditions the suspension of the embargo on a Presidential determination that a "transition government" is in power in Cuba. Moreover, until such transition government is replaced with a "democratically elected government," any suspension of the embargo is subject to reversal upon the enactment of a joint congressional resolution. The Act establishes eight specific requirements and four additional factors for determining when a transition government is in power in Cuba. In a similar manner, it establishes six requirements for determining when a democratically elected government has been elected.

As conditions precedent for suspending the embargo, these requirements represent much more extensive interventions in the internal domestic political and economic processes of the Cuban state than either the GSP or the NAALC. First, the scope of conditionality is expanded far beyond the obligation to respect internationally recognized or multilaterally negotiated labor standards to the very political form of the Cuban state and the organization of the Cuban economy into a market-oriented economic system based on the right to property. Second, these conditions are imposed through the unilateral enforcement of a broad economic embargo as compared to the denial of a trade preference under the GSP or the suspension of a trade benefit or fines under the NAALC.

Aside from underscoring the question of the kinds of rights that might be subject to enforcement through alternative linkage regimes, the unilateralism embedded in the U.S. embargo of Cuba raises an additional set of problems. This is because the means used to promote respect for human rights in Cuba, the embargo, has itself been declared illegal under international law on the grounds that it impinges both on Cuban sovereignty and on the freedom of third party states to trade with Cuba. The persistence of the United States in maintaining and even tightening its illegal embargo suggests that the most important analysis may begin with the question of how to ensure that any future linkages reflect an international consensus or, lacking that, a normatively defensive world order model rather than simply reflecting the geopolitical and economic interests and ideologies of politically dominant groups in the most powerful states.
D. International Organizations: The World Bank and the Human Right to Development

The fourth and final linkage regime shifts the frame of reference from nation-states to the activities of international organizations. This shift introduces an entirely new perspective on some of the most crucial debates triggered by proposals to link human rights enforcement to the development of international economic law. Viewed through the framework of the first three linkage models, state sovereignty appears as a fundamental, though perhaps inevitable, limitation on the prospects for devising and implementing effective human rights linkages. Viewed through the prism of this fourth model, however, securing respect for basic human rights in the policies and practices of international organizations is probably the last hope and most [*375] promising way to begin achieving effective sovereignty for developing countries. This is because this fourth model emphasizes the extent to which human rights violations are generated by the policies developing countries must often implement in order to comply with the conditions imposed by organizations like the World Bank and the International Monetary Fund (IMF) (organizations dominated, not insignificantly, by developed countries). By regulating the policies and projects these institutions can impose on developing countries as well as the procedures through which they operate, human rights linkages can be instruments for promoting effective sovereignty, democratization, and sustainable development.

I would like to describe one proposal that fits nicely into this fourth model. Professor Jim Paul of the Rutgers School of Law-Newark has written extensively about the human right to development, a right asserted in the United Nations General Assembly Declaration of December 1986. n37 Conceptualizing development as "a diverse aggregate of activities carried on by a huge international industry," Paul focuses on the impact development projects have on the basic human rights of affected communities. n38 These projects, often implemented through a combination of legal maneuvers, pay-offs, co-optation of local elites and outright coercion, routinely produce development victims. Projects to construct large scale dams, commercial farming and irrigation projects, ranching, tourism, and the development of industrial zones have produced hundreds of thousands of displaced persons. Victims of development displacement are, in many instances, subjected to involuntary resettlement. Herded into poorly planned and managed resettlements, they suffer "disease, hunger, loss of livelihood, loss of self-reliance" and rarely receive adequate compensation for the forcible removal from their lands and property. n39

Rather than attempting to elaborate the substantive meaning of development, Paul conceptualizes the human right to development as the right to enjoy the fundamental human rights articulated in the Universal Declaration and other international [*376] human rights instruments. Thus, the realization of basic human rights, in and through the process of development, becomes the essence of the Human right to development. This, in turn, imposes on development actors the obligation to respect basic human rights in designing and implementing development projects. For Paul, the most important right implicated in the development process is the right of participation. "The denial of full and effective rights of participation in project activities constitutes not only a violation of fundamental political rights central to our concepts of human rights, but also leads directly to the violation of other basic rights." n40

By defining the Human right to development as the realization of internationally recognized basic human rights, Paul's formulation avoids the rhetorical traps that might otherwise be triggered by the suggestion that the peoples of the world have a right to development. n41 By focusing on the way these rights are incorporated into the process of development and the practices of development actors, Paul's formulation legitimates the kinds of grassroots mobilization necessary to assure affected communities effective participation in and monitoring of the interventions through which they are being developed.

Viewed as an example of the fourth linkage model, the proposal offers yet another perspective on the way human rights linkages may impact and be affected by the concept of state sovereignty. Like proponents of labor conditionality and the U.S. embargo as well as critics of the NAALC regime, Paul's formulation of the human rights problem positions itself against the concept of sovereignty because this concept has often been deployed by developing country governments to shield their participation in development wrongs. Nevertheless, by recognizing that human rights obligations govern international economic organizations [*377] (not just developing country governments) and explicitly limiting the purposes for and conditions under which international organizations may conduct activities in developing countries, Paul's formulation of the Human right to development provides a glimpse of the kinds of linkages that might help address human rights violations generated by the structures and processes of the international political economy. This is particularly true if the Human right to development produces effective procedural mechanisms through which affected communities may challenge the human rights implications of investment decisions, financial policies, and other activities of
international economic organizations, such as the World Bank, the IMF, and the World Trade Organization.

III. THREE DISCOURSES FOR LOCATING LATINAS/OS IN THE LINKAGE DEBATES

Now that I have introduced these four models for linking human rights enforcement to the procedures and institutions of international economic law, I will suggest some of the difficulties involved in developing a critical perspective from which to assess the implications of these different models for Latinas/os and the various communities we comprise. I will do this by organizing my analysis of these linkage models around the critical perspectives offered by the three discourses I have already mentioned. The discourses of development, dependency, and neoliberalism each offer different points of reference from which to evaluate these alternative linkage models because each discourse identifies different institutional arrangements and social relations as the source of the problem of Latina/o political and economic subordination. Moreover, while each discourse invites its exponents to assess proposed linkages in terms of their likelihood of marshaling the rule of law to deal with their particular version of the problem, each discourse is contested both internally, through alternative representations of the problem of subordination, and externally through the deployment of other competing discourses.

A. Development: Discourse and Counter-Discourse

By the term development discourse, I refer to a cluster of arguments and representations that organize our understandings of the causes and cures of Latina/o economic and political subordination around accounts linking subordination to underdevelopment and underdevelopment to the persistence of social practices, relations, and expectations that are represented as elements of Latin culture. n42 In the United States, this discursive construction appears in the deployment of "culture of poverty" arguments to explain the poverty and marginalization of Latin communities. In Latin America, this formulation that glorifies the separation of powers and identifies the interventionist state as "the problem" is the emergence of a "democratic hard state," that is, a state that integrates political legitimacy and the effective power to regulate economic activity, tax private property, and redistribute. n45

What I suggest today is that analyzing the linkage debate through mainstream development discourse is problematic because this discourse presupposes that human rights linkages can undo the socio-economic, cultural, and political impact of the trade agreements and investment decisions to which the rights are linked. Indeed, what the counter-discourses of development help underscore is that even the most effective human rights enforcement mechanisms will not produce a higher level of human rights enjoyment if the international political economy continues to produce political marginalization and systemic poverty for the majority of the world's peoples. The idea that poverty will be alleviated through the assimilation of Western economic and political models simply ignores the extent to which "the Third World" has already been assimilated into the political economy of global capitalism, and the extent to which Third World
poverty (and the authoritarian state) are artifacts of that assimilation. n46 Human rights linkages cannot undo structurally generated poverty, particularly not when the meaning of poverty and development are themselves contested. n47

**B. Dependency: Discourse and Counter-Discourse**

Dependency discourse provides a second perspective on the linkage debate. By the term dependency discourse I refer to a cluster of arguments and representations that organize our understandings of the political and economic subordination of Latin peoples by linking this subordination to the inequality of Latin [*381*] American states within the interstate system. Interstate inequality is, in turn, linked to various accounts of the historical processes and structural arrangements through which colonial expansion and neo-colonial relations have rendered Third World sovereignty a legal illusion.

By linking the elimination of subordination to a defense of state sovereignty, dependency discourse tends to encourage Latinas/os to identify their common interests and construct their political alliances in ways that ignore the relations of privilege and oppression that are organized around differential access to the state. The defense of sovereignty is a double-edged sword precisely because not all Latina/o communities have equal access to or control over the state apparatus, either in the United States or in Latin American countries. Put differently, the critical perspectives organized through dependency discourse tend to ignore the way that conditions of subordination experienced in Latina/o communities are linked to the different positions these communities occupy in relation to the state. They also tend to ignore the extent to which these differences might become even more entrenched if the defense of sovereignty were ultimately successful.

Second, by defining the lines of Latin solidarity around a defense of sovereignty, dependency discourse also tends to suppress the critical perspectives that might help to mobilize Latina/o legal and political opposition to the current structure of the interstate system. Latinas/os in the United States know (or should know) that both the terms of their immigration and their current relationship to the U.S. state are historically and legally linked to the nature of the political relations between the United States and their nations of origins. n48 What is not so obvious, however, is the extent to which the interstate system of unequally powerful nations states is both produced by and central to the processes of uneven development, and the extent to which uneven development is produced by and central to the reproduction of international capitalism, as it is currently organized. n49 By organizing [*382*] Latin political alignments around a defense of sovereignty, dependency discourse tends to suppress the possible emergence of a more transformative struggle against the processes of uneven development, both in the United States and throughout Latin America.

These points can be illustrated by examining the way dependency discourse intervenes in the debate over different arrangements linking human rights enforcement to international economic law. In this context, our assessments of the human rights linkage are made to depend on how such linkages impact Third World sovereignty. Linkages that promote respect for the sovereignty of Third World states or that compensate for the weakness produced by dependency are viewed approvingly, while linkages represented as incursions on Third World sovereignty are viewed critically. These judgments are, in turn, justified by different accounts of the way preserving sovereignty promotes the human rights of Third World peoples. n50

In dependency discourse, state sovereignty is at best a meaningless legal category in a world of unequal states and multinational business organizations, whose economic power and hypermobility make regulation difficult, if not impossible for dependent states. However, dependency discourse tends to suppress recognition of the fact that even the powerful core states have been unable to prevent substantial inroads on their sovereignty, limitations that reflect the interests of the most powerful players in the increasing globalization of production, investment, and exchange, as well as domestic elites. n51

[*383*] The substantial incursions on sovereignty, already apparent in the current international legal order, suggest that the concept of sovereignty operates primarily to retard the struggle to promote the enforcement of international human rights through the development of international economic law, and the focus of LatCrit scholars interested in promoting human rights enforcement must shift from a defense of sovereignty to other alternatives suppressed by dependency discourse. n52 One alternative trajectory is international trade legalism. n53 Rather than equalizing nation states, respect for human rights may require their ultimate replacement by an increasingly integrated international legal order that recognizes individuals and stakeholder groups as the subjects of international law at all levels of the international legal system, from norm prescription to dispute resolution.

**C. Neoliberalism: Discourse and Counter-Discourse**

Neoliberal discourse provides a third perspective on the linkage debate. Like the other two discourses, neoliberalism provides a particular account of the
reasons for and solutions to the problems of economic and political subordination of Latinas/os, both in the United States and Latin America. Moreover, like the other two discourses, neoliberalism can be contested internally through alternative representations of the problem of subordination and externally through the deployment of other [*384] discourses. n54

Neoliberalism represents the economic and political subordination of Latina/o communities as artifacts of failed statist policies, inefficient government interventions, market rigidities, and bureaucratic corruption. n55 The solution to subordination is located in reforms designed to free the market from the constraints imposed through these antiliberal policies and institutional arrangements. Accordingly, this discourse organizes political alignments around support for and opposition to the policies of structural adjustment, flexibilization (e.g. short-term labor contracts), deregulation, and privatization, as well as retrenchment in government welfare programs, in short, the package of reforms promoted as "the Washington Consensus." n56

Neoliberal discourse and policies tend to encourage Latinas/os to embrace political identities and construct alliances around their positions within domestic and international class structures. This is because the impact of neoliberal policies, that is the way they are experienced by different groups of Latinas/os, depends on the way these groups are positioned in the markets that neoliberalism seeks to free. This is easy to see, while Latina/o workers and business elites might find a common base of solidarity in nationalistic opposition to development practices and dependency relations, neoliberal reforms tend to exacerbate interclass differences, pitting Latina/o business elites against workers and other groups that suffer the impact of neoliberal policies. At the same time that neoliberal policies promote interclass [*385] conflict, neoliberal discourse suppresses any recognition of the relationship between the structure of the market and the history of colonialism or the current structure of the interstate system. n57

These points can be illustrated by examining the way neoliberal discourse intervenes in the debate over alternative proposals to link human rights enforcement to international economic law. In this context, our assessments of the human rights linkage are made to depend on how such linkages will impact the operation of the free market. Thus, neoliberal discourse tends to organize opposition to any human rights linkages (whether unilateral or multilateral), arguing that the level of human rights in a country is, and should be, dependent on the level of wealth and capital accumulation. Put differently, neoliberals argue that Third World countries must achieve a certain level of wealth before they can be reasonably held to international standards of human rights. Efforts to impose human rights on Third World states are attacked as a form of disguised protectionism. n58 Of course, this position generates its own counterposition, namely that respect for human rights is a condition precedent to organizing a viable market economy. n59 Indeed, the argument is that Third World countries will remain susceptible to the cycles of military authoritarian dictatorships, government takeovers, and civil war, all of which destroy the free market, until respect for [*386] basic human rights is secured in these countries.

From a different perspective, the neoliberal ideal can be contested by examining the extent to which it is grounded on the right to property, the scope of that right and the enforcement regimes such a discourse could sustain. In other words, would the steps taken to protect the right to property under the Cuban Liberty and Solidarity Act compare favorably or unfavorably to the steps that might have to be taken to secure adequate compensation for the indigenous communities displaced from their communal lands by World Bank development projects?

The linkage debate implicates issues that need to be debated through a number of theoretical models. Developing a program of action and advocacy depends first on understanding how this debate can promote different alliances and confrontations between different segments of the Latina/o population, depending on the discourse through which alternative linkages are represented. Understanding how to maneuver through these various discourses is thus a first step toward combating the manipulation of Latina/o political identities and alliances. Nevertheless, the ultimate goal must be to confront on a normative and practical basis the question of the political identities through which the LatCrit movement should intervene in developing the intersection of international human rights and international economic law.

FOOTNOTE-1:

n1 See generally Elizabeth M. Iglesias, La Transformacion Economica y El Movimiento Obrero Estaounidense [Economic Crisis and the United Labor Movement], 4 EL OTRO DERECHO 5-29 (1992) (exploring two different accounts of the current economic crisis and the need to promote international labor solidarity focused on the policies and procedures of economic institutions and legal regimes like the GATT and the IMF).

n3 The four models I examine do not exhaust the legal regimes, actual and proposed, through which the enforcement of human rights could be linked to the procedures, substantive norms, and institutional arrangements of international economic law. Nevertheless, these four models do provide a useful point of reference for making some important observations about the need to integrate human rights enforcement into the domain of international economic law and the issues at stake in the different regime structures through which such integration might be effected. In any event, my comments are offered as reflections on the kind of issues a more systematic analysis will need to elaborate.

n4 See, e.g., Lea Brilmayer, *Trade Policy: The Normative Dimension*, 25 N.Y.U. J. INT’L L. & POL. 211, 216-17 (1993) (noting that free trade may undermine a "particular way of life" and that in some countries there is a "general interest in preserving local culture which extends beyond the narrow economic benefit to certain sectors").

n5 "Essentialism" means different things in different contexts. Here it is a label applied to the claim that a particular perspective reflects the common experiences and interests of a broader group. It is generally deployed by individuals and sub-groups seeking to resist the suppression of intragroup differences. See, e.g., Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and NLRA*. Not!, 28 HARV. C.R.-C.L. L. REV. 395 (1993) (challenging the way the class essentialism embedded in American labor laws and the race essentialism embedded in the employment discrimination laws interact to produce a pattern of legal decisions that systematically ignore the collective interests and suppress the transformative agency of women of color in the workplace).

n6 See IN THE BARRIOS, supra note 2, at xvi-xx (linking differences among Puerto Rican, Cuban, and Mexican-American communities in the United States to their different positions in the history of American economic and political expansion).

n7 Robert Meister identifies the crucial questions an anti-essentialist scholarship can help to answer: "How [do] certain group identities within a political system provide a perspective from which it is possible to make claims against it? Why do certain social roles form the basis of group identities around which political mobilization becomes possible? How do the conflicts of group interests that are produced by public policy enter into the creation of those group identities that form the basis of political regimes?" ROBERT MEISTER, *POLITICAL IDENTITY: THINKING THROUGH MARX* 220 (1990).

n8 See, e.g., Elizabeth M. Iglesias, *Structures of Subordination*, 28 HARV. C.R.-C.L. L. REV. 395 (1993) (showing how the interpretative practices at the intersection of Title VII and the NLRA construct a network of institutional arrangements that fragment women of color across the political identities of race, class, and gender).

n9 See Pierre Bourdieu, *The Social Space and the Genesis of Groups*, 14 THEORY & SOCY 723 (1985) (identifying intersectionality of individual identities as a crucial indeterminacy because it creates the space for political realignments).

n11 Caribbean Basin Economic Recovery Act of 1983, 19 U.S.C. §§ 2701-7 (1988)(current version at 19 U.S.C. §§ 2701-7 (1994)). The Act established seven mandatory and eleven discretionary criteria for determining country eligibility. Id. § 2702(b)-(c). The labor rights provision was one of the discretionary criteria authorizing the President to take into account "the degree to which workers in such country are afforded reasonable workplace conditions and enjoy the rights to organize and bargain collectively." Id. § 2702(c)(8). The 1983 Act was amended by the Caribbean Basin Economic Recovery Expansion Act of 1990, 19 U.S.C. §§ 2701-7 (1994). Under the 1990 Act, labor rights conditionality is one of the mandatory criteria for eligibility. Id. § 2702(b)(7). The President may not designate any of the 27 countries as a beneficiary country if it does not take adequate steps to afford internationally recognized worker rights. Id.


n14 For example, the CBEREA, like the GSP, conditions country eligibility on presidential certification that the beneficiary country is "taking steps" to afford its workers "internationally recognized worker rights." In defining these rights, the CBEREA refers specifically to internationally recognized worker rights as defined by the GSP. See Jorge Perez-Lopez, The Promotion of International Labor Standards, 10 CONN. J. INT'L L. 427, 433-34 (1995). OPIC similarly tracks the GSP Renewal Act, 22 U.S.C.A. § 2191a(a)(1), while the ATPA tracks the labor provisions of the CBEREA (which in turn tracks the GSP). Id. at 433-34.


three GSP labor rights are fundamental as defined by the ILO. *Id.* at 114 n.58 (noting the applicable ILO Conventions concerning the right to organize and bargain collectively and the prohibition against forced labor). The fourth and fifth rights, while not considered fundamental by the ILO, are supported by various ILO Conventions. *Id.* at 114-15 n.59 (noting the applicable ILO conventions concerning occupational safety, minimum wage, and child labor).

n18 Lance A. Compa, *The First Nafta Labor Cases: A New International Labor Rights Regime Takes Shape*, 3 U.S.-MEX. L.J. 159, 161-62 (1995). The Caribbean Basin Initiative [hereinafter CBI] differs from the GSP in that it does not provide for periodic review of a beneficiary's labor practices once the initial determination is made by the President that the government accords the enumerated worker rights to laborers within that country. Further, the CBI statute does not provide for interested parties to petition for review of individual cases of worker rights violations. Thus, the initial designation of a CBI beneficiary lasts for the duration of the preference program. WORKER RIGHTS UNDER U.S. TRADE LAWS, supra note 10, at 33-34.

n19 Regulations of the USTR Pertaining to Eligibility of Articles and Countries for the Generalized System of Preference Program, 15 C.F.R. §§ 2007-2007.8 (1994). This phase lasts from June 1 of each year, the deadline for submitting worker rights petitions, through July 15th, when the Subcommittee announces in the Federal Register the petitions accepted for review. Under the USTR's regulation, the Subcommittee must accept any petition concerning worker rights unless: 1) the petition fails to satisfy the informational requirements of 15 C.F.R. § 2007.0(b) or fails to state a worker rights violation within the meaning of the Renewal Act; or 2) the country's practices have been the subject of a previous review and the petition fails to present "substantial new information." *Id.*

n20 Compa, supra note 18 at 162 n.20. The Subcommittee draws its information from the labor attaché at the American Embassy or Consulate in the country at issue, as well as the regional labor expert at the Department of Labor in Washington. The Subcommittee also conducts public hearings. Interested parties may submit written briefs and responses commenting on the country's worker rights practices. See 15 C.F.R. §§ 2007 to 2007.8.

n21 There is an appeal procedure if the Trade Policy Staff Committee fails to reach a consensus and decides the case by majority vote. The dissenting agency may appeal to the Trade Policy Review Group, composed of executive department representatives at the under secretary level. If the dissenter is dissatisfied with the Group's decision on the case, the case is then referred to the Economic Policy Council, composed of Cabinet members, which reviews the case and makes a final recommendation to the President. WORKERS RIGHTS UNDER U.S. TRADE LAWS, supra note 10, at 23-24.

n22 As of 1995, the United States has removed or suspended nine countries from the GSP program for worker rights violations: Burma, Central African Republic, Chile, Liberia, Mauritania, Nicaragua, Paraguay, Romania, and Sudan.


n25 Thus, for example, a GSP petition filed against Mexico in 1993 was rejected in part because "the negotiation of the North American Agreement on Labor Cooperation, as a supplement to the NAFTA, demonstrates Mexico's determination to improve its worker rights and provides the United States with a means for ensuring that Mexico continues to improve its labor standards." *Id.* at 350. Indeed, Mexico is no longer a beneficiary under GSP because the GSP is simply
irrelevant to Mexico now that its products will enter the U.S. market under the provisions of NAFTA. Id. at 351.

n26 NAALC, supra note 23, art. 2.

n27 Id.


n30 Id. § 6064(e)(1).

n31 Id. § 6065(a). According to the Act: a transition government is a government that has (1) legalized all political activity; (2) has released all political prisoners and allowed for investigations of Cuban prisons by appropriate international human rights organizations; (3) has dissolved the present Department of State Security in the Cuban Ministry of the Interior, including the Committees for the Defense of the Revolution and the Rapid Response Brigades; and (4) has made public commitments to organizing free and fair elections for a new government (A) to be held in a timely manner within a period not to exceed 18 months after the transition government assumes power; (B) with the participation of multiple independent political parties that have full access to the media on an equal basis, including (in the case of radio, television, or other telecommunications media) in terms of allotments of time for such access and the times of day such allotments are given; and (C) to be conducted under the supervision of internationally recognized observers, such as the OAS, the UN and other election monitors; (5) has ceased any interference with Radio Marti or Television Marti broadcasts; (6) makes public commitments to and is making demonstrable progress in (A) establishing an independent judiciary, (B) respecting internationally recognized human rights and basic freedoms as set forth in the Universal Declaration of Human Rights, to which Cuba is a signatory nation; (C) allowing the establishment of independent trade unions as set forth in conventions 87 and 98 of the ILO, and allowing the establishment of independent social, economic, and political associations; (7) does not include Fidel Castro or Raul Castro; and (8) has given adequate assurances that it will allow the speedy and efficient distribution of assistance to the Cuban people. Id.

n32 Id. § 6065(b). The four additional factors the President shall take into account are the extent to which the government: (1) is demonstrably in transition from a communist totalitarian dictatorship to representative democracy; (2) has made public commitments to, and is making demonstrable progress in (A) effectively guaranteeing the rights of free speech and freedom of the press, including granting permits to privately owned media and telecommunications companies to operate in Cuba; (B) permitting the reinstatement of citizenship to Cuban-born persons returning to Cuba; (C) assuring the right to private property; and (D) taking appropriate steps to return to U.S. citizens ... property taken by the Cuban government ... on or after January 1, 1959, or to provide equitable compensation ... for such property; (3) has extradited or otherwise rendered to the U.S. all persons sought by the U.S. State Department of Justice for crimes committed in the U.S.; and (4) has permitted the deployment throughout Cuba of independent and unfettered international human rights monitors. Id.

n33 Id. § 6066. A democratically elected government is a government which: (1) results from free and fair elections-- (A) conducted under the supervision of internationally recognized observers; and (B) in which (i) opposition parties were permitted ample time to organize and campaign for such elections; and (ii) all candidates were permitted full access to the media; (2) is showing respect for the basic civil liberties and human rights of the citizens of Cuba; (3) is substantially moving toward a market-oriented economic system based on the right to own and enjoy property; (4) is committed to making constitutional changes that would ensure regular free and fair elections and the full enjoyment of basic civil liberties
and human rights by the citizens of Cuba; (5) has made demonstrable progress in establishing an independent judiciary; and (6) has made demonstrable progress in returning ... property taken by the U.S. government.\textit{Id.}

n34 \textit{Id.} §§ 6021-91. These matters have traditionally been protected from external intervention by the international obligation to respect state sovereignty. See U.N. CHARTER, art. 2. Article 2 commands all member nations to respect the sovereignty of all other member nations. \textit{Id.} Paragraph 1 articulates the necessity of sovereign equality of all members. \textit{Id.} Paragraph 4 explicitly states that sovereignty shall not be abridged: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ...." \textit{Id.}


n36 Certainly, proponents of the embargo can assert that representative democracy and a market-oriented economy are normatively defensible. There are two responses to this. First, the initial question is not whether the conditionalities imposed are defensible, but whether a world order in which a super-power state can unilaterally impose such conditionalities upon less powerful states, even in the face of universal condemnation, constitutes a defensible model for the future world order. Secondly, the justifiability of competing political and economic structures, like the substantive meaning and enforceable scope of international human rights, are precisely the issues rendered most problematic when we examine competing structures and rights regimes from the critical perspectives constituted by the discourses of development, dependency and neoliberalism.


n39 \textit{Id.} at 239, 241.

n40 \textit{Id.} at 245.

n41 As Paul states:Thus, while the Declaration is cast in terms of a "Right to Development," it should \textit{not} be read as an assertion of some kind of "right" of states and peoples to enjoy some undefined kind of "development." Rather, the right declared is the "inalienable human right" of peoples affected by "development processes" to realize existing, universally recognized human rights \textit{in and through} "development processes," and it is the duty of those who control these processes to protect and promote these rights. In this way the doing of development, like the conduct of other public affairs must be made accountable to people.\textit{Id.} at 248.

n42 ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD 11 (1995). Escobar's discursive analysis is an effort to understand how the "Third World" has been produced by practices of representation and intervention that have been organized around the concept of development as well as to understand "the variety of forms with which Third World people resist development interventions and how they struggle to create alternative ways of being and doing." \textit{Id.} at 11. It is an effort to "unveil the foundations of an order of knowledge and discourse about the Third World as underdeveloped." \textit{Id.}

n43 See Jose Joaquin Brunner, Notes on Modernity and Postmodernity in Latin American Culture, in THE POSTMODERNISM DEBATE IN LATIN AMERICA (John Beverley et al. eds., 1995) (criticizing "the traditional Behaviorist idea that culture needs to adapt itself to modernity and to produce the motivations and attitudes required for the optimum performance of modern systems of production, reproduction, and social rule"). Brunner argues that any such formulation ignores one of the most fundamental debates over the meaning of
modernity and modernization, particularly given the abundant evidence that western capitalist model of modernity is currently in crisis. Id.

n44 For example, proposals to enhance the scope and enforcement of GSP labor rights conditionality are supported (and opposed) through arguments about the objectives and pre-conditions of development. While opponents argue that labor rights conditionality undermines the development objectives of the preference schemes to which they are attached, proponents reject the notion that development can be achieved through economic activity that ignores social impact. See, e.g., Belanger, supra note 17, at n.27 (citing INTERNATIONAL LABOUR OFFICE, THE IMPACT OF INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 8 (1976) ("Development is not a purely economic concept but that its purpose is fundamentally social and human in character and that economic development cannot automatically ensure social progress").

n45 Tamara Lothian, The Democratized Market Economy In Latin America (And Elsewhere): An Exercise in Institutional Thinking Within Law and Political Economy, 28 CORNELL INT’L L.J. 169, 186 (1995). According to Lothian:[a] state is hard when it enjoys a substantial capacity to form and implement strategies which impose the cost of public investment upon present consumers and the propertied class, and a corresponding ability to resist influence by powerful factional interests (including interests of its own partners in the government-business partnership).... The hardness of the ... [state] limits the proclivity toward the canibalization of government policy by private interests. It cannot ensure strategies against illusion, but it can diminish their vulnerability to corruption by narrow self-interest. Id.

n46 Arturo Escobar makes the point like this: "It is true that massive poverty in the modern sense appeared only when the spread of the market economy broke down community ties and deprived millions of people from access to land, water, and other resources. With the consolidation of capitalism, systemic pauperization became inevitable." Escobar, supra note 42, at 22.

For an account of the authoritarian state as an artifact of the social relations organized through the process of colonization and decolonization, see Hamza Alavi, The State in Post-Colonial Societies, in THE POLITICAL ECONOMY OF LAW IN THE THIRD WORLD 231-9 (Yash Ghai et al. eds., 1987). Alavi writes:before independence members of the bureaucracy and the military were the instruments of the colonial power ... During the freedom struggle, they were on opposite sides of the political barricades from the leadership of the nationalist movement ... After independence, the same political leaders whom it was their task to repress were ensconced in office nominally in authority over them. Id. at 233. In this account, the experience of partial transfer of state power from the colonial state to a dependent indigenous government explains the process through which military circumvention of political officials was institutionalized. Id.


n48 These links are evidenced, for example, by the differential treatment accorded "economic" and "political" refugees, as well as by the non-recognition of political refugees from "friendly" nations. See, e.g., Ari Weitzhandler, Temporary Protected Status: The Congressional Response to the Plight of Salvadoran Aliens, 64 U. COLO. L. REV. 249 (1993).


n50 From this perspective, not all linkage schemes are the same. Linkage regimes, like my fourth model, that are designed to
enforce respect for economic, social, and cultural human rights in the policies of international organizations appear "better" than efforts to link the enforcement of civil/political rights to free trade agreements. This is because the violation of individual human rights is viewed as a consequence of the violation of the sovereignty of poorer states by Bretton Woods institutions and TNCs. A social/economic rights linkage could be used to restrain the extent to which these institutions could impose economic arrangements that prevent Third World states from adopting policies that promote these economic/social rights. See, e.g., Margaret Conklin & Daphne Davidson, The I.M.F. and Economic and Social Human Rights: A Case Study of Argentina, 1958-85, 8 HUM. RTS. Q. 227-69 (1986). By contrast, civil/political rights linkages, like the labor conditionality of the GSP and the U.S. embargo of Cuba, appear to generate a very different dynamic in which international forums and procedures become the vehicle through which First World interests can undermine the power of Third World states.

n51 See Susan Strange, The Name of the Game, in SEA CHANGES: AMERICAN FOREIGN POLICY IN A WORLD TRANSFORMED 238, 260 (Nicholas X. Rizopoulos ed., 1990). See also CHASE-DUNN, supra note 49. Chase-Dunn makes the point like this: "Capital is subjected to some controls by states, but it can still flow from areas where profits are low to areas where profits are higher. This allows capital to escape most of the political claims which exploited classes attempt to impose on it." Id. at 141. According to Chase-Dunn, this is true even in the case of a hegemonic core power: when a hegemonic core power begins to lose its competitive edge in production because of the spread of production techniques and differential labor costs, capital is exported from the declining hegemonic core state to areas where profit rates are higher. This reduces the level at which the capitalists within the hegemonic core state will support the "economic nationalism" of their home state. Their interests come to be spread across the core [and peripheral areas where they invest].Id. at 147.

n52 I would go further and argue that as between struggling for greater respect for sovereignty and the reorganization of international law to recognize individual standing and rights, the latter is ultimately a more worthwhile struggle--although both are probably unattainable in the foreseeable future.


n54 For example, the events through which Latin American political parties began to embrace the neoliberal world view prescribing state retrenchment and external opening can be easily read critically through either development or dependency discourses. See, e.g., Rosario Espinal, Development, Neoliberalism and Electoral Politics in Latin America, in 23 DEVELOPMENT AND CHANGE 27-48 (1992) (linking the allegiance to neoliberalism among Latin American political parties and movements to the deepening economic crisis and increasing external pressures to deal with the debt problem in the early 1980s).

n55 Id. As Espinal explains: the assessment of contemporary Latin American society that lies at the heart of Latin American neoliberalism [is]: first, that the economic crisis [in Latin America] served to unravel the problems inherent in developmentalism, and second, the notion that a renewed liberalism was a good sign of pragmatism and modernity ... . For [neoliberals], the main problem in Latin America was not dependency, but the burden of an inefficient and corrupt state that prevented growth and modernization.Id. (emphasis added).

n56 Lothian, supra note 45, at 175-79.

n57 For example, some argue that the interstate system of unequal states is a condition precedent and inevitable consequence of international capitalism. See, e.g., CHASE-DUNN, supra note 49. Ironically enough, while free markets and free trade may protect domestic economic activity from the corruption and repression of a state apPtus controlled by a domestic elite (e.g. a military-bureaucratic elite or
the officials of a populist state), it also increases the likelihood that domestic economic activity will be controlled by a foreign class elite, the multinationals enjoying privileged access to private capital, core state subsidies, and distribution networks in their nations of origin. *Id.*

n58 Jorge F. Perez-Lopez, *The Promotion of International Labor Standards and NAFTA: Retrospect and Prospects*, 10 CONN. J. INT'L L. 427, 443 n.68 (1995) (describing the opposition with which developing countries responded to the Bush Administrations efforts to include worker rights as an agenda item in the Uruguay Round, viewing it as a means to introduce additional trade restrictions or to suppress their legitimate competitive advantage).

n59 *See, e.g.*, Lothian, supra note 45, at 182 (arguing that policies promoting economic equality are both the preconditions for and the consequence of economic progress. Economic equality is a precondition because sustained economic growth depends on reforms such as land redistribution and educational investment. Reduction of economic inequality is also a consequence of economic progress because "the acceleration of economic experimentalism ... provides an opportunity to carry further the campaign against large and rigid inequalities."
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SUMMARY: ... A fundamental principle of international law, articulated by the decisions of the Nuremberg Tribunals, is that there are universal human rights which every person and every government must respect. ... Incorporating international human rights principles could provide common ground among minority groups within the United States, among poor and working peoples generally, and those who struggle for similar rights in the United States and in other countries. ... The United States has ratified the ICCPR, but not the ICESCR. ... Article 1, Section 1 of both the ICCPR and the ICESCR read as follows: "All peoples have the right of self-determination. ... Carter signed both the ICCPR and the ICESCR in 1977, as well as the American Convention on Human Rights (ACHR) and the CERD. ... The ICCPR was not ratified by the U.S. Senate until 1992 and the CERD was only ratified in 1994. The ICESCR and ACHR have yet to be ratified. ... Even though the United States has not ratified many of the human rights conventions, and has extensive reservations with respect to those it has ratified, much of the core of international human rights law is applicable to the United States as part of customary international law. ... Less frequently have there been assertions of the collective rights of minority groups, at least racial or ethnic minorities, to some form of self-determination. ...

[*388] I. HUMAN RIGHTS: THE NEXT GENERATION

Human rights are frequently invoked as the basis for decisions about U.S. foreign policy, international relations, and humanitarian intervention. n1 Nonetheless, just what "human rights" means is unclear. Within U.S. legislation and judicial decisions, we see frequent references to civil rights, but rarely to human rights, and international human rights law is seldom considered part of the legal recourse available to individuals or groups in the United States today.

A fundamental principle of international law, articulated by the decisions of the Nuremberg Tribunals, is that there are universal human rights which every person and every government must respect. n3 This principle was endorsed by the United Nations Charter n4 and the Universal Declaration of Human Rights n5 and in the many human rights conventions that have since come into force. n6

In international law scholarship, human rights are often divided into three classifications or "generations." Civil and political rights are referred to as first generation rights; economic, social, and cultural rights as the second generation; and "group" rights, including the right of peoples to self-determination and the protection of minority groups within nations, as third generation rights. n7 Sometimes referred to as solidarity rights, third generation rights can also describe rights that are asserted on behalf of all people, such as a right to economic, social, and cultural development or to a healthy environment.

This essay proposes the incorporation of international human rights law, particularly that of third generation rights, into the discourse about the rights of those identified as minorities n8 in the United States. Third generation rights focus primarily on the rights of groups, not individuals. n9 In contrast, U.S. law tends [*390] to define all rights as individual rights. Accepting this limitation on the definition of rights may prevent us from even considering significant solutions to social problems.

Admittedly, there are dangers in describing all human affairs--human needs, potential, passion, and suffering-
in terms of quantifiable, enforceable, legally definable "rights." n10 All of culture and society cannot be collapsed into law. Identifying "rights" in response to all human needs may cause currently recognized civil and political rights to be taken less seriously, with the result that there is less overall protection for human rights. n11 However, it is important to consider ways in which the defining and recognition of rights affects culture and society.

Although not usually described in these terms, many of the movements to improve people's living and working conditions in the United States can be seen as efforts to obtain what are recognized by numerous international conventions, organizations, scholars, and activists as second and third generation human rights. Housing, welfare, public education, health care, affirmative action, and handicapped access legislation involve second generation human rights. Groups that assert such rights are often, in that process, exercising third generation "solidarity" rights. Recognizing this could allow those groups to benefit from a wealth of international law and the experiences of others who have struggled for similar rights. Such recognition could also [*391] clarify connections between what are perceived to be domestic concerns and struggles for human rights in other parts of the world.

Finally, framing the discussion of domestic rights in the broader context of international law may allow us to see groups with apparently disjunct interests as being engaged in the same or parallel struggles. Incorporating international human rights principles could provide common ground among minority groups within the United States, among poor and working peoples generally, and those who struggle for similar rights in the United States and in other countries.

II. THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

A. Emergence of a Law of Human Rights to Supplement the Law of Nations

International law is generally regarded, at least in the "classical" western tradition, as governing relations between nations. It is the law agreed upon between nations and rests on a foundation of state sovereignty. Within this framework, the rights of individuals are to be protected by their own governments or, through comity or agreement, by the governments of other nations. n12

Human rights law departs from this framework in two ways. It posits, first, that people have fundamental rights under international law, even as against their own governments; and second, that other nations and international organizations can intervene in what would otherwise be a nation's domestic affairs in order to protect those rights. Professor Louis B. Sohn has described this as a "silent revolution" which "deprived the sovereign states of the lordly privilege of being the sole possessors of rights under international law. States have had to concede to ordinary human beings the status of subject of international law." n13

Given impetus by the horrors of World War II, much that is currently recognized as human rights law has developed in the [*392] past fifty years. There is an emerging consensus about the existence of certain fundamental human rights and a large and growing body of international conventions on specific subjects. n14 Within the arena of international human rights, the United States asserts itself as a leader, but often defines both rights and remedies more narrowly than do other countries.

Concern for human rights was invoked as cause for United States intervention by President Bush in the 1990 Gulf War n15 and by President Clinton when sending U.S. troops to Haiti, Somalia, Bosnia, and Zaire. n16 When the United States takes action in other countries, governmental officials routinely give a number of reasons which often include allegations of human rights violations along with the protection of U.S. national security interests. n17 One result of this generalized use of human rights as a basis for United States intervention is that it is difficult to draw clear causal connections between the rights violation and the action taken to address it. Nonetheless, the justifications given for various interventions and the position of the United States with respect to various international human rights conventions n18 illustrate that the United States generally views civil and political rights as the only "real," or enforceable, human rights.

B. Individual Rights: Civil and Political; Economic, Social, and Cultural

First generation, or civil and political, rights are sometimes characterized as "negative" rights because they generally require governments to refrain from interfering with an individual's right to participate in civil society or the political process. As international [*393] organizations attempted to articulate human rights in the period just after World War II, civil, political, social, economic, and cultural rights were initially proposed as a unified package, spelling out the promises in the 1948 Universal Declaration of Human Rights. n19 These rights were ultimately split into two groups, with the understanding that civil and political rights were to be implemented immediately. Perhaps because there was something close to consensus on civil and political rights, n20 they have been identified as the "first generation" of human rights.
The primary international agreement that specifically addresses first generation rights is the International Covenant on Civil and Political Rights (ICCPR). n21 The ICCPR recognizes the rights of every human being to life, liberty and security of person; to privacy; to freedom from torture and cruel, inhuman or degrading treatment or punishment; to immunity from arbitrary arrest; to freedom from slavery; to a fair trial; to recognition as a person before the law; to immunity from retroactive sentences; to freedom of thought, conscience and religion; to freedom of opinion and expression; to liberty of movement and peaceful assembly; and to freedom of association. n22

The International Covenant on Economic, Social and Cultural Rights (ICESCR) n23 addresses second generation rights by expanding on provisions of the Universal Declaration. It proclaims a right to work; to equal pay and protection against systemic unemployment; to formation of trade unions; to rest and[*394] leisure; to food, clothing, housing, and medical care; to social security, education, and participation in the cultural life of the community; and to the protection of scientific, literary, and artistic production. n24 Second generation rights are also recognized in regional agreements such as the American Convention on Human Rights, n25 the American Declaration of the Rights and Duties of Man, n26 and the Banjul Charter. n27

The United States has ratified the ICCPR, but not the ICESCR. n28 A common explanation of the current U.S. position of accepting first but not second generation rights as universal is that if a people can choose their own government, they will ensure that it adequately protects their rights. This theory was exemplified by the Reagan administration's emphasis on free elections and helps explain why talk of human rights is so frequently intertwined with talk of "democracy." n29

[*395] Advocates of second generation rights argue that, by themselves, freedom of speech or the right to vote matter little to people who are starving. Their view is that those who control wealth and power do not want to acknowledge the right to adequate food, shelter, medical care, or jobs because such acknowledgment could entail a redistribution of resources, either within a nation or between nations.

The 1968 Declaration of the Teheran International Conference on Human Rights stated that "since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights, is impossible." n30 President Julius Nyereere of Tanzania asked:What freedom has our subsistence farmer? ... he scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. n31

C. Group Rights: Solidarity and Self-Determination

Both first and second generation rights are essentially individual rights, the right of each person to freedom of association or due process of law, to food or education, to be free from discrimination based on ethnicity, race, religion, national origin, or gender. Third generation human rights are, broadly speaking, the rights of groups. According to Professor Sohn: [*396] International law not only recognizes inalienable rights of individuals, but also recognizes certain collective rights that are exercised jointly by individuals grouped into larger communities, including peoples and nations. These rights are still human rights; the effective exercise of collective rights is a precondition to the exercise of other rights, political or economic or both. If a community is not free, most of its members are also deprived of many important rights. n32

Article 1, Section 1 of both the ICCPR and the ICESCR read as follows: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." n33 The term "peoples" has not been defined in the international agreements or documents where it has been used. n34 It appears to denote groups that are neither individuals nor state entities; but, as James Crawford notes, the definition may have to depend on the context. n35 While there is some disagreement about what rights are specifically included in the third generation, there is agreement on the principle that "all peoples have the right to self-determination." n36 Self-determination is generally acknowledged to include the right of people to choose their own government as well as the right of a nation to be free from domination by another nation. n37

[*397] The African Charter on Human and Peoples' Rights of 1981, commonly referred to as the Banjul Charter, recognizes in addition the right to development, the right to peace, and the right to a healthy environment. n38 There have also been proposals for a third international human rights covenant featuring "third generation solidarity rights." n39 This covenant would include such rights as the right to benefit from the common heritage of mankind, the right to live in a healthy and ecologically sound environment, and the right to humanitarian assistance, as well as the rights identified in the Universal Declaration and the Banjul Charter.
James Crawford divides the rights of "peoples" into two general categories: One immediately apparent category is the group of rights which in some respect deal with the existence and cultural or political continuation of groups. This category would include the right to self-determination, the rights of minorities, and the rights of groups to existence (i.e. as a minimum, not to be subjected to genocide). But ... the phrase "rights of peoples" tends to be used ... to refer to the other and more miscellaneous category of rights, concerned with a variety of issues relating to the economic development and the 'coexistence' of peoples. This second category includes rights in respect of permanent sovereignty over natural resources, rights to development, to the environment and to international peace and security. n40

Although the United States participated in the drafting of both the ICCPR and the ICESCR, both of which recognize some rights of peoples, it has consistently refused to acknowledge third generation human rights. In 1984 the United States withdrew from the United Nations Economic, Scientific and Cultural Organization (UNESCO), "at least in part because of UNESCO's [*398] support for 'peoples' rights' and the potential conflict between this 'third generation' of human rights and the protection of individual rights." n41 Representatives of the United States have articulated a fear that the recognition of group rights will serve to undermine the rights of individuals. n42 Some fear that this is happening in countries such as Algeria or Afghanistan, where assertions of power by religious groups appears to impose severe restrictions on the rights of individuals.

This view has been countered with the argument that group rights not only complement individual rights, but that oftentimes individual rights cannot be exercised until group rights are protected. n43 This is reflected in Article 27 of the ICCPR, which states that members of ethnic, religious, or linguistic minorities "shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." n44

III. HUMAN RIGHTS LAW IN THE U.S. LEGAL SYSTEM

A. International Human Rights Law in U.S. Courts

According to the Restatement (Third) of the Foreign Relations Law of the United States: [*399] International law is law like other law, promoting order, guiding, restraining, regulating behavior. States, the principal addressees of international law, treat it as law, consider themselves bound by it, attend to it with a sense of legal obligation and with concern for the consequences of violation ... . It is part of the law of the United States, respected by Presidents and Congresses, and by the States, and given effect by the courts. n45

The U.S. Constitution provides that, along with the Constitution and the laws made pursuant to it, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." n46 As the Supreme Court stated in The Paquete Habana, "international law is part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." n47

The United States played a leading role in the formation of both the League of Nations, where President Woodrow Wilson advocated strongly for the right of peoples to self-determination, and the United Nations. Serving as the U.S. representative to the United Nations Economic and Social Council and as a member of its Commission on Human Rights, Eleanor Roosevelt worked tirelessly on the drafting and implementation of the Universal Declaration of Human Rights. n48 However, shortly after the 1952 presidential election, the Eisenhower administration "announced that it was washing its hands of the United Nations human rights covenants" n49 and, in the words of David Forsythe, "U.S. human rights policy was collapsed into its anti-Communist policy." n50

Concern has been expressed that international human rights standards might be imposed on the United States by other nations. In 1951, Senator Bricker, a Republican from Ohio, introduced a constitutional amendment that would have restricted [*400] the president's treaty-making powers, arguing that ratification of human rights treaties would give other nations undue influence over U.S. domestic policy and could force the end of laws mandating racial segregation. n51 The Eisenhower administration avoided a struggle over the proposed constitutional amendment by promising that no human rights conventions would be submitted for ratification by the Senate.

This moratorium prevailed through the Nixon and Ford administrations. No human rights conventions were, in fact, submitted until the Carter administration, and those which were then submitted contained reservations so significant that some believe they render the conventions meaningless. n52 A common argument is that those rights addressed in the conventions are already protected by U.S. law anyway, thus justifying the reservations that explicitly limit the effect of human rights treaties to current domestic interpretation of protections under the Constitution.
For example, ratification of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) \(^{n53}\) was conditioned on the Helms Proviso, which states that the United States need not alter its domestic laws in any way to conform to the treaty. \(^{n54}\)

When he came into office President Jimmy Carter announced that the United States "commitment to human rights must be absolute," \(^{n55}\) and he identified food, shelter, health care, and education as basic human rights. \(^{n56}\) Carter signed both the ICCPR and the ICESCR in 1977, as well as the American Convention \(^{[*401]}\) on Human Rights (ACHR) \(^{n57}\) and the CERD. However, the early promises were outweighed by the political realities. The ICCPR was not ratified by the U.S. Senate until 1992 and the CERD was only ratified in 1994. The ICESCR and ACHR have yet to be ratified. \(^{n58}\)

The Reagan administration came into office attacking the human rights policies of the Carter administration. In the words of James Leach, it argued that "U.S. human rights policy ought to moderate its concern about the behavior of 'traditional' (and friendly) authoritarian regimes and concentrate instead on the abuses of 'revolutionary' (that is to say, Marxist) governments." \(^{n59}\)

Until the Clinton administration, the only major international human rights convention that the United States ratified was the Convention on the Prevention and Punishment of the Crime of Genocide, \(^{n60}\) which was opened for signature in 1948 and entered into force for the United States in 1989. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(^{n61}\) and the CERD, which was opened for signature in 1966, entered into force for the United States in 1994. The United States has signed but not yet ratified the Convention on the Elimination of All Forms of Discrimination Against Women. \(^{n62}\)

Even though the United States has not ratified many of the human rights conventions, and has extensive reservations with respect to those it has ratified, much of the core of international human rights law is applicable to the United States as part of \(^{[*402]}\) customary international law. \(^{n63}\) It should be noted that according to the Vienna Convention on Treaties \(^{n64}\) --another convention which the United States has signed but not ratified, but which the State Department has explicitly recognized as articulating customary international law on the subject--a state which has signed a treaty has an obligation to refrain from conduct which undermines the purpose or object of that treaty unless the state has made explicit its intent not to ratify the treaty.

As second and third generation human rights come to be accepted as emerging customary international law, it is interesting to consider the implications of recognizing these human rights within our domestic legal system. The struggles of many groups, including those groups identified as racial or ethnic minorities, can be seen as efforts to obtain second and third generation rights. \(^{n65}\) The following section addresses the possibility of re-envisioning U.S. history and current social conditions in terms of third generation or group rights, and considers some benefits of such an approach.

**B. Group Rights in the United States: An Historical Perspective**

The history of U.S. law is, in many respects, a history of the struggles of groups to assert or protect their rights, identities, or cultures. In March 1995, as part of the review of its first report \(^{[*403]}\) under the ICCPR, the United States came before the Human Rights Committee of the United Nations Economic and Social Council. John Shattuck, the Assistant Secretary of State for Democracy, Human Rights, and Labor, stated that "the United States had a history of racism, slavery and racial segregation [that] had among other factors posed obstacles to the full and optimal enjoyment of all Americans of the rights reflected in the Covenant." \(^{n66}\) Assistant Attorney General for Civil Rights Deval Patrick "admitted that discrimination on the basis of race, ethnicity and gender persisted in the United States--not just the effects of past discrimination, but 'current, real life, pernicious discrimination of the here and now.'" \(^{n67}\)

Since the first resistance of Native Americans to colonial rule, the first slave revolts, and the first efforts by Mexicans to prevent annexation of their lands, peoples who are now identified as "racial minorities" in this country have organized and fought for group rights. Some of these have been defined as the struggles of peoples for self-determination, most notably, of course, the efforts of Native Americans to retain some sovereignty over their lands and their people. \(^{n68}\)

Other explicit assertions of what could be termed third generation human rights can be seen in what are often labeled "nationalist" movements. For example, "to advocate self-determination" was one of the eight key points of the Universal Negro Improvement Association founded by Marcus Garvey in the early 1900s. \(^{n69}\)

Malcolm X advocated the need to move from individual rights to group rights, and the need to see the struggle for these rights in an international context. In 1965, just weeks before his death, he said: \(^{[*404]}\)
In recent decades, these struggles have taken many forms, from community and church-based grassroots organizations; to groups such as the National Association for the Advancement of Colored People (NAACP), the Urban League, the League of United Latin American Citizens, or the Japanese-American Citizens League, which tended to support assimilation; to organizations such as the Black Panthers, Brown Berets, and Young Lords which more explicitly advocated the empowerment of groups based on their ethnic or racial affiliations. Regardless of their particular ideological bent, these movements themselves can be seen as assertions of third generation human rights, even as they have organized to demand first and second generation rights. The transition from an unarticulated to a conscious assertion of third generation rights could significantly effect how such movements are organized and perceived.

What we think of as the traditional civil rights movement was precisely that, a struggle for civil and political rights. It was a struggle for the right to vote, for equal access to social and political institutions, and for the right to participate, as individuals, on equal footing with all other individuals in civil society. Martin Luther King, Jr. was in the process of moving from demands for first generation rights to second generation rights when he was killed. As early as 1963 he had stated, "the Negro is not struggling for some abstract, vague rights, but for concrete and prompt improvement in his way of life. What will it profit him to be able to send his children to an integrated school if the family income is insufficient to buy them school clothes?" n71

By the 1967 convention of the Southern Christian Leadership Conference, King "was searching for an alternative to urban rioting along the lines of organized mass civil disobedience, while [*405] fusing demands for economic justice and an end to the Vietnam War with his civil rights agenda." n72 This led to plans for the Poor People's Campaign, with its call for a $30 billion annual appropriation for antipoverty efforts, a full-employment act, guaranteed annual income, and annual funding for at least 500,000 units of low-cost housing. n73 Other movements such as the United Farm Workers' struggle for economic justice, and the pursuit of universal health care and welfare rights were and continue to be struggles for second generation rights.

Minority rights in the United States--first or second generation--are most often framed as the right to participate as individuals in the mainstream political, economic, and social institutions despite being members of certain groups. Less frequently have there been assertions of the collective rights of minority groups, at least racial or ethnic minorities, to some form of self-determination. n74

C. The Potential in Recognizing Third Generation Rights

As noted above, second generation rights are not generally acknowledged as human rights in the United States. For example, in the introduction to the 1982 Country Reports on Human Rights Practices, the Reagan administration declared that the U.S. government does not accept the idea of economic, social, and cultural rights. n75 Rather, individuals are to be given "equal access" to obtaining economic, social, or cultural resources, but they are not guaranteed to anyone. n76 Even the basics of food, [*406] housing, and medical care are no longer guaranteed to children. Increasingly, these resources are to be allocated not to all who live in the United States, but exclusively to U.S. citizens. In other words, second generation rights are envisioned as political rights, rather than human rights.

The struggles to obtain both first and second generation rights in the United States have required organization by the groups affected, and this has required a sense of identification with those groups. The ensuing backlash has attacked both the formation of these organized movements and the substance of their demands. To make the first generation rights that they secured at such great cost meaningful and to turn the tide that is eroding existing second generation rights, minority groups may need to assert third generation rights within American society. A founding principle of the United States is the protection of individual rights and liberties from the tyranny of the group. Perhaps as a result, the presumption that all rights are individual rights, and that all remedies are individual remedies, is deeply entrenched in mainstream American thought. International human rights law and the analyses that are being developed on the rights of peoples within nations could be useful to groups within the United States who wish to expand this framework. n77

The idea of using international human rights standards to bring about change within this country is not a new one. U.S. civil rights organizations were among the firstnational groups in the world to petition the United
Nations for relief from abusive conduct by a member state. In 1947, the National Association for the Advancement of Colored People (NAACP) filed a petition before the United Nations denouncing race discrimination in the United States. The Civil Rights Congress filed a second petition in 1951, charging the United States with genocide under the 1948 Convention on the Prevention and Punishment of Crimes of Genocide. n78

[*407] More recently, indigenous peoples in the United States have been incorporating international human rights law into their struggles. For America's indigenous peoples, rights are no longer framed entirely by the provisions of the Constitution and legislative enactments. Indigenous peoples' demands are increasingly asserted within dual frameworks. One framework is narrow. It consists of rights claims recognized by the American legal system (e.g., due process violations or breaches of trust), even though the rights, as framed, may not accurately embody the cultural, spiritual, and political experience of the group involved. A second framework is expansive. It consists of claims of transnational moral authority cast in the language of international human rights (e.g., right to self-determination). n79

As domestic remedies become increasingly constricted, international law may offer additional relief, and conversely, it is possible that domestic remedies will be expanded by the incorporation of international human rights law. Successfully asserting the emerging international law of third generation human rights as part of the legal recourse available in the United States could establish common ground among various groups in the United States and help clarify some of the connections between domestic issues and international struggles.

In the face of persistent racial divisions and the widening gap between the rich and the poor, in an era when it is becoming more difficult to ensure food, shelter, and basic medical care for all, it may be helpful to reconsider the framework of rights in the United States. The view that the government is only responsible for ensuring the civil and political rights of its citizens, and that these rights can only be exercised by individuals, is one choice—but there are others.

Lawyers and legal scholars can contribute to efforts to expand the scope of human rights in the United States, not only by pursuing such rights and recourse as are identified by the domestic legal system, but by broadening the parameters of that system itself. Dorothy Thomas states that, "long isolated from, and at times dismissive of the rights movement abroad, U.S. groups could benefit from the insights and solidarity of their international colleagues. The experiences of activists elsewhere can contribute to the conceptualization and implementation of domestic advocacy strategies." n84

Commenting on the struggles over ratification of the ICESCR, Philip Alston notes that "the U.S. debate needs to be much more internally focused .... Ratification should not be seen primarily as a foreign policy issue but, rather, as one of domestic policy." n85 Similarly, perhaps debates about third generation human rights should be taken seriously as issues of domestic policy.

D. Expanding the Discourse

This essay contends that an understanding of the international human rights framework could help secure basic rights for racial and ethnic minorities, poor people, and other groups within the United States and that it would be ill-advised to see these struggles as isolated from those of people in all parts of the world to obtain first, second, or third generation rights. The economic resources available in the United States depend on global economic, political, and military relationships, and U.S. government policy toward internal minorities has often been influenced by international affairs. As the Justice Department noted in its amicus brief in Brown v. Board of Education, "the United States is trying to prove to the people of the world, of every nationality, race and color, that a free democracy is the most civilized and most secure form of government yet devised by man." n86

Groups struggling for rights and resources within the United States have a choice of how to view their efforts. One option is to see the interests of peoples in the United States as being aligned with those of peoples around the world. Such a position could lead to support of stronger first, second, and third generation human rights in all contexts. Another option is to see people in the United States, even those who are poor or discriminated against in some way, as benefiting, if only marginally, from the relatively higher standard of living available in the United States. This view leads to efforts to preserve that benefit, even if it is obtained through the enforcement of an inequitable distribution of global resources.

These are choices that need to be discussed further. Opening up the subject of group rights, and the related questions of redistributing resources, is always controversial. It triggers fears of "Balkanization," fears that acknowledging group rights, or perhaps even talking about them, will be divisive. To discuss these issues, difficult questions must be addressed. What is a "group," and which groups should be recognized as having rights? Would recognition of religious groups violate the separation of church and state? Would
recognition of racially identified groups lead to entrenchment of what are increasingly recognized as invalid classifications? Should white survivalists or others who deny the legitimacy of the federal government have group rights protected by that government?

These issues do not go away simply because they are not discussed. Although protection of individual rights is firmly grounded in the U.S. political structure, the rights and opportunities available to individuals have been closely related to their group affiliations. Much of our history is the history of groups—the treatment of and response by native peoples, racial and ethnic minorities, organized labor, and religious groups, to name a few. Generally speaking, the political and legal response to discrimination based on group affiliation has been to guarantee rights to individuals, regardless of their group affiliation.

[*410] There are problems, however, with trying to resolve all social issues individualistically. One difficulty is that the sum of individual interests may not be equal to the whole of the group interest. A classic example of this is the "problem of the commons." Without collective decisionmaking and control over a common resource, the individual incentive may be to use as much as possible, thereby depleting the resource in a way that is in no one's long term interest.

Atomizing the group can leave everyone worse off in other ways. In the 1880s, the U.S. government attempted to divide up Native American lands that were being held in trust and to allot them to individual Native Americans, who were then promised U.S. citizenship. n87 In essence, this was a attempt to turn the group rights of Native Americans into individual rights—an experiment which resulted in the loss of land, natural resources, communities, and access to culture and history. Similar issues were raised in the debates sparked by the Black Manifesto and other calls for reparations for African-Americans in the 1960s and 1970s. n88 The likelihood that individualized reparations would do little, if anything, to address institutionalized racism raises again the need to assess group rights. n89

There is a fear, expressed most often with respect to racial tensions, that the divisions within the United States will tear the society apart. Some believe that these divisions are best addressed by dismantling, or at least ignoring, the groups themselves. n90 However, as long as people see themselves as having common interests, or as having their rights denied because of their group affiliations, they will struggle together to assert those interests or rights. The government can respond by repressing those movements, or by recognizing them and providing some assurance that the rights of groups will be protected. [*411] While some assert that the problems of "Balkanization" come from the recognition of group rights, it may be that they arise when the rights of those groups, and the individuals who compose them, are endangered.

Other nations have addressed these issues in many different ways. There is much to be learned from the treatment of native peoples and French-Canadians in Canada, from the Soviet Union's establishment of semi-autonomous regions, and from the experiences of postcolonial African nations in balancing national interests with ethnic, religious, or linguistic affinities. n91 Understanding how third generation rights have come to be asserted in these contexts can enrich perspectives and discussions about rights within the United States. As Dorothy Thomas states, "stronger links to the international community may encourage greater national solidarity. By placing domestic struggles in an international context, U.S. rights activists may have an opportunity to ease the racial and class tensions that can often frustrate cooperation at local and national levels." n92

IV. CONCLUSION

Despite the tremendous influence that the United States has on the rest of the world, and despite the fact that images from around the globe are constantly available on television and in other media, most of the thinking in the United States remains sharply divided into "American" and "foreign." A common perception is that while other countries may have human rights problems, the United States has civil rights concerns; concerns which can generally be resolved by better enforcement of existing domestic law.

Even those who struggle for second and third generation human rights in the United States—for universal health care, a cleaner environment, or the recognition of the rights of indigenous peoples—often see their efforts as being in a different realm from the issues "ethnic cleansing" in the former Yugoslavia or political prisoners in the Sudan or child labor in Pakistan. The idea that international human rights law not only applies to the United States, but that it can extend the protections and options [*412] currently available is rarely discussed.

This essay has sketched the outlines of international human rights law and identified aspects of "second" and "third" generation human rights law relevant to efforts to improve life for all people in the United States. The U.S. government has been reluctant to acknowledge that international law could provide protections beyond those available under U.S. law, and hesitant to recognize anything beyond civil rights.
Nonetheless, in the terms of international human rights law, many battles have been fought for economic, social, and cultural rights (i.e. second generation rights) and in that process, many groups have exercised (and sometimes articulated) third generation human rights.  

Some see recognition of group rights as creating divisions. However, it may be that social divisions are best addressed by protecting group rights, and that some individual rights cannot be effectively exercised without such protection. These possibilities should be discussed. It is time to look beyond civil rights. We need to expand the discourse to include explicit debates about social, economic, and cultural rights and the rights of groups in U.S. law, debates which are foreclosed by accepting the notion that human rights are limited to civil and political rights.

FOOTNOTE-1:


n2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(1) (1987), provides: "A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world." Id.

Article 38 of the Statute of the International Court of Justice states that the Court, in making decisions in accordance with international law, shall apply international conventions; international custom, as evidence of a general practice accepted as law; the general principles of law "recognized by civilized nations"; and, as subsidiary sources, judicial decisions and the teachings of "the most highly qualified publicists of the various nations."


n3 Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather than States, 32 AM. U. L. REV. 1, 10 (1982) ("The [war crimes] tribunals pointed out that international law was not concerned solely with the actions of sovereign states, but "imposed duties and liabilities upon individuals as well as upon states.")


n6 Sohn, supra note 3, at 10. ("The General Assembly of the United Nations later affirmed these Nuremberg principles.")

n7 The generational terminology was first articulated by French scholar Karel Vasak. See KEVIN T. JOHNSON, CHARTING GLOBAL RESPONSIBILITIES: LEGAL PHILOSOPHY AND HUMAN RIGHTS 16 (1994).

n8 The term "minorities" is used here to refer to groups identified as distinct because of their ethnic, religious, racial, cultural, linguistic, or other characteristics, that comprise a numerical minority and do not exercise dominant political power
within a nation. Unfortunately, in the United States, the term "minority" seems to be increasingly used as a code word for "nonwhite." That is not the meaning I ascribe to it in this essay. The United Nations University has published a WORLD GUIDE OF ETHNIC MINORITIES AND INDIGENOUS PEOPLES (R. Stavenhagen ed., 1988), and the Minority Rights Group has published a series of reports on hundreds of minorities. See Gudmundur Alfredsson, Minority Rights and a New World Order, in BROADENING THE FRONTIERS OF HUMAN RIGHTS 56 (Donna Gomien ed., 1993). See also Roland Oliver, The Minority Rights Group: What's in a Name?, in MINORITIES: A QUESTION OF HUMAN RIGHTS? 1 (Ben Whitaker ed., 1984).

n9 Third generation or "solidarity" rights are sometimes considered to encompass the rights of all peoples, such as the right to development, or the rights to a healthy environment. I use the term in a somewhat more restricted manner, focusing on the rights of identified groups within nation-states.

n10 Richard Rorty identifies some of the dangers in this approach: The language of "rights" is the language of the documents that have sparked the most successful attempts to relieve human suffering in postwar America--the series of Supreme Court decisions that began with Brown v. Board of Education and continued through Roe v. Wade...

Yet the trouble with rights talk...is that it makes political morality not a result of political discourse...but rather an unconditional moral imperative...Instead of saying, for example, that the absence of various legal protections makes the lives of homosexuals unbearably difficult, that it creates unnecessary human suffering for our fellow Americans, we have come to say that these protections must be instituted in order to protect homosexuals' rights.

Richard Rorty, What's Wrong with "Rights," HARPER'S MAG., June 1996, at 15. See also Richard Rorty, Human Rights, Rationality, and Sentimentality, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, at 111, 122 (Stephen Shute & Susan Hurley eds., 1993) (advocating an approach that "sets aside Kant's question "What is Man?" and substitutes the question "What sort of world can we prepare for our great-grandchildren?").


n12 See generally Sohn, supra note 3 (tracing the history of international law).

n13 Id. at 1.


n15 See Hoffman, supra note 1, at A1.

n16 See Devroy & Graham, supra note 1, at A1; Dewar & Marcus, supra note 1, at A22; Devroy, supra note 1, at A29; Lippman, supra note 1, at A11.

n17 In these situations it is often difficult to discern just what the U.S. government's position is with respect to which rights are being violated by whom, and what responses or interventions are acceptable under international law. Additional confusion arises because, under international law, it is sometimes acceptable for a state to intervene in the affairs of another state for humanitarian reasons (e.g. to provide relief to victims of a drought) even if there are no explicit violations of international human rights law.

n18 See text accompanying notes 49-64.

n19 The United Nations Charter identifies among the purposes of the organization the achieving of "international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and
encouraging respect for human rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion ... " U.N. CHARTER, art. I, P. 3.

n20 Sohn, supra note 3, at 32.


n24 Many of these are rooted in President Roosevelt's 1941 proposal for an international instrument dealing with economic and social rights in his "Four Freedoms" speech. He identified these as freedom of speech and expression, freedom of religion, freedom from fear, and freedom from want. Eighth Annual Message to Congress, Jan. 6, 1941, reprinted in 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS 1790-1966, at 2855 (1966), cited in Sohn, supra note 3, at 33 n.162.


n28 The ICCPR and the ICESCR were opened for signature in 1966 and signed by President Carter in 1977. The ICCPR was not, however, ratified by the U.S. Senate until 1992, and the ICESCR has yet to be ratified.


n29 According to Harold Koh, "Treating human rights and democracy as a unit actually disguises two competing rationales for promoting human rights as part of U.S. foreign policy." Harold Hongju Koh, Democracy and Human Rights in the United States Foreign Policy?: Lessons from the Haitian Crises, 48 SMU L. REV. 189, 194 (1994). See also Larry Minear, The Forgotten Human Agenda, 73 FOREIGN POL'Y 76 (1988-89) (criticizing the Reagan administration's focus on democracy over humanitarian concerns). The association between human rights and "democracy" is also illustrated by the 1983 creation of the National Endowment for Democracy (NED), a private corporation which obtained federal funding to "foster the infrastructure of democracy" in other countries. "The NED intersected with human rights efforts in its insistence that democratic institutions
ultimately—and sometimes in the short run—were the most solid bulwarks of human rights." JAMES MACGREGOR BURNS & STEWART BURNS, A PEOPLE'S CHARTER: THE PURSUIT OF RIGHTS IN AMERICA 433 (1991).


n31 BURNS & BURNS, supra note 29, at 411.

n32 Sohn, supra note 3, at 48. See also Roland Rich, The Right to Development: A Right of Peoples? in THE RIGHTS OF PEOPLES 44 (James Crawford ed., 1988) (noting that not only is recognition of a group necessary to allow certain human rights to be protected, but that in certain instances, such as laws against genocide and apartheid, the rights are granted to the group itself).

n33 ICCPR, supra note 21, art. 1, § 1; ICESCR, supra note 23, art. 1, § 1.

n34 Alfredsson, supra note 8, at 71. See also Richard Falk, The Rights of Peoples (In Particular Indigenous Peoples), in THE RIGHTS OF PEOPLES 24-36 (James Crawford ed., 1988) (noting three different ways in which the term "rights of peoples" is used in international law).


n36 ICCPR, supra note 21, art. 1, § 1; ICESCR, supra note 23 art. 1, § 1. Although the ICCPR identifies the right of self-determination of minorities, it sidesteps the question of group rights by granting rights to members of minority groups rather than to the groups themselves. ICCPR, supra note 21, art. 27. According to Vagts and Wilson, "there are at least two group rights so firmly established as principles of international law—the right of peoples to self-determination and the prohibition against genocide—that it is difficult to deny that groups can have rights in international law." Detlev Vagts & Heather A. Wilson, The Rights of Peoples, 83 AM. J. INT'L L. 670, 671 (1989) (book review).

n37 Sohn, supra note 3, at 48.


n39 Alston, supra note 11, at 610.

n40 Crawford, supra note 35, at 57.

n41 Vagts & Wilson, supra note 36, at 670.

n42 This problem is illustrated by the situation in United States v. Antelope, 430 U.S. 641 (1977), in which federal criminal law, including the felony murder rule, was applied to Native American defendants for a murder on a reservation. Had a non-Native American committed the offense, state law would have applied and the defendants could not have been convicted of murder. Clearly in this situation laws made ostensibly to protect the group harmed the individual rights of members of the protected group.


n44 ICCPR, supra note 21, art. 27. Thus, for example, the Soviet Union established semi-autonomous regions, recognizing that the stability of the union depended in large part on the belief of its many minorities that their individual rights could not be assured unless their group rights were protected. As the Soviet Union broke up, the same fear was expressed by ethnic Russians living in areas controlled by other groups. See generally Henry Steiner, Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities, 66 NOTRE DAME L. REV. 1539 (1991).
n45 See RESTATEMENT, supra note 2, pt. I, ch. 1.

n46 U.S. CONST., art. VI, cl. 2.


n49 Id. at 424.

n50 Id.


n55 BURNS & BURNS, supra note 29, at 427 (citing Carter's inaugural address, January 1977).

n56 Id. at 434 (citing 1977 speech of Secretary of State Cyrus Vance).


n63 Professor Sohn says of the U.N. Charter, the Universal Declaration of Human Rights, the ICCPR, and the ICESCR:Although the existence of the norms embodied in these documents cannot be denied, controversy has been raging for almost forty years about their binding character and practical effect ... . The better view is that these documents have become a part of international customary law and, as such, are binding on all states.Sohn, supra note 3, at 12. See Jordan J. Paust, On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts, 10 MICH. J. INT'L L. 543 (1989).

n64 Vienna Convention on the Law of Treaties, opened for signature May 23,
n65 The position that strong protection of civil and political rights will ensure that basic socio-economic needs are met is undermined by reports of widespread hunger, homelessness, and poor health in the United States. A 1990 report of the Children's Defense Fund noted that "a black child born in inner-city Boston had less chance of living to its first birthday than a child born in Peru, Uruguay, or North Korea"; that every year 10,000 American children died because of poverty; that 100,000 were homeless; that nearly 750,000 were abused or neglected. BURNS & BURNS, supra note 29, at 447.


n67 Id. at 102.


n72 Michael Ratner & Eleanor Stein, W. Haywood Burns: To Be of Use, 106 YALE L.J. 753, 767 (1996) (citation omitted).

n73 Id. According to Clayborne Carson: The "Black Power" rhetoric of the period after Malcolm's death owed much to his influence, but the new African-American racial consciousness also resulted from internal changes in the civil rights protest movement--particularly the increasing involvement of poor and working-class blacks and the growing emphasis on economic and political empowerment. CLAYBORNE CARSON, MALCOLM X: THE FBI FILE 32 (1991).

n74 It is possible that such assertions are less likely due to the individual focus of civil and political rights under the U.S. Constitution. Or, perhaps, such movements have encountered much stronger resistance and have not survived.


n76 Senator Dodd characterized the Reagan administration's position on economic and social rights as one in which, rather than rights, these are "objectives to be implemented gradually in accordance with the available resources of a given country." Id. at 64 (emphasis added).


n78 Thomas, supra note 51, at 17 (citing Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61, 94-98 (1988)).

n79 Eric K. Yamamoto et al., Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State
Another problem with individualized rights and remedies is that, in a majoritarian political system the rights of minorities, can be systematically suppressed by the majority. See LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994).

The years of the Reagan and Bush Administration saw the incomes of the richest five percent of the population grow nearly sixty percent while the incomes of the bottom sixty percent of the population decreased roughly fifteen percent. During this period, the poverty rate grew to more than thirteen percent of the population, yet the richest one percent experienced an increase in their incomes of more than one hundred percent. See JOHNSON, supra note 7, at 19-20 (citing THOMAS WHITE, BUSINESS ETHICS: A PHILOSOPHICAL READER (1993)).

Mark Tushnet points out that: Distinctions among rights have always been unstable in fact, though participants in any particular legal culture tend to believe that their culture's definitions of the categories are embedded in the nature of society. Today the differences are taken to be that social rights are more contingent than civil rights and that only civil rights are appropriate subjects for judicial enforcement. I argue ... that these differences are no less contingent than the ones Reconstruction legal culture found to be natural. Mark Tushnet, Civil Rights and Social Rights: The Future of the Reconstruction Amendments, 25 LOY. L.A. L. REV. 1207, 1210-11 (1992).
I approach the task of speaking of a LatCrit perspective on environmental rights as third generation rights (solidarity rights), with great trepidation. I take it as a given that, in our struggle to give shape to a LatCrit theoretical perspective, we mean something more than a RaceCrit perspective from a Latino/a point of view. This unstable Latino/a identity intersects with and is modified by a multiplicity of other equally constructed and unstable identities organized around the concepts of gender, race, ethnicity, nationality, and sexual orientation. A LatCrit perspective permits us to characterize Latino/a as a race or an ethnicity if it is strategically important to do so. But a LatCrit perspective also requires us to step back and remember that Latino/a is not only a race or an ethnicity. A LatCrit theoretical perspective allows us to avoid the crippling necessity of crafting a USLat identity by denying what, for the sake of symmetry, I will term the OtroLat. A LatCrit theoretical perspective requires that we recall the contingency of all geopolitical boundaries, that is, the contingency and constructed nature of nation and national identity. A LatCrit perspective thus requires us to inquire about the distribution of costs and benefits of any given environmental regime.

The term "Lat," the abbreviated form of "Latino/a," is enmeshed in at least two significant "identity" debates. One is the controversy over whether Latino/a refers to race or ethnicity. The second is the importance of gender, or the issue of the intersectionality of race, ethnicity, and gender, highlighted by the common practice of writing Latino/a.

The term "Crit," because it refers to a host of competing and supplementing critical legal theories, is controversial in a very different way. Paradoxically, critical legal theories are suspect for two discordant reasons: first, their progressive activist tendencies; and second, their association with what are believed to be the normatively empty "isms" of structuralism, postmodernism, and deconstructionism. The abbreviated form of the term Crit is already linked to a family of related legal theories including FemCrit, RaceCrit, and QueerCrit. I take it as a given that, in our struggle to give shape to a LatCrit theoretical perspective, we mean something more than a RaceCrit perspective from a Latino/a point of view. The turn to the identifier "Lat," I am suggesting, should not be understood merely as a substitution for the identifier "Race" in the term RaceCrit. Otherwise, LatCrit would be no more than a simple, if necessary, reminder that Latinos/as and their interests are not sufficiently visible within the RaceCrit "mainstream." Rather, I believe, associated with the launching of this new term, is the sense that there is a special critical insight to be gained by the bringing together of Lat and Crit.

So, what happens when you link the complex set of identity positions associated with Latino/a to the various critical theories grouped under the moniker Crit? Do these two terms really fit together? How does each term modify the other? And how, in any case, do they relate to "rights"? Is the LatCrit position closer to a Crit's critique of rights, or closer to a RaceCritic's critique of the critique of rights position?

The second quandary I face in speaking on the subject of a LatCrit perspective on environmental rights is that although we may talk of "environmental rights," it would be hard to sustain a claim that such rights have a formal existence. Even the most determined rights advocates can do little more than point to strands of language in various national and international instruments that are suggestive of "environmental rights," or argue that the existence of such rights is
"inherent in" or "derivative" of other more formal rights. n2 Thus, environmental rights, we are told, are inherent in the right to life, the right to health, and the right to security. Most commentators on so-called "emerging" environmental rights ultimately admit that there is, of course, no consensus as to the content, reach, or effect of such rights. Nevertheless, we are told such rights are essential and our inability to achieve them is evidence of a failure of environmental will.

The third quandary is, even assuming I assent to the existence of something to which we will apply the term "environmental rights," I must ask why it has seemed so natural to relegate such rights to the "third generation." That is, a generation of rights which, because its main exemplar is the right to development, is often treated by commentators in the first world as though it were a concern of developing countries alone. The ascription of the label "third generation" to environmental rights presents two further somewhat contradictory problems. First, because traditional human rights attach to, and may be asserted by, individuals whereas third generation rights are said to attach to groups and cannot be asserted through traditional human rights mechanisms, many human rights activists dismiss them as not "true" human rights. Further, third generation rights are said to deflect attention from true and important human rights or even to justify the postponement of the application of such core human rights. Thus, those who advocate third generation rights are considered to be either misguided or cynical manipulators of the human rights discourse. It is thus not surprising to find that human rights case books give no more than cursory treatment to third generation rights and generally present them as being in conflict with first generation rights. Second, to include environmental rights alongside the right to development raises the question of the relationship between environmental rights and developmental rights. Many advocates of the right to development are uncomfortable with any attempt to place explicit limits on that right. While recognizing that no right is absolute but must yield to some degree in the face of other competing rights, yet they seek to retain the expression of the right in its absolute form. n3 The elaboration of a right to environment that occupies a space adjacent to that of the right to development, may be too close for comfort, and may be experienced as a deliberate affront by those who have been toiling for the recognition of a right to development.

The fourth quandary is that, regardless of the generations of rights and beyond the critique (or the critique of the critique) of rights, it is important to consider whether rights discourse is a useful framework within which to consider and address environmental problems. Even commentators who generally favor the future elaboration of environmental rights recognize two serious limitations of the traditional human rights prism when turned on the environment.

"In the first place, environmental problems are considered to have a multigenerational dimension. The central concept of sustainable development, for instance, assumes a responsibility by the present generation towards future generations. A traditional human rights approach is not well-suited to address the needs of future generations. Indeed, the traditional human rights regime, concerned with the present needs of individuals, may well work against the equitable obligation of sacrificing in the present to preserve the future.

In the second place, and perhaps more controversial, many people, including myself, believe that an anthropocentric approach to the environment leaves a whole host of environmental values out of our calculations. Since human rights discourse is anthropocentric by its very nature, this means that only human-oriented environmental values will be emphasized.

Finally, if we consider the state of the environment today and attempt to list the most critical environmental problems, we will see how unsusceptible they are to correction through a rights solution.

My list of such environmental problems would include:

- The irreplaceable loss of biodiversity on land and sea and the consequent destruction of well-functioning ecosystems;
- The strain on the environment of increasing human demand for fresh water, air, energy, and land, which has grown along with population growth, but also in response to more consuming lifestyles;
- The depletion of the ozone layer and the effects of climate change;
- The need to dispose of the hazardous by-products of our productive activities. (Most environmental harm results from otherwise beneficial activities.)
- The exportation of hazardous activities, products, and wastes to poorer states where transplant and disposal are deemed "cheaper."

Obviously, in the short time assigned for my presentation, I can only begin to touch on some of these issues. I will begin by taking on the challenge of...
articulating what a LatCrit theoretical perspective might be.

[*417] The first, and perhaps very obvious, point is that LatCrit must, by definition, recognize the constructed nature of all identity positions. That is, LatCrit theorists are aware at every moment that the identity position they identify with, let us call it the "Latino/a identity," is a construct whose contours, content, and meaning are perpetually shifting. By "identity" here, I mean the recognition of a set of commonalities and affinities expressed through an associative desire and giving rise to a sense of special responsibility. This associative desire is driven in part by both the human urge for recognition and valuation and the search for a sense of belonging with its goal of protection and the possibility of political action. This unstable Latino/a identity intersects with and is modified by a multiplicity of other equally constructed and unstable identities organized around the concepts of gender, race, ethnicity, nationality, and sexual orientation.

One of the fascinating things about the Latino/a identity, as we have discovered over the past series of discussions (the first LatCrit Conference in La Jolla and earlier discussions at this Colloquium), is that the Latino/a identity cannot be reduced to any of the other identity categories. Persons who self-identify as Latino/a include individuals who also identify with either gender, every race, every ethnicity, every nationality, and every manner of sexual orientation. In this sense the Latino/a identity is truly sui generis. Unique, not in that all other identities are somehow simpler or in fact more homogeneous, but rather that the Latino/a identity contains already and visibly within itself an irreducible confusion which begs the question of "identity."

Such a claim may at first seem both naive and dangerous. After all, it may be argued, while it is true that identity is constructed, the construction of a Latino/a identity is constrained because it emerges within a U.S. context entirely occupied by a black and white paradigm. Furthermore, the legal protections achieved in the United States will only protect Latinos/as, if to be identified as Latino/a is to make a claim to a race or an ethnicity. It would, therefore, be irresponsible to insist on a nonethnic, nonracial classification. How can Latinos/as hold to their sense of an identity which is always breaking down the classifications of race, ethnicity, gender, class, sexual orientation, etc., while pursuing particular political or social agendas which appear to require the reduction of our Latino/a identity to either race or ethnicity?

This is where adopting a distinctive LatCrit theoretical perspective may help us out of the apparent impasse. A LatCrit perspective permits us to characterize Latino/a as a race or an ethnicity if it is strategically important to do so. It is, after all, that too. A LatCrit perspective is not dogmatic and is open to all possibilities.

But a LatCrit perspective also requires us to step back and remember that Latino/a is not only a race or an ethnicity. It allows us not to be overly attached to any of these identity classifications and reminds us that they are themselves fluid and constructed. Further, a LatCrit theoretical perspective should remind us that, while short term benefits may be occasionally derived from playing from within a system that relies on single characteristic identity classification, ultimately we may simply be reinforcing the very system that oppresses Latinos/as. To enter naively into the game of proper classification is to become entangled in a discourse of distinguishing, parsing, and discriminating to determine who is in and who is out.

What I am suggesting is that the LatCrit theoretical perspective should stand for a politics of inclusion. Our shared constructed Latino/a identity requires that we value our differences as well as our commonalities. A LatCrit perspective should recognize and celebrate the simultaneity of identities. We must therefore seek to be as unconstraining and nonexclusive as possible. Rather than expend our energies trying to delimit the contours of our Latino/a identity, we should leave the boundaries of that identity as vague as possible. At a time when identity politics seems to be inexorably leading us to narrower and narrower forms of distinctiveness through particularism, a LatCrit perspective reminds us of the impossibility of achieving perfectly bounded identities while offering us a vision of the multifaceted forms of connection and relatedness that is always available.

What does this have to do with the "international"?

Historically (and very much so today), one of the difficulties that Latinos/as have faced is the problem of their association with what I will call "the foreign." Regardless of the means whereby a Latino/a came to be part of the U.S. polity—whether by annexation, conquest, migration, immigration, or birth—we have been suspect as being "foreign" or of having a "foreign allegiance." [*419] Our reaction has been to deny our foreignness, to position ourselves as domestic by reassigning foreignness to others, especially those others, outside the borders, who are most like us.

At its worst, this has led Latinos/as to reject those outside the U.S. geopolitical boundaries and to deny the "natural" connection that others impute to us. For those of you who have seen John Sayles' movie Lone
Star, it is Gloria, herself, a wetback from an earlier generation and now a well-to-do restaurant owner, who calls the Border Patrol to denounce "wetbacks" she discovers in her backyard. It is Gloria who imposes an English-only policy on her Spanish-speaking workers because "we are in America." It is our attempt to convey, in order to deflect suspicion, that we do know the difference between "us" and "them." It is a move that allows us to insist that while we may be Latinos/as, we are USLats within the border. Outside the United States' geopolitical boundaries, on the other hand, they are "foreigners." The problem is that this perspective and positioning forces us to split in two, to deny part of ourselves.

A LatCrit theoretical perspective allows us to avoid the crippling necessity of crafting a USLat identity by denying what, for the sake of symmetry, I will term the OtroLat.

A LatCrit theoretical perspective requires that we recall the contingency of all geopolitical boundaries, that is, the contingency and constructed nature of nation and national identity. As LatCrit theorists, we are free to recognize that often the only thing that distinguishes "us" from "them" is that we have the right set of papers and they do not.

This is not to say that a LatCrit perspective requires that we abandon or eliminate our borders or claim that borders are meaningless. On the contrary, many of us are very strongly attached to an identity position we refer to as "American" even while we may admit it is geographically constructed. There is nothing surprising about the claim that Latinos/as as a group are as patriotic and committed to something called the United States as any other group of Americans. But as LatCrit theorists, we should be comfortable in holding on simultaneously to our "U.S." identity and to our Lat identity, even if that Lat identity spills over the borders. There is no reason why an identity need be contained within a set of geopolitical boundaries and no reason [*420] to assume we must choose one identity over the other.

Having freed ourselves from the fear of the taint of foreignness at home without relinquishing our Lat identity, when we allow our associative effectiveness and sense of responsibility to spill over across our U.S. borders, we must yet face a greater international challenge. We must face the fact that in the eyes of the OtroLat, we will likely not be recognized as USLats, but just as U.S., which should bring us up short in our venture into the international.

When acting on the international plane, the identity that will be ascribed to us by others and, if we are honest, the identity we should ascribe to ourselves in the first place, is that of a U.S. national. After all, we cannot escape the fact that once we move to the international, we are acting in a sphere organized around the concept of a community of nation-states. When faced by others whose identities and interests are expressed as "national," we will bring our own national identity to the fore. Regardless of our sense of a shared history of oppression, discrimination, or disadvantage, we will be heard, by OtroLats, as speaking from a privileged position, representing a rich and powerful nation with an imperial expansionist past and a domineering present.

A LatCrit theoretical perspective, rather than rejecting this characterization as wrong or unfair, will acknowledge the fact that it does hold a kernel of truth. I cannot speak as a Latina without at the same time speaking as a Norte Americana. I am a Norte Americana and when I speak, even when I speak as a Latina, I speak from a privileged perspective vis-a-vis other peoples. A LatCrit perspective teaches me that in treading into the international, I cannot simply leave my U.S. identity behind, even if I wanted to, because it goes with me. I should not ask others to respond to me as though my nationality was not a constitutive part of my identity and my perspective. Even when I am being critical of the United States, I am critical as an insider. My critique is necessarily one shaped by that condition of being an American, even if a USLat. Thus, a LatCrit perspective teaches me to proceed with caution into the international.

So, where does this leave us? Have we come any closer to addressing the question of what a LatCrit perspective on environmental rights, as third generation solidarity rights, might be?

Here are some thoughts: [*421]

LatCrit theorists must seek to forge an identity that embraces differences and change in order to confront a world that is involved in an attempt to eliminate difference. What this means, inter alia, is that a LatCrit perspective must be sensitive to the dangers of all universalizing rhetoric. Attempts at setting international standards, for instance, must be viewed with a degree of skepticism. Whose values should such standards reflect? Who is to benefit from the harmonization of legal regimes? Should we really be engaged in the popular project of exporting our environmental standards, rules, regulations, and institutions, for wholesale adoption, to other states?

A LatCrit perspective sensitive to difference must recognize that environmental standards will reflect different values and different contexts. The same standard may not be appropriate everywhere. Different standards should not simply be tolerated or treated as
deviations from our appropriate norms, they should instead be approached with respect. Approaching the choice of a standard with respect does not require simple acquiescence nor does it imply that we should forego inquiry into the nature of such a standard, rather it means that we should drop our arrogant certainty in the universal rightness of our own standard or choice and abandon the presumption that all departures from what we think is right are motivated by illegitimate interests. While a change in attitude may seem a modest proposal, if the history of international relations is a guide, it will be a difficult achievement.

The turn to human rights discourse as a means to address environmental degradation can be understood as part of the greater project of global harmonization. Human rights by their very nature are considered to be universal. The content of a right to the environment must, in order to be within the spirit of human rights discourse, be identical for all. Human rights rhetoric does not allow some people to be less protected than others. The result must be that the substantive content of a right to environment must be unacceptably low from the perspective of those who are promoting the adoption of such a right or it must be unachievably high from the perspective of those who labor under conditions of limited capacity, capabilities and competition.

A LatCrit perspective should not treat development needs and arguments as somehow illegitimate. Rather, it should seek [*422] to understand the potent arguments for the recognition of a right to development and not respond to the assertion of development needs as always necessarily a desire to ignore all environmental consequences.

Human rights discourse has been criticized by many in the Third World as a particularly nefarious instance of Western imperialism, a mechanism that justifies interference with the internal affairs of less powerful states. A LatCrit perspective, while recognizing the origin and respecting the seriousness of this charge, need not simply assent to the critique.

Rather, our USLat experience allows us to question the assertion that any government represents or speaks for all people equally. A LatCrit perspective thus requires us to inquire about the distribution of costs and benefits of any given environmental regime. In particular, it makes us realize the importance of information, participation in decisionmaking, and the relevance of making the government and private sectors accountable.

On the other hand, we must reflect seriously on the way in which placing an issue into the human rights framework does in fact accent the problem in a very particular way. While human rights are universally applicable, our tendency in the North is to think that all human rights violations are taking place in the South. Despite recent attempts to highlight the reality of a South within the North, or to point out human rights failures in our own systems, we are likely to consider ourselves the good guys once we enter the game of competitive international achievements. We may not be perfect, we will admit, but we are pretty good compared to those other guys.

During the United Nations Conference on Environment and Development (UNCED) n4 negotiations in Rio, I found myself in an odd position. I am an environmentalist. Yet, as a Costa Rican representative working with the G-77 group of developing countries, I fought the adoption of "environmental" language in various principles. Why? Because within the international context, it became clear to me that the need to address the human threat to the environment could and was being used by some in the North, sometimes unwittingly, as a means to continue the [*423] North's economic domination. Northern countries were unwilling to undertake significant reform of their practices of environmental exploitation because the pain of the change to their economies and to the lifestyles of their citizens was deemed unacceptable. Nonetheless, they were quite willing to advocate equally painful measures to the governments of Southern states. The North was not ready to accept their fair share of the pain of environmental reform. Furthermore, it was unwilling to admit to the responsibility that flows from its historic and continuing role in the disproportionate exploitation of the world's natural and environmental resources and its concomitant disproportionate contribution to global environmental harms. Instead, the North's focus was on the predicted increased amount of environmental harm that would flow from the South, as populations expanded and environmental exploitation went unchecked.

While the Rio negotiations resulted in an apparently symmetrical acceptance of mutual responsibility through, for instance, the call to reduce population growth tied to a call to reform consumption patterns, that symmetry is nothing but a mirage. In the existing international context, developing countries have no tools available to them to force the North to reduce consumption, whereas the North, with its hands on the purse-strings, has many ways to impose conditions on developing countries.

Back to my fundamental question. Can a traditional human rights approach lead to a greater degree of environmental protection? If not, should we abandon the enterprise?
As Raul Sanchez has just argued, a human rights approach may be helpful in redressing individual wrongs at the national level. It is only likely to be helpful, however, if a national right to a healthy environment is backed by specific tort and nuisance legislation providing easy access to administrative and judicial forums, broad standing, and meaningful remedies. Such a system will help provide remedies for and perhaps even prevent specific abuses. A right to a healthy environment may in this way prove extremely valuable. But the central dilemma remains, how can even an enhanced human rights framework help us prevent more diffuse environmental problems? How can it provide redress for environmental harms where no individual or group is particularly harmed, yet all of us now, future generations, and the environment itself are harmed?

[*424] The danger is that if we get too caught up in crafting new present-looking human rights and remedies for individuals and groups, we may mask the fact that we are all more generally responsible for environmental harm. We may ignore the obvious circumstance that it is our collective and cumulative actions, our "normal" practices of escalating production, consumption, and waste in the pursuit of economic well-being and daily comfort, that are to blame for the sad state of the environment, and not, as some would have it, the "abnormal" actions of a few, identifiable, bad agents.

So then, what can a LatCrit perspective bring to all this? Well, right now it is too early to say. The one thing we can hope is that a LatCrit sensibility will not abandon the sophisticated understanding of context and the contingency of identity and law when turning to the international.

A LatCrit perspective must help us to rethink the meaning of universalism in the international. We must strive to articulate a claim about universalism that leads us neither to the disabling arguments of moral relativism, nor towards the difference eliminating doctrine of harmonization. As LatCrits we need not accept claims about sovereignty as a barrier to assessing or opining about what is going on environmentally within any given geopolitical borders. We can and should have a principled position concerning human dignity and the natural ecosystem and seek to promote those views. But we must resist the simple attempt at imposing our own standards on others and resist the trend towards homogenization of human diversity, which seems to follow so naturally from the moment of globalization in which we are told we exist.

FOOTNOTE-1:
COLLOQUIUM PROCEEDINGS: PANEL THREE:
MEXICO'S EL CUCHILLO DAM PROJECT: A
CASE STUDY OF NONSUSTAINABLE
DEVELOPMENT AND TRANSBOUNDARY
ENVIRONMENTAL HARMS

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SUMMARY: ... This Article, which examines certain
aspects of Mexico's El Cuchillo Dam on the San Juan
River and related infrastructure (El Cuchillo Project or
Project) in relation to international law, is the first in a
series of articles concerning the same case-study. ... The
author's symposium presentation focused primarily on the El
Cuchillo Project, and some of its environmental harms,
as compelling examples of why the right to a healthy
environment should be regarded as a human right. ... The
case-study also focused on: the El Cuchillo Project's environmental and other related impacts in
Mexico and the United States; the responses of
governmental authorities on both sides of the Rio
Grande River; the role of the Inter-American
Development Bank (IDB), which financed a large
portion of the Project; and associated violations of
domestic and international law. This abstract primarily
seeks to present a general factual overview of the case-
study and a summary of the author's investigation and
research in this area. ...
within Mexican territory. The new El Cuchillo Reservoir possesses a maximum storage capacity of 1.46 million acre/feet over an area of 40,000 acres and is an area forty-five times larger than the second largest reservoir that provides water to Monterrey. The Project also includes a steel-pipe aqueduct and five pumping stations which carry water from the El Cuchillo Dam uphill for sixty-four miles to the city of Monterrey. Additionally, the Project includes infrastructure and equipment to facilitate water delivery to customers in the surrounding Monterrey area.

Another major element of the El Cuchillo Project consists of the planned construction of sewage systems to collect untreated sewage and wastewater from an area north and east of Monterrey; historically, such effluent has flowed into the San Juan River. The collected sewage is to be pumped to three new sewage treatment plants which, in turn, will send the treated effluent into the Pesqueria River. The Pesqueria River flows north of, and more or less, parallel to the San Juan River. Both rivers flow out of Nuevo Leon and into Tamaulipas, where the Pesqueria River then flows into the San Juan River.

Sending treated effluent from the Monterrey area into the Pesqueria River will prevent contamination of the new El Cuchillo Reservoir, and purportedly, will maintain the water level of an older downstream reservoir located behind the Marte R. Gomez Dam, approximately thirty miles west of Reynosa, Tamaulipas. n8 The Marte R. Gomez Dam, built in the 1930s, is situated approximately five miles south of the U.S.-Mexico border and forty-five miles downstream of the El Cuchillo Dam. The need to maintain the level of the Marte R. Gomez Reservoir [*428] with treated effluent delivered by the Pesqueria River was confirmed by an agreement signed in 1990 by several federal agencies and the governors of Tamaulipas and Nuevo Leon (the 1990 San Juan River Basin Agreement). n9 Through this agreement, the two governors pledged, in general terms, to ensure the effective management of the San Juan River Basin and to maintain the water level of the Marte R. Gomez Reservoir. The need to provide water to the Twenty-Sixth Irrigation District, which surrounds the Marte R. Gomez Reservoir and is bordered by the Rio Grande River to the north, was expressly addressed. Over 10,000 independent Tamaulipan farmers live in the Twenty-Sixth Irrigation District.

The construction of a canal to enable Reynosa to draw its drinking water from the Rio Grande River was the final significant element of the Project. Reynosa had utilized the Marte R. Gomez Reservoir as its chief source of drinking water before the El Cuchillo Dam was built. Project designers must have known that, upon completion of the El Cuchillo Dam, the downstream flow of the San Juan River would be inadequate to satisfy the irrigation needs of the Twenty-Sixth Irrigation District and the potable water needs of Reynosa.

Development of the El Cuchillo Project progressed at breakneck speed during the presidency of Carlos Salinas, who assumed office in January 1988. The Project was designed, environmental impact studies were undertaken, financing was received from the IDB, and construction on the El Cuchillo Dam was completed by October 1994, at which time President Salinas inaugurated the dam. n10 Construction costs of the El Cuchillo Project are estimated at approximately U.S. $ 650 million. The IDB provided loans totaling approximately U.S. $ 325 million. n11

[*429] In the fall of 1993, the area and residents downstream began to suffer devastating impacts when the floodgates closed to fill the new reservoir, particularly in the state of Tamaulipas. n12 One devastating result has been the drastic reduction in the water level of the Marte R. Gomez Reservoir to less than twenty percent of its prior level. Also, the San Juan River has completely dried up between the El Cuchillo Dam and the point downstream where the Pesqueria River joins the San Juan River. No significant flows of water have been permitted past the El Cuchillo Dam. Monterrey began siphoning away water almost as quickly as the new reservoir began to fill.

As of November 1996, the new Monterrey sewage treatment plants were not operating at full capacity, if at all. Untreated sewage and wastewater were collected to prevent contamination of the El Cuchillo Reservoir, but were dumped into the Pesqueria River largely without treatment. As a result, much of the water which remains in the Marte R. Gomez Reservoir is highly polluted.

The situation has been severely aggravated by a devastating drought which has laid siege to northern Mexico for the last three to four years. The coincidence between the start-up of the El Cuchillo Dam and the regional drought has provided Mexican authorities with the convenient excuse that Tamaulipas’ water problems are a product of the drought. Undoubtedly, the drought has made matters much worse; however, but for the El Cuchillo Dam, the water level of the Marte R. Gomez Reservoir would be much higher and not as contaminated.

The drastic drop in the water level of the Marte R. Gomez Reservoir has devastated northern Tamaulipas. Many of the approximately 300 families which earned
their living by fishing in the Marte R. Gomez Reservoir have lost their traditional livelihood. The farmers of the Twenty-Sixth Irrigation District have no irrigation water and, thus, have lost their crops over several planting seasons. In 1995, after they protested vociferously, these farmers received the equivalent of approximately U.S. $15 million in compensation, or approximately 870 pesos per hectare of cultivated land--the approximate cost of one ton of corn. The affected farmers estimate their actual losses to be several times above the compensated amount. By contrast, the fishing families have received no compensation.

Many Tamaulipan residents, dependent on the Marte R. Gomez Reservoir for their livelihoods of fishing or farming, sold their instruments of the trade, boarded up their homes, and moved to the United States. Many are reported to be working in Texas as undocumented laborers. Colonies of former Tamaulipan residents have been established in Houston and San Antonio, Texas.

Some reports indicate that a few local residents who are unable to fish or farm have turned to an even more lucrative employment alternative--drug trafficking. Local residents are familiar with shortcuts and country paths leading up the U.S. border. Such knowledge is invaluable to traffickers, who need local guides to help move drug shipments northward.

Local merchants, who earned a living based on recreational fishing at the Marte R. Gomez Reservoir, have also lost their livelihood. Restaurants and rustic inns in the area have been forced to shut down. Piers and boat launches are now hundreds of yards from the water's edge.

Centro Fronterizo P la Promocion de los Derechos Humanos, A.C. (CEFPRODHAC) filed a complaint before the National Human Rights Commission (Comision Nacional de Derechos Humanos) (CNDH) and federal district court on behalf of the farmers of the Twenty-Sixth Irrigation District and the fishermen who lost their livelihoods. CEFPRODHAC alleged violations of the 1990 San Juan River Basin Agreement and an earlier presidential decree, dated 1952, which had granted the use of the San Juan River to the state of Tamaulipas. By November 1996, both complaints were dismissed on questionable grounds.

Residents, who remained in the vicinity of the Marte R. Gomez Reservoir, have been forced to turn to alternative water sources. Some have drilled authorized or unauthorized wells, which may be lowering the water table in both the area and Texas. Moreover, some farmers of the Twenty-Sixth Irrigation District have pumped water directly from the Rio Grande River without authorization.

In response to worsening draught conditions in Mexico, the United States and Mexican governments signed an emergency water loaning agreement in October 1995. The United States agreed to loan U.S. water in the binational reservoirs located on the Rio Grande River to Mexico for drinking and home use. By April 1996, severe drought conditions had spread to Texas. Unauthorized pumping from the Mexican side of the Rio Grande River, known as diversions, had reached such proportions that the Lower Rio Grande Valley Water District Manager's Association (Rio Grande Water Association or Association) wrote to the U.S. section of the International Boundary and Water Commission (IBWC), on behalf of twenty-three water districts holding the majority of water rights below Falcon Dam. This letter expressed the Association's "serious concern and protest concerning the diversion of water on the right [Mexican] bank of the [Rio Grande] River by individuals in Mexico ...."  n22

The Rio Grande Water Association sought an accounting of the amount of water released from the Falcon Reservoir, which the IBWC had allegedly authorized to cover water diversions documented by the IBWC. The Association noted a severe water shortage was affecting south Texas, and that Mexican diversions from the Rio Grande River disrupted proper and efficient water management of the available water supply. The Association's letter closed with the statement: "United States water users are losing water on a daily basis due to these Mexican diversions." The state government of Texas also became involved and complained directly to the Mexican section of the IBWC.

Diversions from either bank of the Rio Grande River historically have not presented a serious problem between the United States and Mexico. The Mexican and U.S. sections of the IBWC usually agree to subtract the diverted amounts from the relevant water allocations which remain in the Falcon or Amistad Reservoirs; however, by early 1996, the water remaining in the binational reservoirs, which was allocated to Mexico, had dropped to less than twenty percent. By August 1996, the amount allocated to Mexico in the Falcon Reservoir reached less than ten percent, according to the IBWC. In the future, Mexico may have no allocated water from which to subtract diversions, thus, creating a situation which may lead to dramatic conflicts with the United States.

The Mexican government, through the Mexican section of the IBWC, responded with assurances that Mexico would honor all treaty obligations concerning
the Rio Grande River. It also agreed to take steps to control diversions. By November 1996, the two sections of the IBWC still had not negotiated a resolution to the diversions of which the Rio Grande Water Association had complained.

Other widespread negative effects of the El Cuchillo Project are likely. The creation of the new reservoir and the disappearances of a large portion of the Marte R. Gomez Reservoir and a long segment of the San Juan River have, undoubtedly, affected the habitats of numerous plant and animal species. The ranges of some animals are limited to the areas of Mexico and Texas, which are affected by the El Cuchillo Project. Some animals travel among several nations, as in the case of migratory fowl and are legally protected by international treaties. Erosion of dry river and lake beds and previously irrigated crop lands has increased. Groundwater levels in the United States and Mexico have been affected. The city of Reynosa, Tamaulipas must now pump its drinking water from the Rio Grande River, which is extremely polluted with raw sewage, heavy metals, and other industrial wastes. The possibility of spreading disease has increased. Anecdotal evidence, attributable to reduced availability of clean water, points to higher incidences of gastrointestinal diseases, cholera, and dengue fever in northern Tamaulipas.

The extent of the economic and environmental impacts of the El Cuchillo Project has not been assessed because authorities in the United States and Mexico have not even acknowledged that a problem exists. Mexican authorities insist that the current drought, plaguing much of northern Mexico, is to blame. In the United States, officials are either ignorant of the situation altogether or have focused on "bigger" problems which affect the Unites States and Mexico, like the toxic wastes and raw sewage dumped into transborder waterways, including the Rio Grande River. Because the San Juan River is a "Mexican" river, some officials conveniently label any problems which flow therefrom as "Mexican" problems and of no official concern to the United States. Consequently, U.S. authorities are not disposed to file a diplomatic note with Mexico concerning its use of the San Juan River and are even more disinclined to seek redress for harms to [*434] U.S. citizens in an international legal forum.

Thus far, the government of Mexico has not fully apprised its citizens or the U.S. government of the El Cuchillo Project's many impacts. Meanwhile, state and federal officials in the United States have not expressed any concerns, *sua sponte*, regarding such impacts. A few officials have confidentially stated that the situation is "too political." Such silence is especially troubling given that U.S. taxpayers indirectly contributed to the El Cuchillo Project, through the Project's financial support from the IDB.

As of yet, the IDB has not acknowledged that any problems exist with the El Cuchillo Project. IDB officials blame the drought in northern Mexico for any water shortages in the state of Tamaulipas. Nevertheless, IDB officials have acknowledged that the new Monterrey sewage treatment plants have not been completed, and that untreated effluent has been sent down the Pesqueria River to Tamaulipas as a consequence of the El Cuchillo Project, which the IDB helped finance. Environmental impact statements, drafted by Mexican authorities and released by the IDB, reveal that potential impacts in Tamaulipas and Texas were never contemplated. It remains to be seen if the IDB will assume any responsibility for the economic, social, and environmental harms, which are now so obvious.

The instant case-study concerning the El Cuchillo Project is a study of government failures. These failures include:

. failure to respect domestic laws, national constitutions, international customary law, and treaties concerning environmental matters;
. failure to honor citizen rights to information, governmental consultation, health, and a healthy environment, to prompt and fair compensation, to petition the government, and to earn a living;
. failure to correctly assess and internalize predictable costs or both to the environment and a region's inhabitants caused by a large, infrastructure project in an international trans border setting;

[*435] . failure to develop appropriate legislation where existing legislation is inadequate;

. failure to mitigate harm once it has occurred;
. failure to advise a neighboring government and its inhabitants with respect to impending and ongoing harms;
. failure to provide for public involvement in project planning; and
. failure to assess harm caused by a neighboring government's infrastructure project.

This case-study also considers these issues:

. Mexico's domestic governance and overall development policies;
. U.S. government policies concerning Mexico;
. the planning, management, and regulation of the Rio Grande River, and all of its tributaries and related groundwater sources, as a shared international watercourse; n26

. the strategies, procedures and policies of multilateral lending institutions, including the IDB;

. the role of non-governmental organizations in pressuring governments to act lawfully;

. the need for developing existing legal regimes (including the Inter-American Commission for Human Rights, the Inter-American Court of Human Rights, and the new North America Commission on Environmental Cooperation created under NAFTA) to address the issues raised by the case-study; and

. the need for developing new legal regimes and hemispheric legal institutions for protecting the environment in the Americas.

In the U.S.-Mexico border region, the governments of the United States and Mexico are often too willing to tolerate high levels of environmental degradation and the violations of international law, which may accompany such degradation, for the sake of short-sighted trade and industrial development. The case of the El Cuchillo Project is but one example of how citizens [^436] on both sides of the Rio Grande River are left without immediate or effective remedies for many of the environmental harms they must endure, which are permitted and perpetrated by their governments.

FOOTNOTE-1:

n1 Dublin Statement, Principle No. 2, International Conference on Water and the Environment, Jan. 31, 1992, in GLOBAL WATER RESOURCE ISSUES 162 (Gordon J. Young et al. eds., 1994). The Dublin Statement, which addresses critical issues concerning water and sustainable development, was adopted by the International Conference on Water and the Environment, held in Dublin, Ireland, January 26-31, 1992. Approximately 500 individuals participated, including government-designated experts from one-hundred countries and representatives from eighty international, intergovernmental and nongovernmental organizations. Id. at 161. At the outset, Principle No. 2 offers a measure against which the facts of the El Cuchillo Dam Project may be compared.

n2 The author acknowledges the collaboration of the Border Center for the Promotion of Human Rights (Centro Fronterizo P la Promocion de los Derechos Humanos, A.C.) (CEFPRODHAC), a nongovernmental human rights organization, and its founder and president, Mr. Arturo Solis, of Reynosa, Tamaulipas, Mexico, in documenting the case of the El Cuchillo Dam Project. See CEFPRODHAC, CRISIS EN TAMAU LIPAS "PRESA EL CUCHILLO" (Oct. 1996).

n3 The San Juan River, a tributary of the Rio Grande River, originates in the mountains of the northern Mexican state of Nuevo Leon and flows north through the state of Tamaulipas. The northern border of Tamaulipas, formed by the Rio Grande River, starts to the northwest of the city of Nuevo Laredo and extends eastward to the Gulf of Mexico.

n4 The author is preparing five articles covering distinct aspects of the same case-study, with the following working titles: The Impacts of Mexico's El Cuchillo Dam Project in the State of Tamaulipas: A Study in Non-Sustainable Development and Authoritarian Government; Mexico's El Cuchillo Dam Project and the Agreements on Water Between the Governors of the States of Nuevo Leon and Tamaulipas: Water Sharing or Water Grabbing?: Governmental Reaction to Impacts of Mexico's El Cuchillo Dam Project in the United States: Hear No Evil, See No Evil . . .; The Inter-American Development Bank's Financing of Mexico's El Cuchillo Dam Project: Bankrolling the Privatization of Water Infrastructure and Environmental Destruction in the U.S.-Mexico Border Region; and Mexico's El Cuchillo Dam Project: An Example of Why Planning, Management, and Regulation is Necessary for the Entirety of an International Watercourse.

n5 During the last twenty years, human rights advocates and others have advanced claims for the existence of a "third generation" of solidarity rights, including the right to development, the right to peace, and the right to a healthy environment. See Burns H. Weston, Human Rights, in HUMAN RIGHTS IN THE WORLD COMMUNITY 14 (Richard Pierre Claude & Burns H. Weston eds., 1992). Such rights are suggested by Article
28 of the Universal Declaration of Human Rights, which proclaims that "everyone is entitled to a social and international order in which the rights set forth in this Declaration can be fully realized." *Universal Declaration on Human Rights*, G.A. Res. 217, U.N. Doc. 8/811 (1948).

n6 *See, e.g.*, INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 61, 61-69 (Anthony D'Amato & Kirsten Engel eds., 1996).

n7 Most of the facts concerning the El Cuchillo Project were obtained from Mexican press reports; CEFPRODHAC, *supra* note 2; project-related documents obtained from the IDB; interviews conducted by the author; and private correspondence. All documents are on file with the author.

n8 The city of Reynosa is located on the Rio Grande River across from McAllen, Texas.

n9 *Acuerdo de Coordinacion que Celebran el Ejecutivo Federal Atraves de las Secretarias de Programacion y Presupuesto, Contraloria General de la Federacion, de Agricultura y Recursos Hidraulicos, de Desarrollo Urbano y Ecologia, la Comision Nacional del Agua y los Ejecutivos de los Estados Libres y Soberanos de Nuevo Leon y Tamaulipas, Para la Realizacion de un Programa de Coordinacion Especial Para el Aprovechamiento de la Cuenca del Rio San Juan, con el Objeto de Satisfacer Demandas de Agua Para Usos Urbanos e Industriales de la Ciudad de Monterrey y Preservar las de Usos Multiples del Distrito de Riego No. 026, en el Estado de Tamaulipas*, dated May, 1990 (on file with the author).

n10 By comparison, construction of such a project in the United States probably would have been preceded by more than ten years of litigation simply to settle disputes concerning potential environmental impacts.

n11 Total costs of the Project are currently unclear. The IDB initially intended to finance the new Monterrey sewage treatment plants; however, sources at the IDB indicate that the Japanese Overseas Economic Cooperation Fund provided last minute financing. The precise sums involved are not known at this time.

n12 IDB officials contend that populations affected by the El Cuchillo Project were effectively consulted by Mexican authorities. In all likelihood, if any genuine consultations were undertaken, they took place only in Nuevo Leon.

n13 *See* CEFPRODAC, *supra* note 2, at 16.

n14 *Id.* CEFPRODAC has sought to document such amounts.

n15 *See generally supra* note 2.

n16 The CNDH is Mexico's national governmental human rights entity charged with investigating human rights violations. Its mandate includes jurisdiction over complaints concerning environmental harms.

n17 Unconfirmed reports claim that much of the water being drawn from the El Cuchillo Reservoir for use in Monterrey is being consumed by industrial users.

n18 The CNDH rejected the complaint regarding the 1990 San Juan River Agreement on the grounds that the one-year statute of limitations period under which the CNDH operates expired one year after the agreement was signed. The CNDH ignored the fact that the alleged harms were ongoing.

The complaint in federal court was dismissed because the complaining parties had no standing to complain of a breach of what was essentially an agreement between two contractual parties. Moreover, the contractual parties, i.e., the two state governors, had reached an understanding over any alleged breaches to the 1990 San Juan River Agreement in another agreement signed in February 1996.

The claim concerning the alleged violation of the presidential decree of 1952 was dismissed because the various agreements between the two state governors did not constitute violations of the decree. Ignoring the facts, the court noted that the El Cuchillo Project was designed to provide irrigation water to the Twenty-Sixth Irrigation District via the Pesqueria River.
The CNDH has been widely accused of acting with political motives as have Mexico's courts. See, e.g., Raul M. Sanchez, *Mexico's Government Human Rights Commissions: An Ineffective Response to Widespread Human Rights Violations*, 25 ST. MARY'S L.J. 1041 (1994). In January 1996, the problems surrounding the El Cuchillo Project began receiving significant national public attention in Mexico. The press widely reported public protests and the exchange of insults between the Governors of Nuevo Leon and Tamaulipas. Both Governors filed legal actions against the other state. The National Water Commission (Comision Nacional del Agua)(CNA) intervened and, after the February 1996 agreement was reached between the two state governors, the matter was no longer discussed publicly. Many observers believed that a political solution was being prepared. Yet, a third agreement was signed by the two state governors in November 1996. This agreement was soon denounced by numerous citizen organizations in Tamaulipas, including farmers of the Twenty-Sixth Irrigation District, as inadequate and a political sellout.


n20 The IBWC, a binational agency, manages binational water resources according to the terms of binational water treaties signed by Mexico and the United States. One principal IBWC task on the Rio Grande River is to manage releases of water, allocated to either Mexican or U.S. water users, from the Amistad Reservoir, on the upper portion of the river, and the Falcon Reservoir, on the lower portion of the river.

n21 Falcon Dam, located southeast of Laredo, Texas, is one of two binational dams on the Rio Grande. The other is Amistad Dam. See also supra note 20.

n22 Letter from Wayne Halbert, President of the Rio Grande Water Association, to The Honorable John Bernal, Commissioner of the United States Section of the IBWC, (Apr. 17, 1996)(on file with the author).

n23 Id.

n24 The Mexican section is also referred to by its Mexican acronym, CILA (Comision Internacional de Limites y Aguas).

n25 The IDB receives its largest capital contributions from the U.S. government.

I. INTRODUCTION

The United States, Canada, and Mexico entered into the North American Agreement on Environmental Cooperation (Agreement) in response to the concerns of U.S. environmentalists that the North American Free Trade Agreement (NAFTA) would adversely impact the NAFTA member countries' environmental laws and their enforcement. n2 The Agreement created the North American Commission on Environmental Cooperation (Commission), which is responsible for ensuring that the three countries comply with the Agreement. n3 The Agreement provides individuals and nongovernmental organizations (NGOs) with the right to present submissions to the Commission Secretariat to declare that one of the NAFTA countries is failing to effectively enforce its domestic environmental laws. n4 This Comment discusses an NGO submission, the Cozumel Pier Submission (Cozumel). Cozumel is the first NGO submission in which the Commission will compile a factual record. n5 This Comment analyzes Cozumel with a focus on the ability of the Commission's procedural mechanisms to effectively review citizen submissions. n6

On January 18, 1996, three Mexican citizen groups (Submitters) n7 presented the Commission with a submission which alleged that the Mexican government issued permits for construction and operation of a cruise ship dock on the Caribbean sea island of Cozumel without complying with Mexico's Ecology Law. The Ecology Law requires the construction company file an Environmental Impact Statement (EIS). n8 The Submitters were concerned that the construction could cause damage to the Paradise Coral Reef, located off Cozumel Island. n9 After requesting and receiving a response from the Mexican government, the Commission Secretariat decided to conduct an investigation and to prepare a factual record concerning the allegations that Mexico failed to enforce its environmental laws. n10 Part I of this Comment describes the controversial history surrounding the enactment of the Agreement and the establishment of the Commission. Part II addresses the purpose and structure of the Commission and the submission process provisions. A summary of Mexican environmental laws with an emphasis on the principle law surrounding the dispute in Cozumel,
Mexico's Ecology Law is provided in Part III. An outline of Mexico's environmental enforcement efforts appears in Part IV. Part V discusses the importance and prevalence of the EIS. Part VI reviews the procedural history of Cozumel to date, and Part VII analyzes the issues raised in Cozumel. Finally, Part VIII discusses the potential consequences of Cozumel impacting the future of the Commission's effectiveness.

This Comment asserts that the fears of U.S. environmentalists that the Agreement's provisions will ultimately prove unworkable have not been confirmed to date. Instead, the Agreement appears to have created workable procedural mechanisms for reviewing environmental citizen submissions. Further, while [n12] all of those issues that concern U.S. environmentalists did not arise in Cozumel, [n11] and although difficult legal issues remain for the Commission to resolve, the Commission's disposition of the submission thusfar provides a substantial basis for cautious optimism regarding the effectiveness of the Agreement's procedural mechanisms and the Commission's willingness to compile factual records for deserving submissions. [n12]

A. NAFTA's Historical Background

1. The Original NAFTA Proposal

NAFTA was first proposed by then-Vice President George Bush in 1988 to strengthen the American economy and to solidify North American trade relations in light of the rapid evolution of the European Economic Community. Congress granted "fast track" negotiation authority in May 1992, which enabled the Bush administration to negotiate and sign NAFTA with the United States. [n24] The environmentalists pointed to the maquiladoras to buttress their claims that NAFTA would lead to rapid environmental degradation in Mexico. [n23] A maquiladora, also known as [n44] an in-bond export facility, is a foreign-owned manufacturing plant located somewhere along Mexico's 2000 mile border with the United States. [n24] Maquiladoras were established in 1965 to promote growth in manufacturing [n25] by taking advantage of Mexico's inexpensive labor and minimal environmental regulations. [n26] In 1983, the United States and Mexico signed the Agreement on Cooperation for the Protection and Improvement in the Border Area (La Paz Agreement) which addressed the environmental problems caused by rapid industrialization and population growth around the maquiladoras. [n27] The tentative appraisal of the La Paz Agreement is that environmental enforcement in the maquiladoras has improved in recent years. [n28]

2. "Pollution Havens" and "Downward Harmonization"

Primarily, U.S. environmentalists feared that NAFTA would create incentives for corporations to move environmentally sensitive production to Mexican "pollution havens," which are the least environmentally regulated areas available. [n19] By moving to the pollution havens, a company's production could continue unencumbered by U.S. environmental regulation, while NAFTA's free trade provisions would allow the company un tariffed access to the U.S. market. [n20] Environmental and congressional leaders were also concerned that NAFTA would cause U.S. environmental standards to decline. [n21] Environmentalists' fear of "downward harmonization" of U.S. laws and their concern about NAFTA's failure to [n43] regulate industry were the primary threats to ratification of NAFTA by the United States. "Downward harmonization" generally describes a theory of NAFTA's possible effect on environmental regulations in the United States. The theory is that NAFTA's free market forces will cause the United States and Canada's environmental laws to become weaker as a consequence of Mexico's sporadic enforcement of its environmental laws. [n22]

3. The Response to Environmentalists' Concerns

Responding to these concerns over the environment, then-Governor Bill Clinton promised in a 1992 Presidential campaign speech to pursue a supplemental agreement to NAFTA, which would require each country to be responsible for its own environmental laws and regulations. [n29] President Clinton took
office [*445] after the signing of NAFTA, but before the U.S. Congress had ratified it. n30 Negotiations between the United States and Mexico for the creation of the environmental side agreement began on March 17, 1993, and President Clinton signed the Agreement on September 14, 1993. n31 The Agreement and the Commission were thus created largely in response to concerns over the perceived limitations of the NAFTA dispute resolution process in dealing with environmental matters. n32

B. NAFTA's Environmental Provisions

Both NAFTA and the Agreement contain provisions which protect each country's sovereignty. Like the Agreement, NAFTA allows each country to maintain its own level of environmental protection, including the continued application of EIS requirement. n33 More significantly, NAFTA permits each country to establish its own levels of environmental protection. n34

The Agreement complements several of NAFTA's provisions concerning sovereignty. For example, Agreement Article 3 and NAFTA Article 904(2) both recognize the right of each nation to establish its own levels of environmental protection. Agreement Article 40 and NAFTA Article 104 maintain that nothing in either document will affect the nations' existing rights under current international environmental agreements. n35

NAFTA Article 1114 recognizes that "it is inappropriate to encourage investment by relaxing domestic health, safety or environmental [*446] measures." n36 An agreement that merely recognizes the inappropriateness of a particular act does not, of course, make a violation of that act an enforceable offense. Thus, Article 1114 creates no substantive environmental obligations for NAFTA members. n37

The Agreement's Preamble establishes environmental protection is its primary goal. Like NAFTA Article 1114, the Agreement's Preamble does not bind any of the countries to any particular standard of protection. n38 The Preamble and Article 1 establish some of the provisions that enable the Agreement to protect the environment more effectively than other international trade agreements. These sections delineate the broad general principles upon which the Agreement is founded and link the Agreement to NAFTA's goals of providing enhanced levels of environmental protection. The countries also re-affirm, in deference to state sovereignty, the right of each nation to exploit its own natural resources pursuant to its independent national environmental policy. n39 At the same time, NAFTA members acknowledge the need to maintain environmental laws and regulatory procedures without creating additional trade barriers. n40

C. Upward Harmonization

Mexico has already enacted environmental legislation containing standards which are similar to those of the United States. The differences in the countries' domestic environmental laws, however, may present major barriers to upward harmonization of Mexico's regulation and enforcement of those environmental standards. The access to environmental information, the feasibility of bringing citizen enforcement suits, administrative [*447] review, and due process procedures differ greatly among the NAFTA countries, as do the structure and terms of their laws and the roles of federal, state, and local authorities. n41 The Agreement's primary objective is "enhanced compliance with, and enforcement of, environmental laws and regulations." n42 While the Agreement allows each NAFTA country the right to set its own levels of domestic environmental protection, n43 it nonetheless urges each country to ensure that its laws provide for "high levels of environmental protection." n44

To attain this goal of "high levels of environmental protection," the Commission can investigate complaints of a country's failure to enforce environmental laws. n45 Additionally, the Agreement enables citizens, NGOs, businesses, and government entities to request Commission investigations. n46 The Commission's Secretariat, which provides support to the Commission's Council, has the power to review a submission from any private group or person which asserts that a country "is failing to effectively enforce its environmental law." n47 The Agreement's dispute resolution process addresses circumstances in which the submitter demonstrates a "persistent pattern of failure by a country to effectively enforce its environmental law." n48 If the submission meets certain procedural and substantive criteria, the Secretariat may, subject to Council approval, propose the development of a factual record. n49

Several other provisions of the Agreement serve to limit its application and potential impact. Perhaps most significant is Article 45, "Definitions" which creates an exception to enforcement--namely, that a party will not be deemed to have failed to "enforce its environmental laws [if] the action or inaction in question by agencies or officials" of that country "reflects a reasonable [*448] exercise of discretion." n50 or "results from bona fide decisions to allocate resources to enforcement" in respect of higher environmental priorities. n51 A "reasonable exercise of discretion" does not appear to be a difficult standard to meet. Also, due to Mexico's modest resources and underdeveloped
infrastructure, it may often have to make "bona fide decisions to allocate resources" that would result in lax enforcement of some environmental laws. Thus, both of these exceptions could potentially eviscerate the goal of the Agreement requiring "high levels of environmental protection."

D. Citizen Access

Citizen access to the respective court systems of each NAFTA country varies greatly. While U.S. citizens have broad access to the courts to address environmental issues, Mexican and Canadian citizens do not enjoy comparable access. n52 Citizen suits are essentially nonexistent internationally. n53 "Citizen attorney general actions" against the government for nonenforcement or lax enforcement are a common occurrence in the United States. n54 U.S. laws also permit citizen suits against private parties alleged to have violated the environmental laws in circumstances where the government lacks the will or ability to provide enforcement. n55 Despite the enactment of the Ecology Law, n56 which comprehensively covers environmental issues, Mexico has yet to develop the enforcement structure to effectively implement that law. n57 The Agreement, however, makes some provisions for public participation and public information. n58 The Agreement gives interested persons the right to request an investigation of environmental violations and provides "appropriate" access to judicial or administrative procedures. n59

II. THE AGREEMENT AND THE COMMISSION

A. Summary of the Agreement

The Agreement consists of seven parts. n60 Most significant to the analysis and resolution of the issues raised in Cozumel is Part Two which includes "Obligations," among which the most important requirement is to assess environmental impact. n61

The Agreement requires that each country "shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations." n62 The Agreement further provides that the Secretariat, in considering a submission, shall be guided by whether the submitter has pursued "private remedies available under the [country's] laws." n63

[*450] B. Structure of the Commission

Part Three of the Agreement establishes the Commission, n64 which comprises of a Council, a Secretariat, and a Joint Advisory Committee. The Council consists of cabinet-level ministers from each country, n65 which chooses an Executive Director to head the Council for a three-year term. n66 The Council is the Commission's governing body n67 and may develop recommendations regarding strategies for environmental improvements. n68 The Secretariat is responsible for "providing technical, administrative, and operational support to the Council and groups established by the Council." n69 The Secretariat may consider citizens submissions n70 and, in compelling circumstances, compile a factual record. n71 The Joint Public Advisory Committee consists of five individuals from the member countries. n72 One function of this Committee is to advise the Council on any matter within the scope of the Agreement. n73 In addition, the Joint Public Advisory Committee "may provide relevant technical, scientific or other information to the Secretariat, including [information needed] for [the] purposes of developing a factual record." n74

C. The Commission Citizen Submission Process

The citizen submission process begins when a citizen submits for the Secretariat's review a written request asserting that a country is "failing to effectively enforce its environmental laws." n75 The Secretariat determines whether the written request contains sufficient evidence, n76 promotes enforcement rather than harassing industry, n77 indicates that the matter was communicated [*451] to the offending party, n78 and that the country being complained about has been informed and has responded. n79 If the submission passes these requirements, the Secretariat then decides whether to request a response from the country complained of by the submitters. In doing so, the Secretariat considers whether "the submission alleges harm to the person or organization making the submission," n80 whether the submission raises issues which could advance the goals of the Agreement, n81 whether the submitters have pursued any available private remedies, n82 and whether the submission is drawn exclusively from mass media reports. n83 The Secretariat may then request the country to prepare a response within thirty days. n84

If the submission meets all the criteria, the Secretariat then prepares a factual record and submits it to the Council, which may publish it after a two-thirds vote. n85 The Secretariat will not prepare a factual record, however, if the matter "is the subject of a pending judicial or administrative proceeding." n86 Finally, "the Council may, by a two-thirds vote, make the final factual record publicly available." n87

The factual record itself does not, standing alone, trigger any legal consequences, but it could lead to formal consultation proceedings that, in turn, could ultimately lead to sanctions against the offending country. n88 The publication of a factual record that criticizes a country's enforcement may also cause the
country, out of concern over consequential political
fallout, to improve its enforcement. n89

The Council appoints a panel that considers several
factors in setting the amount of the fine. The fine
assessed may not exceed [*452] twenty million
dollars for claims arising in 1994; after 1994, the fine
may not exceed .007% of the total trade between the
countries during the most recent year. n90

D. Interpretation of "Failure To Enforce"

The Agreement requires each country to "effectively
enforce its environmental laws and regulations through
appropriate government action." n91 A complaint that
a country "is failing to effectively enforce its
environmental law" triggers the factual record
procedure. The Secretariat then determines whether
there has been "a persistent pattern of failure" by a
country "to effectively enforce its environmental law." n92
Thus, it is essential to determine what "failure to
effectively enforce" means.

The Agreement affords each country the discretion to
prosecute its environmental laws to a "reasonable"
degree. n93 To advance the Agreement's purpose of
promoting high levels of environmental compliance,
the Commission must be particularly judicious in
evaluating the term "reasonable." If the Agreement is
to be enforceable, the Commission cannot interpret
"reasonable" so as to permit the country to arbitrarily
and completely fail to enforce its environmental laws.

The events surrounding the enactment of the
Agreement allow for two plausible but mutually-
exclusive determinations of whether a particular act or
omission constitutes a "failure to effectively enforce." On
the one hand, presumably, Mexico would not sign
an agreement which it was currently violating. If this
presumption is correct, then the other NAFTA
countries must not have viewed Mexico's
environmental enforcement levels at the time of
enactment as unjustifiable. n94 If so, in order to
comply [*453] with the Agreement, Mexico need not
improve its environmental enforcement, but rather
merely needs to maintain its enforcement policies at
the same level as they existed at the time it signed the
Agreement. On the other hand, the sole reason that the
United States wanted to secure Mexico's approval of
the Agreement was because it believed that Mexico's
levels of environmental enforcement were unacceptable. n95
Thus, a clarification of acceptable
levels of enforcement is not at once discernible on the
basis of the countries' expectations at the time they
signed the Agreement.

Alternatively, the Commission could interpret "failure
to effectively enforce" to mean that a violating country
failed to meet the highest standard set by the NAFTA
countries. In such a case, only a level of enforcement
equivalent to that of the United States or Canada would
be justified. This would require further interpretation
because Canada may be more strict in some areas,
while the United States may be more strict in others.
Setting such a high level of environmental enforcement
would also create a nearly impossible task for Mexico
to achieve. n96

In interpreting the "failure to effectively enforce"
 provision, it is also significant to note that the United
States does not always effectively enforce its own
environmental laws. For instance, both the Bush and
the Clinton Administrations have failed to comply with
a statutory requirement to submit a report comparing
air quality standards among major U.S. trading
partners. n97 Thus, it appears that the United States
itself might be unable to withstand a very strict
application of the "failure to effectively enforce"
standard to its environmental enforcement record.

A more skeptical view of the Agreement is that the
United States had no intention of procuring
improvements in Mexico's environmental enforcement
efforts at the time the Agreement was conceived.
Under this view, the Agreement was merely a ruse to
obtain Congressional approval for NAFTA. In carrying
out the ruse, the NAFTA countries entered into an
international agreement that was intentionally
unenforceable because of its [*454] ambiguous terms.

This author contends that while a plain reading of the
Agreement precludes an objective determination of the
meaning of "failure to effectively enforce," the
Agreement remains feasible and meaningful. This view
presupposes that neither Mexico nor the United States
believed that Mexico was in compliance with the
Agreement at the time that the parties enacted it, but
that the NAFTA countries thereby tacitly agreed that
Mexico would improve the enforcement of its
environmental laws. It has been suggested that such a
"just do your best" standard contradicts both the
principle that the countries owe under the Agreement
and the environmentally sound competitiveness
underlying the dispute settlement process. n98

However, the countries did not agree to a "just do your
best" standard--such a malleable standard would
preclude the establishment of any baseline of
acceptable enforcement. Rather, I contend that the
United States planned to use the Agreement and the
Commission as tools to encourage Mexico to improve
its environmental enforcement efforts. The United
States planned to bring pressing issues to the attention
of the Commission. The United States expected that
Mexican citizens, like U.S. citizens, would also
highlight other instances of their own government's
failure to enforce its environmental laws. The "failure
In 1992, Mexico began serious efforts to enforce environmental laws. Although some Mexican environmental legislation resembles U.S. laws, the Mexican government has historically failed to effectively enforce its environmental laws. Recently, Mexico has exhibited a commitment to higher environmental standards and a willingness to correct pollution problems, particularly along the Texas-Mexico border.

The centerpiece of Mexico's environmental policies is embodied in the Ecology Law which took effect on March 1, 1988. The purpose of the Ecology Law is to preserve and restore the ecological balance and to provide for environmental protection.

The Ecology Law establishes the federal government's authority to set environmental standards and has delegated to the Secretariat for Urban and Ecological Development (SEDUE) the authority to develop environmental policy, promulgate environmental regulations, review EISs and environmental license applications, enforce environmental regulations, and coordinate environmental protection efforts among federal, state, and local government agencies.

The Ecology Law requires an EIS application from anyone who wants to conduct activities within Mexican territory which may cause an environmental imbalance or may exceed the established limits or conditions. EIS applications must be filed with the replacement for the SEDUE, the Social Development Secretariat of Mexico, which determines both the potential environmental impact and adequacy of the protection proposal.

An EIS must be supported by an Environmental Impact Study, which only persons or firms duly authorized by the National Institute of Ecology can perform. The Ecology Law also provides for severe sanctions against environmental violators, and for criminal penalties for severe environmental violations.

Although the Mexican government has established over 5000 health, safety, and environmental standards pursuant to the Ecology Law, limited public notification and lack of procedure to ensure private sector participation have resulted in a vague system of establishing standards and technical regulations.

Although the Commission proves to be accessible to private groups and effectively processes citizen submissions and enforces its determinations, the Commission may be the institutional force which ensures that Mexico improves its environmental law enforcement and minimizes the detrimental impact on North America's environment by NAFTA-induced economic growth.

B. Federalism's Effect on Environmental Enforcement

The Ecology Law is the catalyst for the current trend towards the decentralization of environmental authority from the Mexican federal government to state and local governments. In particular, state and local governments are gaining greater responsibility concerning environmental policymaking and enforcement. The Ecology Law covers matters of national but not strictly federal nature, so they are subject to state and local governments' jurisdiction.

This dissipation of the power to enforce the environmental laws may make it more difficult for the Commission to determine an objective standard for "failure to effectively enforce." Whether the laws are being "effectively enforced" may turn on whether the Commission examines the enforcement policy as a whole or the enforcement policy in a particular region.
VI. THE ENVIRONMENTAL IMPACT STATEMENT

The EIS supporters claim the EIS is a proven technique which provides a process for institutionalizing foresight that avoids or, at least, minimizes the unanticipated adverse effects of industrial growth.

n121 In any event, the EIS is a common approach both in the United States and internationally. n122 While its essential structure is substantially the same throughout the world, the EIS is flexible and has been adopted successfully to operate within many different cultural, political, and socioeconomic arenas. n123 The EIS is increasingly gaining acceptance as a decisionmaking technique. n124

The EIS provides citizens with an opportunity to be heard and to participate in decisionmaking that affects their environment. n125 Supporters of the EIS process claim it is demonstrably effective in compiling environmental data for decisionmakers. n126 [*459] The EIS works best when an independent authority is available to oversee the process. n127 Under the National Environmental Policy Act (NEPA), for example, the U.S. courts provide this oversight through judicial review. n128 Environmental issues that were unanticipated in the process of project prePtion are often identified during the prePtion of an EIS before unintended damage occurs. n129 In sum, the EIS is a potentially useful mechanism for preventing industrial environmental damage which both the Agreement and the Ecology Law respect. n130

VI. THE COZUMEL PIER SUBMISSION

A. Procedural History

On January 18, 1996, three Mexican NGOs presented the Secretariat with a submission under Article 14 of the Agreement. n131 On February 8, 1996, the Secretariat requested a response from Mexico. n132 and the Mexican government responded to the submission on March 27, 1996. n133

B. The Submission

The Submitters allege that Mexican environmental authorities are failing to effectively enforce environmental law by ignoring the EIS requirement in connection with the construction and operation of a port terminal and related works located in Cozumel, Quintana Roo. n134 The Submitters contend that the project contravenes the language and intent of the 1988 Ecology Law. n135 They further assert that the concessionaire failed to [*460] comply with Subpart (e) of Condition Five contained in the Port Terminal Concession issued by the Secretary of Communication and Transportation on July 22, 1993. Condition Five provides that the concessionaire "must present to the Secretary the Executive Project for undertaking the works, containing the following information: (e) the departmentally-reviewed [EIS] respecting the construction and operation of the terminal." n136 The Submitters note that Article 2, Part IV of the Ley de Puertos (Law of Ports) governing the concession defines the terminal as: "the facilities established in or outside of a port, consisting of works, installations and surfaces, including off-shore, which allow for the integral operation of the port in accordance with its intended uses." n137 The Submitters conclude that Mexican environmental authorities have required the concessionaire only to submit an EIS for the construction of the pier at Cozumel rather than requiring for the totality of related on-shore port terminal facilities, including a passenger building, access road, and parking lot. n138

C. Summary of Mexico's Response

Mexico responded by raising procedural issues concerning the Secretariat's decision both to accept the submission and to request a response from Mexico. In addition, it also disputes the Submitters' other legal contentions. n139 Mexico began by asserting that the matters raised in the submission are based on acts which took place prior to the enactment of the Agreement. n140 Mexico then contended that Article 14(1) limits the scope of inquiry to allegations that a Party "is failing" to effectively enforce its environmental law. n141 Because the statutory language is phrased in present tense, Mexico asserts that the Agreement does not apply to any instances of failure to enforce environmental laws that occurred in the past. In sum, Mexico considers the matters which the Submitters raise to be beyond the scope of [*461] Article 14 and that the language of Article 14 does not permit the Agreement to be applied retroactively. n142

Mexico also argues that the Submitters failed to provide reliable evidence that demonstrates the character of the organizations they purport to represent. n143 Mexico further contends that the Submitters failed to demonstrate that their organizations have suffered direct harm as a consequence of the acts alleged in the submission. n144 Mexico additionally asserts the Submitters have not exhausted remedies available under Mexican law and that the submission does not further the objectives of the Agreement.

In considering the allegations raised in the submission, Mexico states that the on-shore activities represent distinct projects which need not be evaluated contemporaneously with the construction of the pier, and that the construction and operation of the pier meets all applicable EIS requirements.
asserts that in August of 1990, the authorities reviewed an EIS denominated *Muelle de Cruceros en Cozumel, Quintana Roo* (Cruise Ship Pier, Cozumel, Quintana Roo). n146 Additionally, Mexico notes that the Secretary of Communication and Transportation (SCT) "only has authorized the initiation of works relating to the pier, and that the other works referenced in the Concession will be reviewed by environmental authorities upon authorization by the SCT." n147 Mexico maintains that the Concession is not integral, or multi-activity based, in character and that the environmental authorities will review the EISs for any additional works only after these initial works are authorized by SCT. n148

Mexico also responds that the requirement for the approval of an EIS in the Concession for the port terminal is "subject to various conditions established in the same Concession, and that some of these conditions are conditions precedent to the EIS requirement. [*462] as in the case of Condition One." n149 In other words, Mexico asserts that Condition Five is subject to the prior fulfillment of Condition One of the concession and that Condition One has not yet been fulfilled.

Mexico questions the relevance of the second paragraph of Article 28 of the Ecology Law, since the works at the Concession site do not consider the "use of natural resources" as those terms are employed in the law. n150 Mexico observes that the reference to "natural resources" in the second paragraph of Article 28 refers to "those works or activities which utilize animals, forest resources, aquifers or the subsurface as necessary raw materials, or which propose to directly extract such resources." n151

D. Secretariat Observations

1. Jurisdiction and Scope of Article 14

The Secretariat agreed in principle with the Mexican government that the Agreement did not have a retroactive effect. n152 The Agreement Article 47 indicates that the countries intended the Agreement to take effect on January 1, 1994. n153 The Secretariat could not discern any intentions, express or implied, conferring retroactive effect on the operation of the Agreement's Article 14. n154 In any case, the events or acts concluded prior to January 1, 1994, may create conditions or situations that give rise to current enforcement obligations. n155 It follows that certain aspects of these conditions or situations may be relevant when considering an allegation of a present, continuing failure to enforce environmental law. n156 The Vienna Convention on the Law of Treaties provides some basis for Mexico's assertion that the [*463] Agreement should not have retroactive effect.

In light of the possibility that a present duty to enforce may originate from, in the language of the Vienna Convention, a situation which has not ceased to exist, the Secretariat found that the further study of this matter does not constitute retroactive application of the Agreement, nor would such study contravene the language of Article 14 of the Agreement. n160

2. Articles 14(1) and 14(2)

Article 14(1) of the Agreement establishes threshold requirements for consideration of a submission by the Secretariat. n161 Article 14(2) sets forth criteria to guide the Secretariat in determining whether the submission merits requesting a response from the Party. n162 The Secretariat concluded that the Submitters complied with the procedural requirements of Article 14(1). n163 The Secretariat considered that under the circumstances the Submitters attempted to pursue local remedies, primarily by availing themselves of the *denuncia popular* (public [*464] denunciation) administrative procedure. n164

In considering harm, the Secretariat noted the importance and character of the resource in question—a portion of the magnificent Paradise Coral Reef located in the Caribbean waters of Quintana Roo. n165 While the Secretariat recognized that the Submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources brings the Submitters within the spirit and intent of Article 14 of the Agreement. n166 The Secretariat concluded, despite the complexity of the issues raised in the submission, that the further study of this matter would substantially promote the objectives of the Agreement. n167

E. Secretariat's Recommendations to Council

In accordance with Article 15(1), and considering the possibility of a present failure to effectively enforce environmental law, the Secretariat recommended to Council that a factual record be prepared. n168 The *prePtion* of a factual record will shed light on both the Submitters' allegations of nonenforcement and the government of Mexico's important contentions in this matter. n169 The Secretariat states that the *prePtion* of a factual record in this matter will promote the
A factual record will consider all of the information relevant to the issue of whether the Mexican environmental authorities' conduct in not requiring the submission of an EIS on the totality of works contemplated in the Cozumel Port Terminal project constitutes a failure to enforce existing law. These considerations, for the most part, turn on facts relating to the definition of a "port terminal" under the Law of Ports and the relevance of this issue to the matter under consideration, the extent to which the project or projects have been "authorized," and the facts relative to the documentation generated after January 1, 1994.

The Secretariat does not recommend that the Commission examine acts or conduct, which occurred prior to the entering into force of the Agreement, for the purposes of evaluating any alleged failures to enforce law at that time, including, for example, the EIS prepared in 1990 for the Cozumel pier. The Agreement does not use the term "standing," but rather establishes two principles for the Secretariat to employ in determining whether to compile a factual record. First, the Agreement allows citizens who reside in the offending nation's territory to institute an action with the Secretariat. In addition, the Agreement states that the Secretariat should be guided by whether the submission alleges harm and furthers the goals of the Agreement. In Cozumel, the Submitters are organizations in Mexico and have alleged harm to the Paradise Coral Reef as a result of the construction on Cozumel, and thus, the Submitters appear to have satisfied these requirements. The Agreement, however, provides Mexican citizens with the amount of access to the courts which Mexico's domestic law provides. Hence, only those persons with a legally recognized interest under Mexico's laws have standing to make a submission against Mexico to the Commission. Since Mexican citizens cannot bring a suit unless they can prove direct injury and the Agreement only gives citizens the access that they would have in their native court systems, the Agreement does not appear to give Mexican citizens standing to file citizen submission if they cannot show direct injury to themselves. The Mexican Constitution itself appears to present legal obstacles to the ability of NGOs to sustain citizen suits. The Mexican Constitution uses the term "injured party" in cases in which an individual sues the government. Mexican cases define an "injured party" as one "who suffers a direct lesion in their legal interest, in their person or in their patrimony, by any law or act of authority." The Mexican Supreme Court of Justice has stated that its country's legal system "does not accept a citizen suit system," where the individual has not suffered a direct injury. In sum, both Mexican case law and Constitution appear to prohibit citizen suits due to the requirement that private parties bringing actions against the government must demonstrate that they have been directly injured.

The public denunciation may prove to be a more successful method for the Submitters, and NGOs generally, to establish standing. The public denunciation, which the Ecology Law introduced into the Mexican legal system, is similar to the U.S. environmental citizen suit in that it provides Mexican citizens with the opportunity to inform the appropriate governmental authority of any act or omission which violates provisions of the Ecology Law or other environmental regulations. The power to inform the government is, of course, not equivalent to the right to sue because the government can simply ignore the citizen's information. The right to make a public denunciation, however, may be sufficient to create standing for the Submitters and NGOs. The structure of the citizen access provision of the Agreement may actually share more procedural similarities with the Mexican public denunciation than with the U.S. citizen suits. The essence of the Agreement is that citizens may make submissions, but not obtain damages. Both proceedings address failure to enforce, but do not appear to require that the citizens show a direct injury in order to have standing. Thus, the public denunciation appears to satisfy the Agreement's requirement that the submitters reside in the offending nation's territory and alleges harm while furthering the Agreement's goals, thus creating standing for Mexican citizens who wish to present submissions to the Commission. In Cozumel, the Mexican government argues that the NGOs have not alleged any particularized harm. If the Commission accepts this argument, and summarily dismisses the case on the procedural ground of standing, it will deal a deadly blow to future citizens' submissions under the Agreement. The Agreement provides for neither attorney's fees nor
damages for the injured party. Indeed, while the Commission may assess fines, the value of the fines would be primarily symbolic. Thus, the Agreement's citizen submission process may discourage private citizen claims because the process allows citizens to make submissions, but does not provide citizens with any incentive to make them because neither attorney fees nor damages will be awarded. Therefore, unless the injured party is wealthy and willing to pursue the claim on principle alone, no one except a citizen's group (which would probably have no direct injury) could present a submission to the Commission. n185

[*468] B. Exhausting Domestic Legal Options

In Cozumel, the Mexican government also argues that the Submitters’ claim—that the Mexican government is not enforcing the Ecology Law’s EIS requirement—is one which the Submitters have the legal right to bring in the Mexican courts to raise the same issues and attempt to obtain a remedy. n186 However, by presenting the submission to the Commission, the Submitters have already brought the matter to the Mexican government’s attention. The Mexican government presumably reviewed the matter in the process of responding to the Commission. The Mexican government to date, however, has chosen not to remedy the situation. Thus, it is difficult to perceive any justification for the view that the Mexican government’s reaction would be any different if the matter were processed in the Mexican court system. n187 One rationale for including the “failure to enforce” provision in the Agreement is to encourage citizens to spotlight a country’s practice of failure to enforce environmental laws which are prevalent throughout that country. Further, it is far from clear that the Submitters could bring a case in a Mexican court which would address the legal issues which arise in Cozumel. Indeed, Mexico asserts that the Submitters do not have standing to sue under Mexican law. Thus, the Mexican government’s argument that the Submitters do not have standing is a strong refutation to the argument that Submitters should file a claim in Mexican court. n188

C. Sovereignty

The Agreement’s critics suggest that an international body which scrutinizes a country’s performance in enforcing its own laws leads to some potentially perplexing problems. First, an international entity which attempts to evaluate another country’s laws and determine whether they are being sufficiently enforced may encounter difficulty in interpretation and judgment; however, this argument is not particularly powerful. Since most of Mexico’s environmental laws were patterned after U.S. laws that now have some precedent behind them, the Commission’s task to evaluate failure to effectively enforce will be easier than these critics suggest.

Second, the critics suggest that the country’s representative, from whom the other Commission members may seek guidance, may have a strong political interest in the outcome and will not necessarily contribute impartial legal input. An alternative explanation is that, by putting the Commission on a short political leash, the countries have made themselves fully accountable for the successes and the failures of the Commission. n189

Third, the Agreement provision that bestows NGOs with the right to present submissions against a country which is failing to enforce its laws was apparently drafted in part with the assumption that it would be less intrusive to national sovereignty if the focus was on the country’s own laws instead of an agreed upon international standard. Instead, the countries have created an international entity which examines the enforcement and the laws of the country in question to determine whether the country is effectively enforcing its environmental laws. The critics argue that in practice this may prove to be more intrusive than establishing a standard for all of the countries to maintain. By creating a system which appears desirable because of its flexibility, the countries have chosen to defer the task of setting environmental standards to a later time. The results of submissions to the Commission may shape Mexico’s enforcement priorities. n190 This fear will probably not be actualized. Cozumel is the first of only two submissions regarding Mexico to date. n191 Unless there is an enormous change in this trend, there will not be enough Commission decisions to impact Mexico’s overall environmental enforcement.

Further, the problem of defining and evaluating “effective enforcement” has not arisen in Cozumel thus far, rather, the Secretariat in its recommendation adroitly addressed the few issues involving Mexican law which have arisen, principally in its review of the Ecology Law.

D. Procedural Obstacles

Some commentators have stated that the Agreement’s dispute resolution structure contains many procedural obstacles for the private citizen or NGO that brings a claim that a country is failing to enforce its environmental laws. n192 As in all NGO submissions to the Commission, the Submitters had to overcome several procedural impediments to get a record submitted to the Council. First, the Submitters had to persuade the Secretariat that the submission deserved to be investigated. n193 Second, the submission had to appear to be aimed at promoting enforcement rather than harassing industry. n194
had to first seek domestic remedies. n195 Fourth, the Submitters had to convince at least two-thirds of the Council to direct the Secretariat to compile a Factual Record on the submission. n196 In Cozumel, the Submitters successfully cleared all of these hurdles.

Another hurdle can be found in the fact that a submitter's right to present a submission to the Secretariat is limited in that the best possible result is that the Secretariat will compile and submit a factual record to the Council. The Secretariat has demonstrated in its disposition of Cozumel that it is willing, in compelling circumstances, to compile a factual record to submit to the Council. In addition, a two-thirds vote of the Council is required to make the factual record public. Without this vote, not even the submitter will have access to the factual record. The Council was intended to be an independent entity which serves an important duty to the NAFTA countries. Thus, it stands to reason that in instances where the Secretariat finds that a [*471] Submitter's claims are sufficiently important to compel the compilation of a factual record, that the Council will make its evaluation public, or proffer some very good reasons to explain its decision not to do so.

E. Retroactivity

The retroactivity issue is one which may become more easily resolved with the passage of time and as fewer citizen submissions are presented which involve events that occurred prior to the enactment of the Agreement. In the interim, however, the retroactivity issue may arise in many citizen submissions. Retroactivity appears to be an issue which is relatively easy to resolve. As the Secretariat correctly observes, events or acts that occurred "prior to January 1, 1994, may create conditions for situation...which give rise to current enforcement obligations." n197

The Secretariat's resolution of the retroactivity issue demonstrates a sensitivity to the particular facts of Cozumel. The retroactivity issue could have provided the Secretariat with a convenient way to resolve the matter in favor of the Mexican government. The Secretariat chose not to follow this path, but rather, permitted review of the submission and compilation of the factual record with reference to the events that occurred after January 1, 1994, without unfairly penalizing the Mexican government for any events which occurred prior to January 1, 1994.

F. Deferring to the Country's Rational Allocation Of Resources

The Commission can grant an exception for a country's failure to "effectively enforce" if the failure to comply "reflects a reasonable exercise of discretion or results from bona fide decisions to allocate resources...determined to have higher priorities." n198 If a country asserts that its failure to enforce is a reasonable exercise of its discretion, then a challenge may be inappropriate. Furthermore, the offending country may avoid a challenge if it demonstrates that its resources are better used for other interests. [*472] This exception for a "bona fide resource allocation decision" n199 was seen as one of Mexico's strongest arguments for failing to enforce its environmental laws. n200 To date, however, Mexico has not raised this exception as a defense in Cozumel.

Another important nuance in the "failure to effectively enforce" determination involves recent changes in the severity of the Ecology Law's EIS requirement. Mexico's Environmental Ministry published new rules, appearing on October 23, 1995, in the Diario Oficial, which allow construction companies to file simplified "preventive reports" rather than an EIS in an effort to eliminate bureaucratic obstacles to economic growth. n201 This change is apparently in response to companies which have complained that the EIS requirement tends to punish those companies which comply with the requirement, while companies which do not comply run only a minimal risk of sanctions because enforcement is so remiss. n202 The Mexican government acknowledged the previous policy's failure by stating that the rule changes were part of "a program of deregulation and administrative simplification" which was designed to improve efficiency. n203 According to official estimates, an average of 1200 EISs are submitted each year, creating a backlog of projects and year-long delays in the approval process. n204

It clearly appears from these facts that the Mexican government is failing to effectively enforce the Ecology Law's EIS requirement. First, the Mexican government has acknowledged that the EIS program is a failure. n205 Second, the official estimates that a mere 1200 EISs are filed each year indicate that many companies which should be filing EISs are not doing so. The perception of the companies that comply with the EIS requirement also compel this conclusion.

[*473] The maquiladoras are another example of the Mexican government's failure to require the filing of EISs. Despite awareness of the pollution problem which the maquiladoras are causing, none of the six U.S.-owned maquiladoras that were investigated had prepared an EIS as required by Mexican law. n206 In sum, both the lack of EIS filings for construction projects and the maquiladoras tend to demonstrate that Mexico is not effectively enforcing the Ecology Law's EIS requirement.

An important aspect of Cozumel as it will shape future submissions is the evolving definition of "failure to
environmental law enforcement." The Submitters, the Mexican government, nor the Secretariat have indicated that the phrase should be interpreted in a narrow sense so as to require the Submitters to demonstrate a pattern of enforcement violations. n207 Indeed, the Submission, Response, and Recommendation make reference to the particular facts in Cozumel. It is more difficult to prove the occurrence of a single event than it is to prove a pattern of events. Thus, if Cozumel stands for the proposition that the submitter merely needs to prove the occurrence of a single event, NGOs in Mexico will have acquired a considerable amount of influence over Mexican environmental enforcement. If used in a constructive way, Mexican NGOs will be able to highlight Mexico's most pressing problems and may be able to receive some relief.

VIII. A VIEW TOWARD THE FUTURE
   A. Is The Focus on Enforcement Proper?

Some critics of the Agreement make a two-fold argument that the Agreement places undue emphasis on the enforcement of environmental laws. First, the critics claim that it is unrealistic to expect Mexico to be able to implement an environmental enforcement program compatible to that of the United States [*474] due to the disparities in wealth between the two countries. n208 Second, the critics assert that a powerful environmental enforcement program like that in the United States may not be the most advantageous allocation of Mexico's modest resources n209 because environmental enforcement is expensive and will not, in and of itself, improve Mexico's environment or human health. n210 Instead, enforcement only indirectly improves the environment and human health if enforcement fosters compliance. n211 The critics contend that overly emphasizing enforcement may lead to the misallocation of Mexico's scarce environmental resources. n212 The critics also argue that Mexico must first develop a basic environmental infrastructure before environmental enforcement expenditures can yield marginal environmental benefits.

First, this argument presupposes that enforcement is expensive, but does not lead to improvement. This argument ignores the deterrent value of enforcement. If environmental laws are rigorously enforced to the extent that they deter environmental damage, emphasizing enforcement may prove to be more effective than emphasizing infrastructure.

Second, the Agreement's enforcement provisions provide a strong refutation to these arguments. The Agreement gives the Council the power to spend any imposed fine "to improve the environment or environmental law enforcement" in the punished country. n213 At first glance this appears to be a peculiar form of punishment because the money never leaves the borders of the punished country. However, this provision may work to allow the Commission to highlight enforcement problems but not infringe on the country's sovereignty. Provided that the Commission directs the money to be spent in a rational manner, this provision may advance environmental improvement first, in principle, by embarrassing both the country that does not enforce its laws and the private party which breaks the laws and, second, in deed, by directing funds towards improving the environment in the punished country.

[*475] B. Potential Consequences Following the Resolution of Cozumel

Cozumel will prove to be important because, if the Commission finds that Mexico is failing to effectively enforce the EIS requirement and decides to assess a fine, the principle of abiding by the Agreement will be the sole motivation for the United States and Canada to support the Commission's decision. The issues raised in Cozumel have little to do with NAFTA's primary subject--free trade among the United States, Canada, and Mexico. The subject of Cozumel is also local in nature. There is little indication that any occurrences complained of in Cozumel will result in any adverse environmental impact outside of Mexico. In addition, the conduct about which the Submitters are complaining--the construction--may not be sufficient to outrage the United States or Canada so as to compel either country to take decisive action, diplomatic or otherwise. The Submitters do not contend that the construction is creating any health or safety hazards. Instead, the complaint is essentially that in constructing the port to develop its tourism industry, Mexico is destroying one natural resource that makes the area attractive to tourism in the first place--namely, the Paradise Coral Reef. In this light, it appears unlikely that the United States or Canada would impose sanctions upon Mexico as a result of Cozumel. Thus, the United States and Canada will be acting primarily on principle if either country takes any action in procuring Mexico's obedience to the terms of the Agreement should Mexico prove to be recalcitrant.

If the Commission finds that Mexico is not enforcing its own regulations, Mexico has three options. One option is for Mexico to do nothing; another is for Mexico to change or repeal its current laws so that businesses can more easily comply with them. Exercising these options may lead to domestic political fallout and possibly a response by the other two NAFTA countries. These are extreme options, and Mexico will probably be hesitant to choose either of
these options because they could cause an equally extreme reaction from the United States and Canada.

Another option is for Mexico to attempt to enforce its own laws and regulations more vigorously. Mexico may be reluctant to pursue such enforcement out of fear that international businesses may decide against investing or locating in Mexico. However, access to the U.S. market and the other benefits of NAFTA membership will probably prove to be more important to investment decisions, and, in the end, improvements in environmental enforcement will not deter a great deal of foreign investment.

IX. CONCLUSION

The critics may be setting unrealistic standards for the Agreement and the Commission. The NAFTA countries could not have enacted any international agreement that would lead to Mexico's becoming an environmental panacea immediately. The environmentalists' fears of industrial flight from the United States to Mexican pollution havens demonstrate that a primary purpose of the Agreement was to ensure that NAFTA-induced growth would not cause an equivalent decline in the Mexican environment. If the Agreement is effective in preventing or eliminating the decline in the Mexican environment that accompanies NAFTA's industrial growth, then the Agreement is serving this purpose. In other words, the Agreement need not lead to a Mexican environmental panacea, but rather it merely needs to lead to environmental improvements that correspond to the industrial growth NAFTA caused in order to be declared a success under the standard that the environmentalists set forth.

The critics' argument that the phrase "failure to effectively enforce" will prove to be ineffective solely because of its imprecision is also unpersuasive. In U.S. jurisprudence there are many legal standards that preclude a precise meaning. The Agreement was enacted with the knowledge that changing conditions will often render ineffective laws that contain overly-specific language. The NAFTA countries chose to postpone the resolution of some difficult decisions and to defer these decisions to the Commission for its evaluation. This choice merely underscores the importance of the Commission's function as both factfinder and legal analyst, but does not necessarily preclude the Commission from evaluating submissions effectively. The Commission in Cozumel thoughtfully analyzed the procedural matters, which should give observers a basis for cautious optimism.

While NAFTA includes general references to the commitment of its members to the environment, it neither creates substantive obligations nor provides a dispute resolution process for environmental matters. Thus, the countries cannot look to NAFTA to provide guidance in resolving environmental disputes among themselves. Instead, the Agreement addresses such disputes. The fact that a violation of the Agreement does not lead to expulsion from NAFTA may not prove to be particularly important. The Agreement also contains a monetary assessment provision that is significant because of its symbolic power and because it promotes environmental improvements. While the threat that NAFTA membership could be taken away could have been useful in giving the Agreement greater strength in enforcement, it is not necessary and, indeed, would contradict NAFTA's primary importance of promoting free trade as taking away NAFTA's benefits would be tantamount to re-instituting the trade barriers which existed prior to its enactment.

The Commission's analysis of the standing and retroactivity issues is of primary importance in its disposition of Cozumel. Mexican citizens do not enjoy considerable access to the Mexican courts to challenge government actions and numerous obstacles exist for Mexico's NGOs. In spite of these legal obstacles, the Commission did not require the Submitters to show direct injury to acquire standing. Thus, it appears that the Commission broadened the scope of standing for the Submitters and gave the Submitters even more leeway than the U.S. courts have afforded U.S. NGOs. The Commission's standing decision is encouraging for the prospects of NGOs' future submission to the Commission. The Commission's refusal to dismiss the submission on the ground of failure to allege direct injury will probably encourage other Mexican NGOs to file submissions.

The Commission's treatment of the retroactivity issue is also very encouraging for future NGO submissions. Because the Agreement's enactment is still part of the recent past, the retroactivity issue may present itself in other submissions in the near future. It was, therefore, extremely important that the Commission resolve the issue in a manner which did not unnecessarily discourage future submissions. The Commission should not allow a country to be excused from punishment for lax enforcement solely because some events occurred prior to the Agreement's enactment. Additionally, the Vienna Convention on the Law of Treaties dictates that the Commission should not evaluate events that occurred prior to the enactment of the Agreement. The Commission was conscious of this dilemma and allowed the submission to proceed without evaluating any events that occurred prior to the Agreement's enactment. In so doing, the Commission was able to satisfy both concerns.
Since Cozumel has not yet been decided in its entirety, a final analysis is impossible at this point. However, it is apparent at this preliminary stage of the proceeding that many of the concerns of environmentalists and other critics of the Agreement have not been actualized in this particular case. In particular, the Commission has not given the Agreement a self-defeating, draconian interpretation, precluding objective substantive analysis for serious citizens' environmental claims. Instead, the nature of the proceedings to date indicate that the Agreement's citizen petition process will prove to be a workable mechanism. None of the environmentalists and critics' concerns and fears have precluded the Commission from proceeding to a conclusion on the merits despite the difficult legal and political setting in which Cozumel arose.

FOOTNOTE-1:

n1 Recommendation of the Secretariat to Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation, Submission No. SEM-96-001 (Jan. 18, 1996) [hereinafter Recommendation]. Information on the Commission and its activities can be obtained on the Internet at http://www.cec.org [hereinafter Commission Web Site].


n4 Id. art. 14.

n5 The Secretariat, in deciding whether it would be proper to compile a factual record, reviews the submission, and, if the submission passes several procedural tests, asks the Council for approval to compile a factual record. Id. arts. 14 and 15.

n6 Cozumel raises issues which are important in and of themselves. In addition, as the Commission's first major submission, the resolution of Cozumel should have important precedential value and may set the tone for future submissions to the Commission.

n7 The Mexican citizens groups which presented the submission are the Mexican Center for Environmental Law (Centro Mexicano de Derecho Ambiental, A.C.), the International Group of 100 (Grupo de los Cien Internacional, A.C.), and the Natural Resources Protection Committee (Comite P la Proteccion de los Recursos Naturales, A.C.). Recommendation, supra note 1, at 1.

n8 The Ecology Law requires that an Environmental Impact Statement (EIS) be filed with the Secretaria de Desarrollo Social (Social Development Secretariat of Mexico or SEDESL). For a more detailed discussion on the Ecology Law's EIS requirement, see infra Part III.

n9 Recommendation, supra note 1, at 3.

n10 Id. at 4.

n11 In particular, Mexico did not argue that the decision not to require the filing of an EIS was due to the reasonable allocation of its resources. See infra Part VII.F.

n12 Victor Lichtinger, Executive Director, North American Commission for Environmental Cooperation stated: The Agreement and the Commission are looked to with a great sense of expectation by a wide range of communities of stakeholders within, and beyond, North America. In practice, the extent to which these opportunities are realized and the particular directions they take will ultimately be defined by the specific elements of the legal agreement itself and the work of the Commission and their governments, in elaborating and implementing the mandate of the agreement. This is particularly the case as many of the legal elements embodied in the Agreement are novel and without precedent and will therefore be subject to ongoing interpretation in the context of evolving environmental concerns of North Americans. Victor Lichtinger, Executive Director, North American Commission for Environmental Cooperation, Foreword to PIERRE MARC JOHNSON & ANDRE BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND


n14 Id. at 68.


n17 Kublicki, supra note 13, at 60-61. Whereas proponents of NAFTA perceived the Agreement as a catalyst of economic growth and an indirect means to better environmental protection, NAFTA's opponents saw it as insufficient to protect the environment from the industrial growth which NAFTA was predicted to cause. Id.

n18 Raustiala, supra note 16, at 35.

n19 Id. at 34.

n20 Id.


n22 Kevin W. Patton, Dispute Resolution Under the North American Commission on Environmental Cooperation, 5 DUKE J. COMP. & INT'L L. 87, 92 (1994), citing Stewart Baker, After the NAFTA, 27 INT'L LAW. 765, 769 (1993). The opposition to NAFTA within the U.S. environmental community was so strong that several nonprofit environmental groups brought suit against the Office of the U.S. Trade Representative (OTR) alleging that the OTR violated the National Environmental Policy Act (NEPA) procedural requirements by failing to provide an EIS in connection with the ongoing NAFTA negotiations. Public Citizen v. Office of the U.S. Trade Representative, 970 F.2d 916, 917 (D.C. Cir. 1992). The U.S. Court of Appeals for the District of Columbia affirmed the district court's dismissal of the case. Id. at 923. The Court of Appeals held that the OTR's failure to prepare an EIS for NAFTA was not judicially reviewable because OTR's petition and submission of NAFTA to the President was not a "final agency action" subject to NEPA's EIS requirement. Id.

Similarly, the National Association of Ecological Organizations in Mexico City filed a complaint with the Mexican federal attorney general for the environment, demanding that Mexico be required to prepare an EIS before it ratified NAFTA. Mexican Ecology Groups File Complaint to Force Impact Statement on NAFTA Accord, 16 Int'l Env't Rep. (BNA) 646 (1993). The complaint alleged that NAFTA will lead to industrial growth which could damage Mexico's environment. Id. The attorney general, however, rejected the complaint, stating that while the Ecology Law requires EISs for specific projects or activities, it does not apply to trade agreements. Mexican Official Rejects Complaint Calling for Environmental Impact Statement, 16 Int'l Env't Rep. (BNA) 671 (1993). The organization had the right to appeal the attorney general's decision, but apparently the organization has not successfully appealed an environmental complaint in the past and did not choose to do so. Id.

Two Agreement provisions which ensure each country's national sovereignty support the environmentalists' fears. The Agreement affirms the "right of each [country] to establish its own levels of domestic environmental protection" and the right of each country to "exploit their own resources pursuant to their own environmental and development policies." Agreement, supra note 3, art. 3. Other factors, however, may prevent this fear from becoming a reality. In particular, many members of the American public, whether impassioned "environmentalists" or not, would refuse to allow U.S. laws to sink to the level of current Mexican law enforcement. In addition, there are already economic incentives for the United States to relax its environmental (and labor)
standards in order to more effectively compete in the world market, but the United States has not chosen to do so.

n23 The environmental problems included "fresh water supply, industrial and municipal wastewater, air pollution, municipal solid waste, and industrial hazardous and nonhazardous waste." Alberto A. Bustani & Patrick W. Mackay, NAFTA: Reflections on Environmental Issues During the First Year, 12 ARIZ. J. INT'L & COMP. L. 543, 545 (1995).

n24 For a general discussion of the maquiladoras, see L. Gray Sanders, Maquiladoras and the Yucatan, 5 FLA. INT'L L.J. 525 (1990); Elizabeth C. Rose, Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras, 23 INT'L LAW. 223 (1989); see also Michael D. Madnick, NAFTA: A Catalyst for Environmental Change in Mexico, 11 PACE ENVTL. L. REV. 365, 373 (1993). The experience of the rapid growth of the maquiladoras and the concomitant rapid decline in environmental standards in their surroundings may be the best argument of those who fear that American jobs are being lost as a result of NAFTA. Id. at 374.

n25 Bustani & Mackay, supra note 23, at 545.

n26 Kublicki, supra note 13, at 92.


n28 In 1989, only six percent of maquiladoras adhere to the government license requirements. At the time, SEDUE, now replaced by the Social Development Secretariat of Mexico (SEDESOL), did not maintain a list of maquiladoras that produced toxic wastes, effluents, or air pollutants. By 1992, however, over sixty-seven percent of the maquiladoras had been inspected and over fifty-four percent of maquiladoras had begun to comply. In addition, twenty-two maquiladoras were closed permanently in 1992. Kublicki, supra note 13, at 91-92.

n29 Remarks by Governor Bill Clinton at the Student Center at North Carolina State University (Oct. 4, 1992), in NAFTA & THE ENVIRONMENT 263 (Daniel Magraw ed., 1995). Clinton stated that he would establish an environmental commission to encourage the enforcement of each country's own environmental laws. Clinton also stated that the environmental commission should have the power to provide remedies, including the power to assess money damages. Id. at 265-66.

n30 Le Priol-Vrejan, supra note 15, at 488.

n31 Id.

n32 It is clear from Clinton's statements that such supplemental environmental agreements were prerequisites to his approval of NAFTA. Remarks by Governor Bill Clinton, supra note 29, at 263.


n33 Kublicki, supra note 13, at 71.

n34 NAFTA, supra note 2, art. 901.

n35 Id. art. 104.

n36 Id. art. 1114(2). NAFTA's drafters specifically included this provision to discourage the creation of "pollution havens." DuPuis, supra note 21, at 486.

n37 DuPuis, supra note 21, at 486. Both environmental and congressional leaders criticized NAFTA's lack of any enforcement power. Id. In response to this criticism, President Clinton reiterated his commitment to the principle that the Agreement would guarantee that each
country enforce its own environmental laws. *Id.*


n39 Agreement, *supra* note 3, art. 1(a), (d).

n40 *Id.* art. 1(e), (f).


n42 Agreement, *supra* note 3, art. 1(g).

n43 *Id.* art. 3.

n44 *Id.*

n45 *Id.* arts. 15 and 21.

n46 *Id.* art. 14(1).

n47 *Id.*

n48 Agreement, *supra* note 3, art. 22(1). The Agreement defines a "persistent pattern" as a "sustained or recurring course of action or inaction beginning after the date of entry into force of this Agreement." *Id.* art. 45(1)(b).

n49 *Id.* art. 15.

n50 *Id.* art. 45(1)(a).

n51 *Id.* art. 45(1)(b) (emphasis in original). A two-thirds vote is required for the Council to make the factual record public. *Id.* art. 15(2). "The preparation of a factual record by the Secretariat ... shall be without prejudice to any further steps that may be taken with respect to any submission." *Id.* art. 15(3).


n53 *Id.*

n54 Philip C. Jessup, former Judge of the International Court of Justice, noted the importance of public involvement, notification, and participation in dispute resolution. He stated that "it would be folly to provide for the settlement of disputes" in the international arena without allowing for the participation of "those entitled which will be as much concerned with enforcement of the new standards as will governments of states." Patton, *supra* note 22, at 94, citing Philip C. Jessup, *Do New Problems Need New Courts?*, 65 AM. SOC’Y INT’L L. PROC. 261, 265 (1971). But see Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (rejecting citizen suit against the United States on the ground that plaintiffs lacked standing because they could not show imminent injury).

n55 Patton, *supra* note 22, at 94. The United States created the citizen suit in the Clean Air Act, Section 304, as amended in 1970. JEFFREY G. MILLER, *ENVIRONMENTAL LAW INSTITUTE, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* 4 (1987). The citizen suit provisions which are contained in other U.S. environmental statutes closely follow the language of the Clean Air Act, Section 304. *Id.* at 7. These sections authorize "any person" to commence suit to enforce compliance with the acts against "any person" alleged to breach them or to require the government to execute a compulsory duty under the acts. *Id.*

n56 See infra note 99.

n57 Spaulding, *supra* note 52, at 1135.

n58 Agreement, *supra* note 3, arts. 10, 21, and 39.

n59 *Id.* art. 6.

n60 The seven parts of the Agreement include the following: 1) Objectives, article 1; 2) Obligations, Articles. 2-7; 3) Commission, Articles 8-19; 4) Cooperation and Provision of Information, Articles 20-21; 5) Consultation and Resolution of Disputes, Articles 22-36; 6) General Provisions, Articles 37-45; 7) Final Provisions, Articles 46-51. Agreement, *supra* note 3.

n61 *Id.* art. 2(1)(e).

n62 *Id.* art. 3. Unfortunately, the Agreement does not define "high levels"
and there is no guarantee that any of the NAFTA countries would not lower their standards. Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, 8 TEMP. INT'L & COMP. L.J. 257, 261 (1994).


n64 *Id.* art. 8(1).

n65 *Id.* art. 9(1).

n66 Agreement, *supra* note 3, art. 11(1).

n67 *Id.* art. 10(1).

n68 *Id.* art. 10(2).

n69 *Id.* art. 11(5).

n70 *Id.* art. 14.

n71 *Id.* art. 15.

n72 *Id.* art. 16(1).

n73 Agreement, *supra* note 3, art. 16(4).

n74 *Id.* art. 16(5).

n75 *Id.* art. 14.

n76 *Id.* art. 14(1)(c).

n77 *Id.* art. 14(1)(d).

n78 *Id.* art. 14(2)(e).


n80 *Id.* art. 14(2)(a).

n81 *Id.* art. 14(2)(b).

n82 *Id.* art. 14(2)(c).

n83 *Id.* art. 14(2)(d).

n84 Agreement, *supra* note 3, art. 14(3). However, in exceptional circumstances, and on notification of the Secretariat, the country may advise the Secretariat within sixty days of the delivery of the request. *Id.*

n85 *Id.* art. 15(1).

n86 *Id.* arts. 14(3)(a) and 45(3)(a).

n87 *Id.* art. 15(7).


n89 *Id.*

n90 Agreement, *supra* note 3, Annex 34(1). First, the panel will consider the duration and the pervasiveness of the country's pattern of nonenforcement. Second, the panel will consider whether the level of enforcement required by the environmental law could be reasonably expected given the country's resources. Third, the panel will consider the reasons that the country proffers for its failure to enforcement. Fourth, the panel will acknowledge the efforts made by the country to remedy its pattern of nonenforcement since the time when the final report was written. Finally, the panel will consider any other relevant factors. *Id.* at Annex 34(2)(a)-(e).

n91 *Id.* art. 5.

n92 *Id.* arts. 14(1), 22(1), and 28(3).

n93 *Id.* art. 45.

n94 Kublicki, *supra* note 13, at 112.

n95 *Id.* at 60-61. See discussion *supra* Part I.A.1. In particular, see the finding of the U.S. Accounting Office survey.

n96 Kublicki, *supra* note 13, at 60-61.

n97 Charnovitz, *supra* note 62, at 279.


Mexico enacted the Ecology Law in 1988, apparently in part to prevent further environmental degradation and in part to facilitate acceptance into NAFTA. The other main sources of Mexican environmental laws are its Constitution, the Environmental Laws and Regulations, the Ecological Technical Norms, and the International Treaties. Hector Herrera, *Mexican Environmental Legal Framework*, 2 SAN DIEGO JUSTICE J. 31 (1994). Since 1938, Mexico has signed almost all
international environmental treaties and agreements. *Id.* at 33.

n100 Herrera, *supra* note 99, at 31-32. The Ecology Law contains provisions on the following matters: "protected natural areas, national exploitation of natural elements, environmental protection, community participation, and control and safety measures and penalties." *Id.* at 32.

n101 *Id.* at 33.

n102 Kublicki, *supra* note 13, at 85. An EIS must: describe both the proposed project and its potential environmental impact; name the drafters of the documents; list the substances used in the projects; state the emissions or effluent that the project will produce; provide corporate information; describe the natural, social, and economic environment of the area; and list any applicable local land use regulations. The SEDESOL imposes special scrutiny on several kinds of projects including: construction, water projects, bridges, federal tourism developments, and projects which impact either two or more Mexican states or Mexico and a neighboring country. *Id.*

n103 *Id.*

n104 *Id.* at 85.

n105 *Id.* at 83-84.


n107 The Mexican EIS requirement is in some respects more severe than the NEPA's EIS requirement. First, both public and private works must meet the Ecology Law's EIS requirement. The NEPA, on the other hand, requires an EIS only for federal projects. The EIS in Mexico provides the sole basis for approving or rejecting a project, whereas an American EIS is purely procedural under the NEPA--at least as interpreted by the *Supreme Court,* Kleppe et al v. Sierra Club et al, 427 U.S. 390 (1976).

n108 Herrera, *supra* note 99, at 33-34. If the project is considered high risk, a Risk Study must be filed with the EIS. The Risk Study must state the risks that the project poses to the environment, as well as the technical security measures required to prevent, diminish, or control adverse effects on the environment. *Id.*

n109 A company which violates the Ecology Law may be subject to fines of twenty to twenty thousand times the minimum daily wage and the operations may be either suspended or terminated. Once these initial sanctions have been imposed, the violator must comply within thirty days or potentially face additional sanctions up to twenty thousand times the minimum wage. Further, fines for persistent violations may reach forty thousand times the minimum wage. Kublicki, *supra* note 13, at 88-89.

n110 *Id.* at 89. Criminal penalties can be imposed for crimes that endanger human health, endanger areas with dense populations, or severely damage ecosystems. Jail terms of three months to six years are available for crimes that endanger human health or severely damage ecosystems. *Id.*

n111 Kublicki, *supra* note 13, at 60-61.

n112 However, Mexico's primary motivation in passing environmental laws may have been for the United States to approve NAFTA. DuPuis, *supra* note 21, at 476.


n114 Kublicki, *supra* note 13, at 90.

n116 Id.

n117 Id.

n118 Bustani & Mackay, *supra* note 23, at 546. For instance, environmental areas such as risk assessments, environmental emergencies, and hazardous materials and wastes generally fall under federal responsibility. The states, on the other hand, generally regulate water pollution and vehicle emissions, monitor air emissions, oversee the compliance with water pollution regulations, municipal sewage systems, solid waste disposal and state wildlife reserves.


n120 Id. art. 160.


n122 Id.

n123 Id.

n124 Id.

n125 Id.

n126 Id.

n127 Robinson, *supra* note 121, at 594.

n128 Id.

n129 Id. As stated above at note 22, the response of the U.S. environmental community, fearing that Mexico would continue to be a "pollution haven" because of NAFTA, was to sue on the basis that the U.S. failed to file an EIS concerning NAFTA. It is thus ironic that the first case to reach the stage in which the Commission will compile a factual record concerns Mexico's failure to require the filing of an EIS.

n130 See Kubicki, *supra* note 13, at 71.

n131 Recommendation, *supra* note 1, at 1.

n132 Id.

n133 Id.

n134 Id.

n135 The Ecology Law provides that "performance of public or private works or activities which may cause ecological imbalance or exceed the limits and conditions provided for in the [Federal Government's] technical ecological standards and regulations must be subject to a prior authorization from the Federal Government or the state and local agencies." Ecology Law, *supra* note 99, art. 28.


n137 Id.

n138 Id.

n139 Id.

n140 Id.

n141 Id.

n142 Id.

n143 Id.

n144 Article 14(2)(a) states that the Secretariat shall be guided by whether the Submitters show direct harm as a consequence of the acts alleged in the submission. Agreement, *supra* note 3, art. 14(2)(a).


n146 Id.

n147 Id.

n148 Id.

n149 Id.


n151 Id.

n152 Indeed, finding otherwise would have contradicted the language of the Agreement. Further, it would produce an absurd result. The reason the United States wanted the Agreement was because the United States believed that Mexico was not
effectively enforcing its environmental laws. Thus, it was assumed that prior to the enactment of the Agreement that Mexico was in violation. See Raustalia, supra note 16.

n153 Agreement, supra note 3, art. 47.

n154 Recommendation, supra note 1, at 3.

n155 Id.

n156 Id.

n157 Article 28 of the Vienna Convention on the Law of Treaties states that "unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind the party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Treaty with respect to that party." Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 28, 1155 U.N.T.S. 331, 339 (1980).

n158 Recommendation, supra note 1, at 3.

n159 Id.

n160 Id.

n161 Agreement, supra note 3, art. 14.1(a), (f).

n162 In deciding whether to request a response by the country, the Secretariat looks to whether the submission alleged harm to the person or organization making the submission; whether the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of the Agreement; whether private remedies available under the country's law have been pursued; and whether the submission was drawn exclusively from mass media reports. Agreement, supra note 3, art. 14(2)(a)-(d).

n163 Recommendation, supra note 1, at 3.

n164 Id.

n165 Id.

n166 Id.

n167 Specifically, Article 1(a), (d), (f) and (g) are applicable. Article I provides that it is the objective of the Agreement to "foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations ... support the environmental goals and objectives of the NAFTA ... strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices ... [and] enhance compliance with, and enforcement of, environmental laws and regulations." Agreement, supra note 3, art. 1(a), (d), (f), (g).

n168 Recommendation, supra note 1, at 3.

n169 Id.

n170 These objectives include "enhancing compliance with, and enforcement of, environmental laws and regulations [and] strengthening cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices." Agreement, supra note 3, art. 1(g), (f).

n171 Recommendation, supra note 1, at 3.

n172 Id.

n173 Id.

n174 Id. (addressing Mexico's Response).

n175 Agreement, supra note 3, art. 14(1)(f).

n176 Id. art. 14(2)(a), (b).

n177 Recommendation, supra note 1, at 1.

n178 Agreement, supra note 3, art. 6(2). "Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party's environmental laws and regulations." Id.

n179 THE MEXICAN CONSTITUTION OF 1917 COMPARED WITH THE CONSTITUTION OF 1857, at 81 (H.N. Branch trans., 1926). The Mexican Constitution makes this prosecutorial requirement in article 107(I). Id.


n181 Id.

n182 Id.
n183 Ecology Law, supra note 99, art. 189.

n184 Recommendation, supra note 1, at 2.

n185 The citizen suit sections of the U.S. environmental legislation of the 1970s, including the Clean Air Act, were developed to remedy the government's failure to enforce. MILLER, supra note 55, at 4. Congress believed that citizens suits would either encourage government enforcement or would, at least, provide an alternative means of enforcement. Id. To further this end, the citizen suit sections allow the court to award costs, including reasonable attorney's fees, to any party. Id. at 9.

n186 Recommendation, supra note 1, at 2.

n187 In addition, no provision in the Agreement requires that the matter be brought in the country's court prior to filing with the Commission. If the matter went through the domestic courts, it is likely that the Commission would never handle any cases because, by the time the submitters exhaust their domestic remedies, the case would be moot.

n188 It is noteworthy that the Commission has previously rejected cases which were pending in domestic courts. The Secretariat, pursuant to Article 14(3)(a), recently declined to review a petition because the case was pending in the courts of another country. The Aage Tottrup Submission, Submission No. SEM-69-002 (Mar. 28, 1996), available on the Commission Web Site, supra note 1.

n189 JOHNSON & BEAULIEU, supra note 98, at 161.

n190 The Mexican government may capitulate to United States demands for improved enforcement of particular environmental laws. In this scenario, a foreign government would be shaping Mexico's domestic environmental policy. The Agreement would be the impetus for undermining the very sovereignty it was drafted to protect. See Agreement, supra note 3, art. 3.

n191 The reason for the lack of Mexican submissions may be that potential submitters are awaiting the outcome of Cozumel before they invest the resources necessary to file a submission with the Commission.

n192 Patton, supra note 22, at 112.

n193 Agreement, supra note 3, art. 14(2).

n194 Id. art. 14(1)(d).

n195 Id. art. 14(2)(b).

n196 Id. art. 15(2).

n197 Recommendation, supra note 1, at 3.

n198 Agreement, supra note 3, art. 45(1)(a).

n199 Id. art 45(1)(b).

n200 See supra text accompanying notes 50-51.

n201 These preventive reports can be as brief as a few pages and contain a much smaller range of information than the EIS which can reach more than 100 pages. Requirement for Complete Impact Studies Lifted for Companies Doing Construction, 18 Int'l Env't Rep. (BNA) 832 (1995) [hereinafter Requirement for Complete Impact Studies].


n203 Requirement for Complete Impact Studies, supra note 201.

n204 Draft Standards Would Allow Some Projects to Bypass EIS if Certain Criteria are Met, 19 Int'l Env't Rep. (BNA) 962 (1996).

n205 Requirement for Complete Impact Studies, supra note 201.


n207 This issue is not, however, completely resolved. It remains to be seen how the Secretariat will construe "failure to effectively enforce" in its compilation of the factual record.

n208 For a general discussion on the rational allocation of Mexico's resources toward the improvement of environmental
performance, see Knight, supra note 41; Kublicki, supra note 13.

n209 Knight, supra note 41, at 629.

n210 Kublicki, supra note 13, at 115.

n211 Id.

n212 Knight, supra note 41, at 620.

n213 Agreement, supra note 3, Annex 34(3).

n214 For instance, determining whether an act is reasonable is the lifeblood of torts law. Similarly, U.S. Constitutional case law has developed intricate systems for evaluating the constitutionality of certain acts even where the Constitution provides only general guidance in making such a determination.

n215 In particular, Mexico did not argue that the decision not to require the filing of an EIS was due to the reasonable allocation of its resources. See supra Part VII.F.
LEGAL MEMORANDA: MEXICO: MEXICO'S LEAD PHASE OUT PROGRAM FOR PETROLEUM PRODUCTS

SUMMARY: The Mexican federal government recognizes that a high lead content in petroleum products over the years has contributed to the severe environmental hazards that Mexico faces today. Construction of methyl tertiary butyl ether (MTBE) plants: one-hundred percent of this advance completed, four projects completed; ... It contains twelve tables which regulate the chemical compound of unleaded and leaded gasoline, as well as diesel fuel, industrial gas oil, heavy fuel oil, natural gas, liquid petroleum gas, and turbo fuel. ... As an additional effort above what is required by NOM No. 086, PEMEX is complying with the winter compromise of a thirty percent reduction in the content of lead in Nova Plus gasoline, limiting its content to a maximum of 0.2 milliliters of tetraethyl lead, in place of 0.3 that is the specification that is applicable for the rest of the year. ...

I. INTRODUCTION

The Mexican federal government recognizes that a high lead content in petroleum products over the years has contributed to the severe environmental hazards that Mexico faces today. In particular, because of Mexico City's great demographic concentration and its geographic location in a valley, the negative effects of fuel with high lead content have been augmented, leading in part to the Metropolitan Zone of Mexico City having one of the worst environmental problems in the world.

In addition to the enactment of NOM No. 086, the petroleum industry, organized through the governmental organization Petroleos Mexicanos (PEMEX), voluntarily entered into an Ecological Pact in 1991. This Ecological Pact had as its goal the production of better fuels of international quality. Specifically, the production of unleaded "Magna Sin" gasoline was implemented, as well as the progressive decrease of lead contained in leaded "Nova Plus" gasoline.

II. SOME OF THE ACTIONS TAKEN BY THE FEDERAL GOVERNMENT OF MEXICO THROUGH 1995

As part of the Ecological Pact of PEMEX, the following advances were achieved as of late 1995:

- . change to continuous regeneration in reforming plants: ninety-three percent of this advance completed, three of six projects completed;
- . construction of isomerization units of pentane and hexane: forty-three percent of this advance completed, three of seven projects completed;
- . construction of methyl tertiary butyl ether (MTBE) plants: one-hundred percent of this advance completed, four projects completed;
- . construction of tertiary amyl methyl ether (TAME) plants: ninety percent of this advance completed, one of two projects completed;
- . incorporation of the process of catalytic disintegration F.C.C.: ninety percent of this advance completed, one of two projects completed and operational;
- . construction of units of hydro-desulfurization of diesel: one-hundred percent of this advance completed, two projects completed;
- . construction of a complex of residual hydro-treatment: thirty-five percent of this advance completed; and
- . leasing of olefins: only one of four projects had been begun as of late 1995.

In addition to the Ecological Pact of 1991, the construction of both refining equipment and a coking plant have been under-taken, which has permitted great availability of unleaded gasoline and gas. The program of investment of PEMEX for the instrumentation of
these thirty projects amounts to approximately U.S. $3.44 billion.

In conjunction with these actions, the substitution of fifty percent of Nova Plus gasoline (leaded gasoline) for Magna Sin gasoline (unleaded gasoline) has been facilitated, as well as the elimination of diesel with a sulfur weight of 0.05% for automotive vehicles in the Metropolitan Zone of Mexico City and of 0.5% on the national level for industrial plants. Likewise, the content of lead in reformulated gasolines has reached historic minimum levels.

A. Reduction of the Concentration of Reactive and Toxic Hydrocarbons in Nova Plus and Magna Sin Gasolines to Reduce the Maximum Concentrations of Ozone

One of the government’s priority strategies is the improvement of the fuel that is used in the Metropolitan Zone of Mexico City. This action is principally focused on the reduction of the emissions of the precursors of ozone.

Ozone is naturally present in the same quantity in soil as well as in the highest layers of the atmosphere. The formation of ozone is caused by very complex reactive activities of sunlight, in which nitrogen oxides and hydrocarbons participate. Because of this, in 1992 PEMEX adopted strict specifications that limit the content of reactive and toxic hydrocarbons:

. thirty percent maximum of aromatics
. fifteen percent maximum of olefins
. two percent maximum of benzene

Likewise, a maximum limit for the pressure of reid gas was established at 8.5 per square inch. These levels have been regulated in an official manner since December 2, 1994, with the publication of NOM No. 086.

PEMEX has complied with these strict specifications. In fact, the environmental quality of the gasolines that are consumed in the Valley of Mexico exceeds the average of those that are distributed in the United States and is similar to those of California, which has the most strict environmental standards in the world.

It has been recognized that because of the geographic and atmospheric conditions of Mexico City, atmospheric pollutants become especially trapped within the Valley of Mexico during the winter months. As a result, the Metropolitan Zone of Mexico and PEMEX have established contingency programs that impose more strict regulations during this time of year.

In the winter of 1993-94, for example, PEMEX adopted the following specifications, which, again, are even more strict than the rest of the year:

NOVA PLUS GASOLINE

<table>
<thead>
<tr>
<th>Parameter</th>
<th>NOM No. 086</th>
<th>Winter 94-95</th>
<th>Percent Reduction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aromatics</td>
<td>30% vol.</td>
<td>25% vol.</td>
<td>17% vol.</td>
</tr>
<tr>
<td>Olefins</td>
<td>15% vol.</td>
<td>12% vol.</td>
<td>20% vol.</td>
</tr>
<tr>
<td>Benzene</td>
<td>2% wt.</td>
<td>1.5% wt.</td>
<td>25% wt.</td>
</tr>
</tbody>
</table>

MAGNA SIN GASOLINE

<table>
<thead>
<tr>
<th>Parameter</th>
<th>NOM No. 086</th>
<th>Winter 94-95</th>
<th>Percent Reduction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aromatics</td>
<td>30% vol.</td>
<td>30% vol.</td>
<td>__</td>
</tr>
<tr>
<td>Olefins</td>
<td>15% vol.</td>
<td>12% vol.</td>
<td>20% vol.</td>
</tr>
<tr>
<td>Benzene</td>
<td>2% wt.</td>
<td>1.5% wt.</td>
<td>25% wt.</td>
</tr>
</tbody>
</table>

To ensure continuation of these compromises, PEMEX and the Government of the Federal District enacted an operation of gasoline quality control in the Metropolitan Zone of Mexico City. An analysis to determine petroleum quality was conducted in service stations as well as four distribution terminals that are accountable to PEMEX in the Valley of Mexico. This independent analysis was carried out by the Laboratory of Bacteriology and Physico-Chemistry at the Universidad Nacional Autonoma de Mexico (UNAM).

The analysis conducted in the distribution terminal showed that the specifications were indeed being met, as the following chart shows:

NOVA PLUS GASOLINE
Many other factors have contributed toward the stabilization of the level of ozone: a lower concentration of reactive hydrocarbons in the gasoline and consequently a lower concentration of precursors of ozone in the atmosphere; the obligatory vehicular emissions verification; the introduction of catalytic convertors in those vehicles made in 1991 and after; the installation of floating ceilings in PEMEX storage tanks; the installation of systems for the recuperation of vapors in the tanks of fuel transportation trucks of PEMEX; and the conversion of vehicles of intensive use to liquid petroleum gas.

Also, when pollutant levels exceed the established IMECA (Metropolitan Units of Pollution) limit in Mexico City, a contingency program entitled the Program of Atmospheric Hazards goes into effect which imposes even more stringent regulations. Because of advances in fuel quality, the number of days has decreased in which the application of the Program of Atmospheric Hazards has been required. In 1991 it was necessary to apply the program sixty-three days, during 1992 this was reduced to forty-one days. For 1993 and 1994, it was only necessary in eleven and three days respectively and in 1995 only two days.

B. Reduction of the Content of Lead in Nova Plus Gasoline, for Diminishing the Presence of this Pollutant in the Atmosphere.

In the air, lead is one of the components of suspended particles. The principal source of lead emission is automobiles, owing to the use of gasoline with this metal. As a consequence of the reformulation of gasolines, the concentration of lead has diminished, because lead has been reduced in Nova Plus gasoline to ninety-two percent in relation to the levels in the year 1991.

On the other hand, the consumption of unleaded gasoline, Magna Sin, represents forty-two percent of the total consumption in the Valley of Mexico. At the same time that new fleets of cars were equipped with catalytic converters, the consumption of this gasoline maintained a continuous increase, while that of Nova Plus diminished. As a consequence, the levels of lead have been significantly abated and after two years they have been maintained inside the standard set for the Valley of Mexico. NOM No. 086 specifically addressed the maximum limits of lead in fuel. It contains twelve tables which regulate the chemical compound of unleaded and leaded gasoline, as well as diesel fuel, industrial gas oil, heavy fuel oil, natural gas, liquid petroleum gas, and turbo fuel. This NOM also recognized that different norms are necessitated for fuel used inside the metropolitan zones of Mexico City, Guadalajara, and Monterrey, as well as the Northern Border Zone. Because of the concentration of industrial development in these areas, fuel composition is more strictly regulated than in other locations in Mexico.

With regard to unleaded Magna Sin gasoline, Table One of NOM No. 086 sets the maximum level of lead at 0.0026 (0.010) kg/m³ (g/gal). This level is obligatory in the entire country except the Metropolitan Zone of Mexico City and the Northern Border Zone through 1997. Beginning in 1998, these specifications will be applicable to the entire country except the Metropolitan Zones of the cities of Mexico, Guadalajara, and Monterrey and in the Northern Border Zone.

Table Two of NOM No. 086 addresses the content of lead in unleaded Magna Sin Gasoline required in the Northern Border Zone. The maximum level is set at
Likewise, Table Three establishes the specifications required in designated metropolitan zones at 0.0026 (0.010) kg/m³ (g/gal). These specifications are only obligatory in the Metropolitan Zone of Mexico City through 1997. But beginning in 1998 these specifications will also be applicable to the Metropolitan Zones of Guadalajara and Monterrey.

With regard to leaded Nova Plus gasoline, Table Four of [*486] NOM No. 086 sets the maximum permissible content of lead at 0.06 to 0.28 (0.2 to 1.0) kg/m³ (ml/gal). This level is applicable in the entire country through 1997 except in the Metropolitan Zone of Mexico City. Beginning in 1998, these specifications will be required in the entire country except the Metropolitan Zone of Mexico City, Guadalajara, and Monterrey.

The maximum permissible lead content levels in leaded Nova Plus gasoline in designated Metropolitan Zones were set at 0.06 to 0.08 (0.2 to 0.3) kg/m³ (ml/gal). Through 1997, this level is only applicable to Mexico City, but beginning in 1998, the Metropolitan Zones of Guadalajara and Monterrey will also be held to this stricter standard.

As an additional effort above what is required by NOM No. 086, PEMEX is complying with the winter compromise of a thirty percent reduction in the content of lead in Nova Plus gasoline, limiting its content to a maximum of 0.2 milliliters of tetraethyl lead, in place of 0.3 that is the specification that is applicable for the rest of the year. The analysis that was carried out by UNAM showed that the established specifications were being met, as the content of tetraethyl lead during the winter period was on average 0.11 milliliters of tetraethyl lead.

C. Reduction of Sulfur in Industrial Gas Oil to Minimize the Concentration of Sulfur Dioxide in the Air

As a winter measurement, in the month of December in 1991 the use of fuel oil that contained more than three percent of sulfur by weight was prohibited in the Valley of Mexico. This action has become a permanent restriction. Industrial gas oil (used in diesel engines) was substituted in place of fuel oil, industrial gas oil having an environmental advantage of a lower content of sulfur (two percent maximum by weight).

One of the benefits of fuel with a greater quality is that it diminishes the concentrations of sulfur dioxide in the atmosphere. Additionally, gas oil has a greater combustion owing to a lower content of impurities (gas oil contains 99.5% less insoluble elements of n-pentane and nickel than fuel oil) and less viscosity. As such, its handling and aspersion in the original burners facilitates a cleaner combustion which permits less emission of particles.

[*487] For winter periods, PEMEX established a temporary specification in order that the content of sulfur in industrial gas oil would not exceed 1.5% by weight. The analysis carried out to verify the quality of gas oil indicates that the limits established were being met to the degree that the average content of sulfur in gas oil was 1.4% by weight.

The concentrations of sulfur dioxide registering in the Net-work of Atmospheric Monitoring of the Metropolitan Zone of Mexico City have been maintained since 1993 within the level needed to protect health.

III. CONCLUSION

Recognizing that pollutants such as lead produce deleterious effects on the quality of air, the Mexican federal government has taken an active approach in setting content limits as well as improving the general quality of fuel. These actions took into consideration the National Policy of Fuels, applicable regulations and laws, and the actual production capabilities of PEMEX. Yet despite the advances that have been made throughout the 1990s, regional factors such as Mexico City's geography make the overall improvement of air quality a difficult goal to realize.

The specifications contained in NOM No. 086, as well as other government contingency programs and the independent actions of PEMEX, have led to a significantly diminished level of lead emissions. A report released by the Mexico City government entitled "Program to Improve the Valley of Mexico Air Quality 1995-2000" showed that Mexico's unleaded gasolines now have lower levels of aromatics and benzene than equivalent U.S. or European petroleum products. However, certain properties, such as sulfur content, are much higher in Mexican unleaded gasoline. In 1996, PEMEX began the sale of premium gasoline. Although no information is available yet on the exact quality of this higher grade, it is another step toward the reduction of lead emissions and, consequently, improved air quality.

[*488] Daniel Basurto Gonzalez and James D. DeRosa

Basurto, Santillana y Arguijo, S.C.

Mexico City, Mexico *

* This legal memorandum was originally presented by Mr. Basurto at the November 1995 Hemispheric Energy Symposium in Washington, DC, at the invitation of the U.S. Department of Energy. Mr. Basurto is
a founding partner of Basurto, Santillana y Arguijo and focuses his practice on environmental law. He is a graduate of the Universidad Anahauc with honors. Mr. DeRosa worked at Basurto, Santillana y Arguijo in the Fall of 1995 as a Student Trainee Exchange Program scholar. He is a 1995 graduate of Case Western Reserve University School of Law and is currently a Staff Attorney at Jones, Day, Reavis & Pogue in Cleveland, Ohio.

<table>
<thead>
<tr>
<th>Legal Decrees</th>
<th>Reference</th>
<th>Description</th>
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<tbody>
<tr>
<td>Political Constitution of Mexico</td>
<td>Art. 27</td>
<td>Establish that the Nation of Mexico shall have the legal ownership of petroleum and all carbides of solid, liquid, or gaseous hydrogen, and that neither concessions nor Contracts will be organized because only the Nation of Mexico will carry out the exportation of these resources.</td>
</tr>
<tr>
<td>Regulatory Law (LR) of Constitutional Article 27 on the Field of Petroleum</td>
<td>Art. 1</td>
<td>Designate that the Nation of Mexico shall have legal ownership, inalienable and inprescriptible, of all hydrocarbons that are found in the mantel of the earth or in</td>
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</table>
petroleum fields.

Art. 2  Indicate that the Nation of Mexico can carry out the various activities related to hydrocarbons that constitute the petroleum industry.

Art. 3  Indicate that the petroleum industry is established for exploration, exploitation, refining, transportation, storage, distribution, and sale of petroleum, gas, artificial gas, the products that are obtained through the refining of the same, and of any derivatives that serve as primary industrial basic materials.

Art. 4  Designate that the Mexican Nation will carry out the exploration and exploitation of petroleum and the rest of the activities that constitute the petroleum industry through public decentralized institution.

Art. 8  Indicate that the Federal Executive is authorized to establish zones of petro-
leum reserves in land that is possibly oil-bearing in such quantity as is mer-

Art. 9

Establish that the petroleum industry is of exclusive federal jurisdiction and only the Federal Government can prescribe the technical or regulatory decrees that govern and establish what taxes are imposed.

Art. 10

Specify that the petroleum industry is a priority public utility.

Regulation of the LR of Constitutional Article 27 on the Field of Petroleum

Art. 5

Establish that the exploration and exploitation of petroleum as carried out by PEMEX will be realized through the assignment of land by a Secretary appointed for this effect.

Art. 20, 21, and 22

Indicate that the assignments asked for by PEMEX can be totally or partially negated when it is decided that the land requested by PEMEX should be incorporated into or continue to be a part of the reserve zones of
the Nation, or when the rights and obligations that it derives are transferred or taxed in any form.

Art. 23, 24, and 25
Indicate general decrees related to refining.

Art. 37
Designate that the temporary occupation or expropriation of utility land can be declared for the petroleum industry when an agreement has not been reached with the owners or when the identity of the owner or holder is not known.

Art. 45
Specify that when the land is of Federal Jurisdiction or the property of the states and municipalities, the acquisition or temporary use of this land must be obtained by the authority in a corresponding form.

Regulation of Petroleum Work
Art. 1
Specify that petroleum work requires both a previous license from the legally authorized Secretary and the definition of what they intend with such operations.

Art. 7
Establish the obliga-
tion of accompanying the license petition with a descriptive report and the plans necessary in order to technically and economically justify the work and constructions, from the point of view of security and better profitability of natural hydrocarbons.

Art. 23 Indicate that PEMEX has the obligation to maintain all of its installations in a good state of safety and conservation.

Art. 29 Designate that licensees have the obligation to give timely notice of accidents in the installations to the management or respective agency of PEMEX and to the Secretariat of Environment Natural Resources and Fisheries, when the ecology has been affected or the environment has been polluted.

Art. 37 Designate that corresponding to the licensed organism is the responsibility for damages or injury that arise when in transit across land,
river, sea, or atmosphere, and with regard to fish, agriculture, livestock, or third parties.

Art. 38 Designate the obligation of the licensee to provide to the management or the agencies, all of the plans, reports, or data that is stipulated in this regulation, as well as those that appear in the daily reports of the operation of drilling, completion, and repair of wells.

Art. 51 to Art. 293 Indicate the regulations concerning the following areas: exploration, drilling, production, tamponage of wells, transportation, storage, terminals and plants of storage and distribution.

Regulation of the LR of Constitutional Article 27 of the Field of Petroleum, on the Subject of Petro-Chemistry

Art. 10 Establish that the legally competent Secretary, taking into consideration the opinion of the Mexican Petrochemical Commission, has the power to facilitate the permits for making petrochemical products. These permits will estab-
lish, among other things, the location of the plant where the products will be made.

The Organizational Law of the Federal Public Administration

Art. 33
Empower the Secretary of Energy to carry out petroleum cadastre, as well as regulate the petroleum industry and basic petrochemistry (parts VI and VIII).

General Law of Ecological Equilibrium and Environmental Protection (LGEEPA)

Art. 1
Designate that the object of the law is to establish the basis for the rational development of natural elements in a manner that is compatible with the equilibrium of the ecosystems and to establish the coordination in this matter between the diverse branches and entities of the Federal Public Administration.

Art. 5
Indicate that the regulation of highly dangerous activities and related hazardous materials and residues are of interest to the Federation (parts X and XIX), as well as the rational development and use of the water, the soil, and the resources of
<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Art. 15</td>
<td>Designate that non-renewable natural resources should be utilized in a manner that will avoid its exhaustion and the generation of adverse ecological effects.</td>
</tr>
<tr>
<td>Art. 3, 19, 20, 98, and 99</td>
<td>Regulate the activities of ecological ordinance of the territory that have implications for the petroleum industry.</td>
</tr>
<tr>
<td>Art. 29</td>
<td>Establish the application of the Environmental Impact Evaluations to public work, exploration, extraction, treatment, and refining of mineral substances and nonmineral reserves of the Federation, oil pipelines, gas pipelines, and the petrochemical industry (parts I, II and IV).</td>
</tr>
<tr>
<td>Art. 108 and 109</td>
<td>Empower the Secretariat of Environment, Natural Resources and Fisheries, to carry out the Official Mexican Standards (NOMs) necessary for the protection of the en-</td>
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</tbody>
</table>
Regulation of the LGE-EPA on the Subject of Hazardous Waste (RP)

All of the articles

Regulate the activities of generation, treatment, transportation, recycling, incineration, and final disposal of Hazardous Waste (RP).

Regulation for Land Transportation of Materials and RP

All of the articles

Regulate the activities of packaging and packing, vehicular equipment, safety, responsibilities, and obligations related to the transportation of Hazardous Waste.

The Organizational Law of Petroleos Mexicanos (PEMEX)

Art. 11

Designate that one of the functions of the general directors is to ensure compliance with the decrees related to ecological equilibrium and preservation of the environment that guarantees the adequate use of petroleum resources (part XI).

APPENDIX II

OBJECTIVES

1.-- To satisfy the demand for goods and services at a lower cost.

2.-- To increase the technical and economic efficiency of the energy sector.

3.-- To guarantee optimal stability, security and quality in the

ENERGY
POLICY supply of raw materials and services.
OFF MEXICO
4.-- To implement clear formulas of actual levels of fuel with an international base of reference and the national availability of the same.
5.-- To offer legal security to participants in the energy sector.
6.-- To secure energetic and environmental quality of fuel.

[*501] APPENDIX III COORDINATED EFFORTS UNDERTAKEN FOR FUEL POLICY

1st. Coordinated planning of investment in the sector of exploitation, refining and sale of hydrocarbons.
   . Refining of petroleum.
   . Natural gas.
   . New technologies.
   . Fuel of energetic quality.
   . Consumer orientation.
   --Substitution of fuel.
   --Policy of cost.

   [arrow down] [arrow up]


   [arrow down] [arrow up]

   <-- . Fuels with sulfur.
   . Fuels without sulfur.

[*502] APPENDIX IV

[SEE FIGURE IN ORIGINAL] [*503] APPENDIX V

[SEE FIGURE IN ORIGINAL] [*504] APPENDIX VI

[SEE FIGURE IN ORIGINAL] [*505] APPENDIX VII

[SEE FIGURE IN ORIGINAL] GRAPHIC: CHARTS 1 through 4, PRESENT CONDITION OF THE GLOBAL POLICY OF FUELS IN MEXICO; EVOLUTION OF THE PROFILE OF FUEL FOR TRANSPORTATION; DOMESTIC SALE OF AUTOMOBILE GASOLINES 1995, Source: PEMEX, Corporate Manger of Operations; OFFICIAL MEXICAN STANDARD (NOM) NO. 086 FOR THE ECOLOGICAL QUALITY OF FOSSIL FUELS $}$