FOREWORD: Foreword: Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities *

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Francisco Valdes +

BIO:

+ Professor, California Western School of Law; Visiting Professor, University of Miami School of Law, 1995-96, 1996-97. J.S.D. 1994, J.S.M. 1991, Stanford Law School; J.D. with honors 1984, University of Florida College of Law; B.A. 1978 University of California at Berkeley. The Foreword would not have been possible without the work and effort of the authors and participants whose papers I introduce and discuss below, nor without the commitment and support of the La Raza editors. I therefore begin by thanking both sets of individuals and, in particular, La Raza Co-editors-in-chief Bob Salinas and Sandra Flores for their leadership and assistance regarding the Colloquium herein introduced. I likewise thank David Oakland for excellent editing. Because this Foreword would not be possible without the work of pioneering Critical Race theorists, I also thank all RaceCrits. In addition, I especially thank Bob Chang, Juan Perea and Robert Westley for comments and suggestions that immeasurably improved this Foreword. Finally, I thank Joseph Colombo for first-rate research assistance.

SUMMARY: ... During the past decade or so the birth and growth of "Critical Race Theory" has enlivened and transformed critical legal scholarship. ... These remarks, individually, display that the tensions between modernist identity politics and postmodern identity theorizing does not entail incoherence; this Colloquium, as a whole, is an act of creative balance, suggestive of a post-postmodernism in critical legal scholarship that bodes well for the future of Latina/o participation in critical legal discourses devoted to race, ethnicity, and subordination. ... With this approach, she highlights the inter-connectedness of race, ethnicity, and gender in American law; that is, with this approach, Professor Romany brings into sharp relief why critical legal scholarship must be expansive and inclusive, and specifically why Latina/o analyses of our places and prospects in the social and legal scheme of a patriarchal, Anglo power structure must take varied sources of oppression into account. With this analysis, Professor Romany brings a salutary sense of inter-connectivity to Latina/o critical legal discourse, and also to the two theoretical genres that she critiques and unites in this presentation. ... As a scholar with an Asian American subject position, Professor Chang brings an allied but distinct perspective to this Colloquium. ... The concept of pan-ethnicity, as I use it here, provides a frame for sameness/difference discourse in Latina/o contexts. ...

[*1] I.

INTRODUCTION

During the past decade or so the birth and growth of "Critical Race Theory" has enlivened and transformed critical legal scholarship. n1 Not only has Critical Race Theory animated and advanced the law's discourse on race matters, it also has helped to diversify this discourse: Critical Race Theory has ensured (for the first time in American history) that law review race scholarship is produced and published in significant or mainstream venues by scholars self-identified with subordinated racial groups and perspectives. n2 In so doing, Critical Race Theory has ensured that this expanded written record on race, law, and society includes the experiences, "stories" and insights of marginalized "voices" and communities. n3

While still in its developmental stages, this lively and influential genre of critical legal scholarship has produced theoretical insights that have begun to penetrate the judicial consciousness. n4 Critical Race Theory, in [*3] other words, promises to keep affecting not only the way in which race discrimination is conceived and discussed but also litigated and adjudicated, n5 thereby helping to make the sort of practical difference that is a key aim of activist scholars. This branch of critical legal theory thus has filled conceptual, discursive and practical voids in American legal culture, both through its written literature and its repertoire of live events. n6
Indeed, among the key contributions of Critical Race Theory (and its jurisprudential counterparts) has been the pioneering of post-modern legal theorizing that is skeptical yet progressive, as well as increasingly inter-disciplinary. In particular, the critical legal scholarship of race (and gender or sexual orientation) in recent times has interrogated and helped to debunk various essentialisms and power hierarchies based on race, color, ethnicity, sex, gender, sexual orientation and other constructs. This discourse has given rise to "outsider jurisprudence" and "perspective scholarship," which have helped to constitute and establish innovative fields and kinds of legal theorizing. Perhaps most notable among these newer strands of critical and outsider perspectives on the law are Feminist Legal Theory, Critical Race Theory, Critical Race Feminism, and Queer Legal Theory.

An obvious pending task is delineating the inter-relationship, if any, of these various and varied jurisprudential enterprises; indirectly, this Colloquium's focus on a group as diversified as "Latinas/os" calls for some reflection on this task, and on the questions that its undertaking raises. Nonetheless, one point is already clear: driven by a sense of progressive activism, Critical Race Theory, together with these other jurisprudential viewpoints, has infused contemporary legal discourses with a newfound concern for social and legal transformation on behalf of communities traditionally subordinated by dominant legal and social forces. Without doubt, the body of literature and the convening of individuals that flow from the enterprise known as Critical Race Theory have made a continuing difference on multiple planes in the race/power status quo within American legal culture.

From its inception, however, moments of tension have punctuated this ongoing constitution of "RaceCrits" as theory and community, and a sense of oddness surrounds this tension because it derives from a curious and continuing paradox: despite the original and sustained centrality of individuals who are women and/or non-African people of color to this enterprise, despite the increased diversity of perspectives and insights that it has brought to legal discourse on race, Critical Race Theory is sometimes experienced and described as both androcentric and Afrocentric, as well as heterocentric. Thus, in recent years, Critical Race Theory (like Feminist Legal Theory) has found itself confronted with the objection that it has replayed the omissions and oversights of the majoritarian status quo.

In brief, Critical Race Theory may have been insufficiently attentive to the interplay of patriarchy and white supremacy in the shaping of race and racialized power relations. Its interrogation of "race" perhaps left important "intersections" unexplored. Likewise, Critical Race Theory perhaps has been insensitive to the limitations in scope and depth of the "Black/White paradigm" as an exclusive lens for the deconstruction of race and race-based subordination in a multi-cultural society. The struggle against "race" subordination, if operationally narrowed to the oppression of African Americans, misses the Latina/o, Asian American, Native American and other dimensions of "race"-based power relations. And if Critical Race Theory still wonders "what sexual orientation has to do with race," it is only because it has overlooked the poignant and powerful testimony of the many lesbians, gays, and bisexuals of color who have raised their voices against both homophobia of color and gay racism.

If accurate, these particular shortcomings would be irony in the pure, for Critical Race Theory itself was born of well-warranted reaction to the careless and false homogenities of traditional legal culture, or even an antecedent movement in modern legal culture--Critical Legal Studies. This earlier movement, which conceived of itself as pluralistic and progressive, discovered that legal scholars from three overlapping communities or groups--women, people of color, and women of color--were profoundly disaffected with the tendency of Critical Legal Studies to slight "minority" scholars and communities even as it dedicated itself to improving the lot of the oppressed. Critical Legal Studies, as a relatively direct precursor of Critical Race Theory, therefore contained or indicated lessons that recent events or dialogs suggest may not have been fully appreciated among RaceCrits themselves. For those of us who affiliate with and are supporters of Critical Race Theory (or of Feminist Legal Theory) the challenge, of course, is to ensure that the omissions or oversights of the past, wherever they be, are rectified resolutely and completely. But that is not all.

In this historical and contemporary context, as this Colloquium shows, the specific roles and places of Latina/o voices, communities, and interests (among others) become an open question: is Critical Race Theory a project of or for Latinas/os? is it qua Latinas/os . . . should it be, can it be? For Latina/o legal scholars, several key underlying questions immediately arise. Does the Black/White paradigm somehow define or delimit Critical Race Theory in a conclusive or definitive manner? Conversely, do or can critical race discourses and venues place Latinas/os at the center, at least for some significant portion of the time? Is critical "race" theory concerned with "ethnicity"? Should it be? Is, can, or should Critical
Race Theory be a viable and inviting project to those with a Latina/o subject position? n27

To nudge the discourse on these pending questions, the pages that follow present the remarks delivered at a Colloquium on Representing Latina/o Communities: Critical Race Theory and Practice, held by the Law Professors Section of the Hispanic National Bar Association in October 1995. n28 These remarks present an array of perspectives, foci, methodologies, and conclusions. On their face, these diversities evidence both the richness of the existing work produced by Latina/o legal scholars and the range of identity and intellectual pluralisms that presently exist in the Latina/o law professorate of the United States. Whether or not one disagrees with any of these scholars on any given point or conclusion, these multiply-diversified authors and works display the extent of contribution that Latina/o critical legal scholars have made, are making, and will continue to make, to contemporary conversations about race, ethnicity, and gender subordination.

Precisely because of their multiple diversities, these works confront a dilemma prominent in current critical legal discourses, including Critical Race Theory: the sameness/difference dilemma. n29 In recent years this dilemma has attracted much commentary in critical legal discourses of race (and gender) as scholars self-identified with traditionally subordinated communities sought to theorize from particularized subject positions. n30 The recent proliferation of outsider or perspective jurisprudence has brought with it questions and critiques of identity and community, of sameness and difference. This sameness/difference multi-log, as the works presented in this Colloquium attest, remains open-ended for and among Latinas/os as well.

In fact, these works suggest that sameness/difference discourses are compelling to Latinas/os because the category "Latina/o" is itself a conglomeration of several peoples from varied cultures and localities, all of which have managed to become thoroughly embedded in American society through different yet similar experiences. These group experiences include, but are not exclusively about, Mexican-American, Puerto Rican, and Cuban-American communities. n31 Each of these (and other) Latina/o sub-groups not only comprises "different" national origins and cultures but also diverse spectrums of races, religions, genders, classes, and sexualities. Given these multi-textured groups, and their wide ranges of overlapping experiences vis a vis the dominant culture of this Euro-American society, issues of sameness and difference must be a source of fascination and dissection for Latina/o legal scholarship—they are exactly the issues with which any conception or practice of coalitional Latina/o pan-ethnicity in the United States must grapple. n32

Yet, within these (and other) diversities, the remarks below manage to share and exude a sense of commonality that threads them into one whole here: they are the work of scholars who identify as, or are concerned with, Latinas/os in American society. These scholars, due to heritage, experience, and volition are well-positioned, and they have elected, to speak here as agents of Latina/o legal scholarhip in a social and theoretical context that frequently overlooks Latina/o existence. As a set, these works display both a sense of individuality and collectivity, of difference and sameness. This Colloquium manifests, in a specifically Latina/o context, some ability to traverse the grounds of a postmodern pan-ethnicity with caring, constructive, and progressive outlooks. In this way, this Colloquium also reflects the larger issues confronting Critical Race Theory at this historical moment.

This moment in the history of Critical Race Theory, so gracefully and incisively presented by Angela Harris in her Foreword to the 1994 Symposium on the topic by the California Law Review, captures the stresses, lessons, and opportunities posed by our era's experience with modernism and postmodernism. n33 In that Foreword, Professor Harris engages three complex phenomena and points, which inevitably frame and inform not only the current state of Critical Race Theory, but also this Colloquium. These three phenomena and points are: 1) the benefit in turning the tensions that arise from the interplay of modernism and postmodernism in critical legal scholarship into an opportunity to advance critical legal theory; n34 2) the simultaneous pursuit of sophistication and embrace of disenchantment to achieve a creative discursive balance that generates progressive and transformative theorizing; n35 and, 3) the need to initiate a politics of difference and identification that will foster a nuanced and capacious jurisprudence of reconstruction to alleviate myriad forms of human suffering. n36 These points, in turn, can aid the design and creation of a "reconstructed" n37 and "sophisticated" n38 modernism via Critical Race Theory and outsider jurisprudence.

Professor Harris' Foreword therefore serves as an excellent point of departure and reference for any consideration of the works constituting this Colloquium. The participants are outsider scholars electing to identify with each other despite differences of race, sex, class and sexuality, using this Colloquium as an opportunity to practice a "politics of difference" and a "politics of identification" through
various jurisprudential methods. Their remarks indeed are charmed by the "creative balance" of "sophistication and disenchantment" that can yield a "jurisprudence of reconstruction" from the current sameness/difference identity tensions in critical legal scholarship.

In fact, the remarks presented below consistently exhibit a strong sense of commitment to the modernist goals of dignity, equality, and justice while accepting and proceeding from the postmodern problematization of these concepts. The tension that resides in the coexistence of modernist and postmodernist influences within these works provides a glimpse into a critical legal discourse "suspended in creative balance" to advance the anti-subordination project. n39 These remarks, individually, display that the tensions between modernist identity politics and postmodern identity theorizing does not entail incoherence; n40 this Colloquium, as a whole, is an act of creative balance, suggestive of a post-postmodernism in critical legal scholarship that bodes well for the future of Latina/o participation in critical legal discourses devoted to race, ethnicity, and subordination.

This Colloquium thus occurs at the intersection of progressive critical legal discourse: the residual, resilient power of the Black/White paradigm over the American consciousness regarding race/ethnicity group relations, and the emergence of post-postmodern identity theories and politics. Because current discourses regarding race/power relations often seem to track mostly the relationship of unitary blackness to unitary whiteness, this Colloquium is, first and foremost, a by-product of the discursive practices that operate within America generally, and within Critical Race Theory specifically, to the exclusion of other racialized (and gendered) groups, such as Latinas/os. The message is simple: the politics and techniques associated with this paradigm keep all peoples of color in subordinated positions. Its dismantlement requires a more textured critique and a more expansive discourse.

Indirectly, if not frontally, this Colloquium consequently occasions continuing reflection on the inter-related meanings of the Black/White paradigm and the sameness/difference dilemma in post-postmodern theorizing, and it specifically invites a place at the table for Latina/o legal scholars and others interested in the conditions of Latina/o communities. n41 The remarks presented at this Colloquium therefore do more than display the vigor, richness, and promise of a nascent Latina/o legal scholarship. They beckon a larger renewal of the broader anti-subordination project with Latinas/os as full discursive participants.

The work and thought that unfold below thus suggest a need and place for a prospective community of critical legal scholars that is self-consciously Latina/o; this Colloquium, in addition to occasioning [*11] reflection on Latinas/os and Critical Race Theory, also provides an occasion for contemplation of "LatCrit" theory or discourse. n42 Because they prompt reflection on the underlying questions noted above, the set of remarks that constitute this Colloquium indirectly call for further exploration of the prospects for a Latina/o critical legal discourse that is more openly, directly, and unabashedly Latina/o in content and focus. n43 However, this prompting of further reflection is only a beginning. n44

Set against this background this Foreword is focused on both the Practices and the Possibilities that I associate with Latinas/os and critical legal scholarship on race, ethnicity, and other sources of subordination in American law and society. Its title thus reflects this Foreword's core thesis: as illustrated by this Colloquium, the time has arrived to move from past and present practices to the powerful possibilities that beckon. This progression not only will preserve the gains of recent years but also can help reinvigorate the anti-subordination agenda.

This Foreword thus divides into two parts. The first is devoted to practices and the second to possibilities. Neither part, however, is an attempt to catalog comprehensively either practices or possibilities; rather, each is limited to the practices or possibilities that are evidenced or suggested by this Colloquium.

Focusing mostly on the express or implied messages contained in the texts of these remarks, this Foreword reflects on current practices, as addressed in these works, to raise some of the possibilities that these messages might augur specifically for the future of Latina/o legal scholarship. In these opening lines, my purpose is to speak both to the present that is, but also to the future(s) that might be. After reviewing and discussing the predominant or common themes and points or practices within each of the following presentations, I therefore conclude with some thoughts about the possibilities they might foretell as a set.

Finally, it bears emphasis that, by publishing these remarks in this way, the Colloquium organizers and participants, and the La Raza editors, seek several gains. First, we seek to make the thoughts and ideas presented at the live version of the Colloquium more readily accessible to those who were unable to; we hope, in other words, to create opportunities for a form of virtual attendance. Second, we seek to amplify the body of legal literature devoted to the discussion of issues particularly germane to Latina/o concerns and communities; in consequence, we intend to elevate
both these concerns and communities, as well as the current state of knowledge and awareness in American legal culture. Third, we seek to [*12] build relationships among and between Latina/o legal scholars and journals; in this way, we aim to foster the success of both. The seven presentations that follow, each somewhat akin to an "oral essay" in its published format, make evident the value of this effort.

II.

ON PRACTICES: LATINAS/OS AS AGENTS AND OBJECTS OF CRITICAL LEGAL DISCOURSES

The first presentation, by Leslie Espinoza, could not be more timely, given the current state of legal and cultural politics and practices regarding group relations based on race, ethnicity and gender in American law and society. n45 These relations and practices, increasingly characterized by a politics of backlash against the recent gains of women, people of color, and sexual minorities in American society, n46 have resurrected an old conception of "merit" as an antidote to "reverse discrimination." n47 The backlashers wage their politics of retrenchment in part by valorizing falsely "objective" markers of merit as the cornerstone of a supposedly color-blind utopia in American law and society.

Within legal culture specifically, these politics of backlash and retrenchment designate merit, as constructed and assigned under the LSAT, to be the exclusive device policing the gateway to the power and privilege that attaches to the legal profession in the United States. n48 With the return to the primacy of the LSAT ensuring a legal meritocracy, we are granted license to disengage from a critical or vigilant approach to race, ethnicity, and gender hierarchies in American legal culture. In this current retrenchment, merit will save American law from race and its related practices or constructs.

But the futility of this yearning for a merit that never was, is driven home by the direct and sustained unpacking of this paragon of objective merit in contemporary American legal education. Through her dissection of actual and recent LSAT questions--the means by which the revelation, imputation, and allocation of lawyerly "merit" is to be practiced--Professor Espinoza reveals how the social construction of merit under the LSAT operates as a reification of stereotypes and power relations rooted in the social construction of race, ethnicity, and gender. In this way, she confirms that merit itself is a construct, which also is pervasively racialized, [*13] ethnicized, and gendered. Her scrutiny of the LSAT exposes how the biased construction of race and gender in American culture biases the construction of merit itself specifically in American legal education.

Thus, it is Professor Espinoza's work that can save us from the ravages of this lopsided vision of merit, and from its pernicious consequences on people of color and women. She asks, "Should [admissions decisions] be based on biased questions?" Even more fundamentally, she poses a question that backlashers never address directly: "What makes a good lawyer?" n49 Acknowledging that the educational testing community has made "consistent efforts" at the elimination of bias during the past ten years, Professor Espinoza concludes that, today, the practice of "bias is less obvious although it is still pervasive. Often the bias now appears in the answer choices." n50 Professor Espinoza's work shows the futility of seeking haven from our racialized and gendered world in this resurrected misconception of merit.

The following presentation, by Juan Perea, follows Professor Espinoza's substantive deconstruction of the LSAT in a practical setting: using anecdotal and episodic data, he further unpacks the same or similar normative stereotypes and practices that distort the LSAT and that, consequentially, infect the minds and attitudes of those provided entree via the LSAT to American legal culture. n51 Presented with wit and brevity, this unpacking takes the form of four seemingly lighthearted but profoundly revealing questions, which frequently are asked of Latinas/os in American legal settings. Each of these questions opens a window into the construction and operation of Latina/o identity in American law and society, and into the practice of racialized and ethnicized discrimination against Latinas/os within contemporary legal culture.

By posing this set of questions in this particular sequence, Professor Perea prompts us to consider, from different angles or through different experiences, the place and prospects of Latina/o people in an Anglo-constructed society and legal system. By addressing the passive-aggressive sub-text of each query, Professor Perea demonstrates how they operate to undermine the status and position of Latinas/os in the law and throughout society. Ranging from the "what are you question" to the "you don't belong here conundrum," n52 this litany of subversive and offensive queries reminds us that Latinas/as, like other people of color, have secured only a tenuous toehold in America's legal professions.

Accompanied by a host of suggested responses, Professor Perea's questions also point out how daily life presents Latina/os with manifold opportunities to engage the microaggressions n53 of daily life in a racist and ethnocentric society and legal system. Each of the queries and episodes effectively describe the
practice and precepts of racism, ethnocentrism, [*14] and nativism; each of these instances thus create occasions for the practice of anti-racist, pluralist, and egalitarian politics. Presented as they are with humor and grace, these questions and episodes display both the need for, and the exercise of, individual action and courage in blunting the social and legal forces that deploy Latina/o identity to subordinate those who are Latina/o-identified.

These two presentations, by Professors Espinoza and Perea, therefore ought to prompt Latina/o scholars to reflect in earnest on the way in which the classrooms and corridors of our legal institutions might look after the current wave of regressive politics is exhausted. These presentations are topical and propitious because they can, and should, excite increased and prompt resistance to this current wave among Latina/o legal scholars. As Professor Keith Aoki points out in a similar setting, the current wave of backlash is "far from being a phenomenon of mass consensus, the social terrain on which backlash occurs is hotly contested. It is far from clear that 'backlashers' will carry the day." n54 Thus, it is crucial for Latina/o legal scholars to weigh in with discursive and activist interventions while it (still) counts. With their remarks at this Colloquium, Professors Espinoza and Perea present us with vivid reasons for acting without delay, as Latina/o legal scholars, in the service of the social and legal causes that resist retrenchment in all its forms and fronts.

The third presentation, by Angel Oquendo, shifts the discussion to a broader and more theoretical plane. n55 Through an explicit consideration of Latina/o identity as a species of "race" in American society, Professor Oquendo invites Latinas/os to consider in tandem the social construction of ethnicity and race. By pivoting the discussion explicitly on a comparative and cultural approach to these constructs, Professor Oquendo accomplishes two important points regarding current practices and their discontents. First, he underscores the social construction both of race and of ethnicity in the norms and rules of American society, both historically and presently. Second, Professor Oquendo's historical and conceptual approach allows for a lingering contemplation on the commonalities among and between African Americans and Latinas/os as "people of color" in a society that culturally and legally has espoused white supremacist ideology for most of its time as a nation. n56 These two points are broadly important because they elucidate both the current practices and prospective possibilities regarding "sameness" and "difference" that sometimes separate African American and Latina/o perspectives and efforts.

By reflecting on the meaning of "race" to Latinas/os in this country, Professor Oquendo's presentation illuminates the way in which both African Americans and Latinas/os are implicated in the current, or in alternative, social constructions and applications of this concept. It follows, then, that both African Americans and Latinas/os are implicated in the resistance against the current practice of race/ethnicity backlash and [*15] retrenchment. These points thus can help to facilitate and inform the coalitional outreach that leaders and activists, both in the law and outside of it, must undertake mutually and continually in order to bring the energies of these two communities into line with one another in our corresponding quests to extirpate white supremacy from American law and society.

In this vein, Professor Oquendo's analysis also leads to a similar consideration of sameness and difference between Latinas/os and other colorized immigrant groups, such as Asian Americans. This prompting follows in particular from Professor Oquendo's identification of immigration-related experiences and nativist prejudices as central to the creation and texturing of Latina/o communities and concerns. In this way, Professor Oquendo contextualizes race in its relationship to culture, ethnicity, and nativism. Professor Oquendo's remarks consequently leave us thinking about the ways in which Latina/o legal discourses might converge specifically with its Asian American counterpart. n57

Past and present experience points to several areas of convergence. For both Asian Americans and Latinas/os, the dominant constructions of race, ethnicity, and culture become salient features of colorized otherness, despite the diversity of humans grouped under each of these generalized categories. Both of these groupings takes place outside of, and suffer erasure under, the Black/White paradigm. At the same time, both of these groupings ignore or deny the diversities crowded into them. For these reasons, both Asian American and Latina/o scholars have many sources and sites of possible or potential sameness and difference to excavate in the years to come.

However, Professor Oquendo's presentation accomplishes even more. In pointing us toward a contemplation of sameness and difference between the various communities of color that have come into existence within, and as part of, the American nation, Professor Oquendo also reminds us of the sameness/difference dilemmas within Latina/o communities. His words serve to remind us of the historical and demographic fact that this generalized group--"Latinas/os"--in fact comprises several distinctive groups, each with even more specialized
African Americans in some ways reflect the Latina/o experience and group psyche of Asian Americans. Consequently, this presentation can serve as a reminder of the history of American imperialism and the way it has affected people of color. The United States, and other imperial powers, came to us; the United States did not come to the Latinas/os; the Latinas/os came to the United States. In some ultimate sense, the conqueror always comes to the conquered. He reminds us that American and European governments practiced colonialism against native peoples around the world by journeying to their lands, deceiving and destroying their systems of order, ravaging and looting their economies and cultures, and obliterating the memories of indigenousness. 

For instance, he describes issues that revolve around language as common to all Latinas/os, even though the migration patterns of Mexicans, Puerto Ricans, or Cubans may have differed from each other, and also from those of other Latina/o groups in American society. Indeed, Professor Oquendo discerns a common uniqueness among Latinas/os, resulting specifically from the unfolding of the Latina/o colonial experience on this continent: focusing on the territorial expansionism of American policy, Professor Oquendo observes that "the Latina/o community did not come to the United States; the United States came to the Latina/o community." This unique history, he argues, positions Latinas/os singularly vis-à-vis other immigrant groups while also situating Latinas/os in a common position vis-a-vis each other.

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Proceeding from the "cultural resistance to Anglo assimilation" that is the hallmark of Latina/o civil rights struggles, Professor Romany's aim is to expose the "gender specific character of racial, ethnic, and cultural devaluation." This positioning and focusing, specified explicitly at the outset of the paper, epitomizes the practice of willful synthesis and creative balance that symbolizes the finest of political and theoretical possibilities for the future of Latinas/os, Critical Race Theory, and post-postmodern anti-subordination legal discourses. This blending of modernist purpose and postmodern perspective points the way to a powerful future for the nuanced sort of outsider or perspective jurisprudence that may yet be crafted.

With this purpose, Professor Romany at once expands the analysis beyond race and into gender, while managing to situate ethnicity at the center of this expanded discourse. With this approach, she highlights the inter-connectedness of race, ethnicity, and gender in American law; that is, with this approach, Professor Romany brings into sharp relief why critical legal scholarship must be expansive and inclusive, and specifically why Latina/o analyses of our places and prospects in the social and legal scheme of a patriarchal, Anglo power structure must take varied sources of oppression into account. With this analysis, Professor Romany brings a salutary sense of interconnectivity to Latina/o critical legal discourse, and also to the two theoretical genres that she critiques and unites in this presentation.

In this way, Professor Romany inevitably and forcefully confronts the sameness/difference dilemma within or between Latina/o groups. She acknowledges at the outset a "clear recognition of the heterogeneity of the Latina/o community and hence of Latinas." By placing Latinas at the center of her work—which avowedly is calculated to "seize commonalities"—and by recognizing difference and heterogeneity, Professor Romany provides a positive example of detailed yet balanced critical legal scholarship: she demonstrates how Latina/o legal theorizing can be at once focused and expansive, specific yet contextual. In this way, Professor Romany displays a "dual commitment to eliminating oppression and celebrating difference" that defines the best moments and hopes of critical legal theory.

The following presentation by Robert Chang helps to broaden and strengthen the insights and practice emanating from the preceding ones. As a scholar with an Asian American subject position, Professor Chang brings an allied but distinct perspective to this Colloquium. In some respects, Professor Chang's presentation fulfills the allusions of sameness and difference between Asian Americans and Latinas/os previously raised by Professor Oquendo. Specifically, Professor Chang cites "the attribution of foreignness" as a common theme running through the American experiences of both Asian Americans and Latinas/os. He elaborates how this inscription of foreignness erects a figurative border, which all Asian Americans and Latinas/os carry with us as individuals. This metaphorical border accompanies us everywhere, even--or perhaps especially--when our physical movements take us to the heartland of this country, far away from any literal or geographic borders.

Likewise, Professor Chang notes how the "negative identity" signified by labels such as "Asian American" or "Latina/o" in an American context connotes that "our true home lies elsewhere," even though that connotation and its negativity depends on imagined places or homelands. In this in-between eternity, Asian Americans and Latinas/os are reduced indefinitely to neither here nor there. We vanish both from the American landscape as well as from our native lands under the cloak of this false yet definitive interstitiality. Professor Chang thus critiques this romantic and complex dream because it displaces the reality of Asian American and Latina/o permanence, potentially to our detriment.

This inscription of negative identities generates an acute sense of identity ambivalence, as Professor Chang notes, precisely because it situates Asian Americans and Latinas/os nowhere; the negative label constructs peoples without countries. The resulting loss of identification with either "here" or "there" is potentially harmful because it causes Asian Americans and Latinas/os to internalize fractured and conflicted identity relations that perpetuate disempowerment: are we here, for real, permanently, or are we simply cultural impostors biding time until a return to the true site of our belonging occurs? This "dream of return" ultimately—and ironically—may paralyze the development of a full commitment to resistance against racist nativism in the here and now, by Asian Americans and Latinas/os who are here now.

This paralysis flows from the ambiguity and ambivalence of the disorientation inherent in this displacement, and the consequential disempowerment based on a sense of inauthenticity as members of the American body politic: if we are transients, why insinuate and invest ourselves fully in controversies
over which we lack cultural standing and which, in any event, are only temporary for us? Asian Americans and Latinas/os, both permanently resident in the United States for spans of generations, are constructed as perpetual strangers in a manner that may instill and perpetuate our subordination. Professor Chang's remarks thus raise an insidious specter: this dream of return to a homeland, largely imaginary but still a way of cherishing cultural roots, may postpone struggles against past and present subordination.

With these stalwart words, Professor Chang effectively urges all Asian Americans and Latinas/os to reconsider the implications and challenges of our permanence in the United States, to act as if we realize that we are here to stay because, well, we are. For both Asian American and Latina/o legal scholars, the internalization of such fractured and conflicted identities by our selves and among our communities is problematic because it enervates the struggle against the law's complicity in current oppressions. The challenge posed by Professor Chang to us, then, is to craft balance from [*20] ambiguity and ambivalence, resolution from displacement and disempowerment.

Underlying and animating this presentation is an immensely important and intricate larger question: can the numerous issues emanating from immigration, language, and nativism be a source of commonality specifically between and among Asian American and Latina/o scholars, communities, and agendas? Both--"Asian American" and "Latinas/os"--embrace distinct groups with specialized identities, both categories exist as foreignized counterpoints to "true" American identity, and neither construct is accommodated within the "comfortable binary" of the Black/White paradigm. Engaging this question, Professor Chang effectively challenges critical legal discourse, and specifically Latina/o critical legal discourse, to interrogate the lessons proffered to Latina/o legal scholars by the Asian American experience. By inference, he also challenges nascent Asian American critical legal discourse to engage and interrogate the Latina/o experience.

This dual engagement and interrogation has tremendous revelatory and transformative capacity because it focuses on two traditionally subordinated, but currently ascendant, subject positions, neither of which is accommodated by the Black/White paradigm of American society. From either or both of these positions, Professor Chang can and does question the putative necessity of this paradigm; from both of these positions, Professor Chang acts as interloper to disrupt the dichotomous cross-oppositions of whiteness and blackness that occlude Asian Americans and Latinas/os in the United States. By making Asian and Latina/o ethnicity salient, he emphasizes how these racialized communities problematize the construction of both blackness and whiteness in American society. Professor Chang thus brings us full circle: how can we assess the relevance of Critical Race Theory to Latinas/os, and other non-Black people of color, in a socio-legal context that is not only bracketed but blanketed with whiteness and blackness?

The next two presentations close the Colloquium, aptly, with forward-looking critiques of current practices in legal culture and American society. The first focuses on the way in which domestic coalitional work [*21] is premised on acts of learning and understanding that, in turn, permit scholarly imagination, creativity, and energy to cross key lines. Among these lines are the ones that unnecessarily separate academics from activists, as well as the lines that sow undue divisiveness among subordinated communities based on race, class, and ethnicity. The second of these presentations joins fields of international law with agendas for domestic social transformation to carve out new opportunities for reformatory projects through the scholarly development of uncharted legal strategies. This second presentation thus crosses additional lines--those that separate the "domestic" from the "foreign" domains of the law in the current practices of critical legal scholarship. Both of these therefore speak expressly to the urgency of building bridges. In this way, the next two works display and urge the necessity and benefits of Latina/o legal scholarship that transcends traditional boundaries regarding identities, communities, doctrines, and politics.

The first of these, by Deborah Ramirez, presents a case study in community service and activist scholarship to help secure reform on the ground. This presentation, inspired by personal life experience, is drawn from Professor Ramirez' recent work with the Hispanic Advisory Commission in Boston, which was formed to develop state policy initiatives on behalf of Latina/o communities in Massachusetts. This fusion of life and politics with scholarship thereby models, in a Latina/o setting, the essence of praxis--the vital blending of practice with theory, a blending that ideally animates and undergirds outsider or perspective jurisprudence.

But this example of scholarly activism also clears narrative space and provides discursive privilege for community voices--this example shows how a community can educate the educators on the hidden effects, specifically on Latinas/os, of current legal and social practices and their political or conceptual themes. Professor Ramirez encountered first their visceral sense of marginalization under the
Black/White paradigm: Boston's Latinas/os "asked for recognition of Latina/os" as such, she reports. n87 The community, articulating itself in the language of lived experience, thus confirmed a concrete reality; an inclusive racial/ethnic discourse to help guide public policy and lawmakers beyond the Black/White paradigm is more than an academic matter.

This work similarly trains our sights on the front-line operation and impact of the sameness/difference dilemma. Professor Ramirez reports that her community's response focused on the need for the government, and hence the law, to recognize the racial, economic, and cultural similarities and differences that delineate the Latina/o experience in the United States vis a vis other population groups. In particular, they sought [*22] official recognition that Latina/o histories and conditions distinguish this experience from those that ground the African American communities of the United States, even though both groups face similar issues of disempowerment and impoverishment. Professor Ramirez reports that Boston's Latina/o community would "like the government to recognize not just that these differences exist, but that we as a community also exist." n88

This work thus illustrates the joint operation in American law and society of two themes that permeate the Latina/o experience in the United States, and hence this Colloquium: these community voices cry out for official responses to the joint effects of the Black/White paradigm's tendency to suppress recognition and understanding both of commonalities and of differences between and among racialized and ethnicized groups in American society and its legal regimes. This response encapsulates the importance of praxis and nuance in critical legal scholarship. This community outcry vividly underscores the urgency of critical legal discourses informed by the sophistication and disenchantment, and guided by a politics of difference and identification. n89

The concluding presentation, by Berta Hernandez-Truyol, takes these lessons beyond the physical boundaries of the United States. On this note, the Colloquium closes with a conjunction of legal fields that occupy and affect both the interiors and exteriors of American law and society. n90 With this expansion of scope and focus, Professor Hernandez-Truyol's presentation reminds us that the present practice of subordination inside the United States implicates multiple fields of law and life, and that contemporary strategies of resistance to it must cross conventional lines and borders in order to achieve optimal results.

The core of her presentation urges us to "globalize our domestic legal practice by integrating international human rights norms as a means of developing, expanding and transforming the content and meaning of our human/civil rights jurisprudence." n91 This globalization, Professor Hernandez-Truyol points out, is made both imperative and problematic by the "current political-social climate," which caters to backlash and favors retrenchment on many fronts. n92 But "the benefits to be reaped from the incorporation of accepted human rights principles into our domestic rights discourse" are too important to be neglected. n93 To obtain these benefits, Professor Hernandez-Truyol embraces and espouses a "diversity perspective," which is calculated to build bridges both within and beyond Latina/o groups and communities. n94

[*23] In the first portion of this presentation, Professor Hernandez-Truyol takes an inward look at intra-group sameness/and difference between and among Latina/os. She reviews historical circumstances and contemporary conditions to review contextually and critically the myriad sources of Latina/o sameness and difference. By urging us to recognize, celebrate, and balance the "complexity and diversity of our Latina/o roots," n95 Professor Hernandez-Truyol urges us to negotiate the intra-Latina/o sameness/difference dilemma with care and generosity--with sophistication and disenchantment. By invoking "our comunidad latina" in the face of complexity and diversity, Professor Hernandez-Truyol sets out to "build bridges between our own peoples," and to achieve an "internal coalescing" of Latinas/os as a predicate of Latina/o success specifically in legal academic circles specifically. n96 This first portion of the presentation transports back to ourselves, literally; with this discussion, Professor Hernandez-Truyol notes for our sake that the success of Latina/o law professors and scholars depends on our ability to practice what we preach. In doing so, she both practices and preaches scholarly sensibilities to nurture Latina/o pan-ethnicity and coalition-building within contemporary legal culture.

In the second portion of this presentation Professor Hernandez-Truyol then turns to "the great racial divide" that replicates Black/White color divisions. In doing so, she invites us to consider how this divided and divisive status quo inflicts invisibility and marginality both on Latinas/os and on Asian Americans. In this presentation we therefore encounter, once again, the suggestion that Latinas/os and Asian Americans share a situational kinship as non-Black immigrants of color within American society and under its Black/White paradigm. In this portion of the presentation, we once again encounter the sameness/difference dilemma, its effects on intra-Latina/o group affinities, and its impact on people of color inter-group relations.
This general non-recognition of identity multi-dimensionality that the Black/White paradigm facilitates, Professor Hernandez-Truyol points out, impoverishes social and legal discourses on race relations given its absurd underinclusiveness. Not only is this underinclusiveness pernicious for the many reasons already noted in the preceding presentations, Professor Hernandez-Truyol emphasizes here that recognizing this multi-dimensionality also is the foundation for connecting domestic practices to international law. n97 To build this final bridge between the domestic and international domains of the law, Professor Hernandez-Truyol focuses on three issues particularly important to traditionally subordinated racial and ethnic groups in the United States: "Penalties (as in death), Privacy (as in personal) and Indecent Propositions (as in 187)." n98 Each of these legal and political fronts, Professor Hernandez-Truyol points out, provide [*24] opportunities for African Americans, Asian Americans, and Latinas/os to work together as diverse peoples of color in pursuit of more than bare survival under a white supremacist society. Each of these fronts effectively provides opportunities for the practice and politics of difference and identification.

And, in each of these contexts, Professor Hernandez-Truyol analysis shows the transformative synergy that resides at these intersections of domestic case law and international norms or rules. In each instance, the application of international law strengthens the case for domestic reform. In each instance, a transnational analytical framework helps to reveal the narrowness that inspires the practices and politics of backlash domestically. This concluding presentation considers a dimension of Latina/o critical legal discourse that remains generally under-utilized in outsider jurisprudence: marshaling international law in the cause of domestic liberation for America's people of color.

As noted at the outset, these seven presentations also compel us to consider the possibilities that await Latina/o critical legal discourse. These scholars, in addition to elucidating current practices in American law and society vis a vis Latinas/os and other people of color, highlight the potential of legal discourses to add impetus to the theoretical and political advances already secured under the banner of Critical Race Theory. This Colloquium, in effect, can serve as a platform in the shift from practices to possibilities for Latina/o legal scholars. The remainder of this Foreword takes note of three such possibilities which, collectively, are designed to help Latina/o legal scholarship capitalize on the prospects raised by, or to be implied from, the current practices of American critical legal discourses evidenced within or by this Colloquium.

III.

ON POSSIBILITIES: LATINAS/OS, PAN-ETHNICITY, AND POSTMODERNISM

As with the preceding discussion of practices, the three possibilities noted below obviously do not exhaust the realm of Latina/o potential in critical legal scholarship. Instead, this trio of possibilities is calculated to focus Latina/o legal scholars on the tensions that await us as we seize the opportunities open to us. By focusing on these three possibilities, I hope to promote within Latina/o legal discourse a sense of post-postmodernism, by which I mean a productive engagement with "sophistication" and "disenchantment" as we stand at the threshold of LatCrit theory. n99

These three possibilities therefore are posed as partial means through which LatCrit theory can negotiate issues of sameness and difference toward a progressive sense of a coalitional pan-ethnicity. If Latina/o legal scholarship can help to unpack the particular legal and material conditions that affect Latina/o-identified individuals and communities in [*25] the United States, helping through this knowledge to empower and improve Latina/o positions and interests, we will have performed a great service. But if this scholarship also helps to cultivate a sense of sophisticated commonality, or post-postmodern pan-ethnicity, among the "different" groups of Latinas/os in American society, we also will have provided a sturdy basis for an intra-Latina/o politics of difference and identity. If so, we will have helped to foster an intra-Latina/o consciousness as a potent and enduring means toward Latina/o self-empowerment.

Moreover, by cultivating post-postmodern coalitions, LatCrit theory can position itself to be a strong and positive collaborator in the broader and joint resistance to subordination, which animates the work of RaceCrits, FemCrits, Race/FemCrits, QueerCrits, and other emergent outsiders. Each of these schools of perspective jurisprudence shares with the others issues of oppression, methodology, authenticity, identity, community, and legitimacy; n100 each of these subject positions seeks to deconstruct and reconstruct the role of law in subordination. Working from sophistication and with disenchantment, and embracing an inter-people of color politics of difference and identification, LatCrit theory can be a solid partner, specifically of Critical Race Theory, in building the jurisprudence of reconstruction and transformation that communities of color in American society so much need. n101
Accordingly, the first of these possibilities is the very prospect of a discursive or theoretical genre openly focused on and driven by Latinas/os, and denominated and deployed with Latinas/os *qua* Latinas/os uppermost in mind. This threshold possibility springs from recurrent themes in the presentations of this Colloquium: a continuing sense of Latina/o marginality under all extant discourses or critiques of law even though the concepts, issues and goals of the discourses are familiar and important to Latinas/os. Whether it be the vestigial omnipresence of the Black/White paradigm in the American mainstream or the more recent Afrocentrism and heterocentrism of Critical Race theory (or the apparent whiteness and straightness of Feminist legal scholarship), the loss of diverse Latinas/os *qua* diverse Latinas/os from the discourse truncates Latina/o needs and aspirations.

At this juncture, it appears that this loss can be rectified or alleviated in one or both of two basic ways: an inward turn, focused on initiating LatCrit theory, or an outward emphasis, renewing our commitment to existing discourses. In other words, Latinas/os can endeavor to elevate ethnicity within Critical Race theorizing and gatherings (and to rejecting the whiteness of Feminist legal theory) or move to initiate a similar enterprise focused specifically on Latina/o. Or, Latinas/os can pursue a two-track approach, which combines at once both inward and outward directions.

[*26*] Without doubt, the two-track approach is preferable. The presentations of this Colloquium, again, either spell it out or imply it: Critical Race Theory creates discourses that are relatively conducive to critical examinations of ethnicity, to nuanced explorations of sameness and difference within and beyond any group of color, to gains and insights in corresponding quests toward equality and dignity. For these reasons, Latinas/os should continue to participate in and support Critical Race (and Feminist) legal scholarship. For these same reasons, Critical Race Theory (and Feminist Legal Theory) must continue opening itself to Latinas/os, Asian Americans and other people who are neither African nor Anglo. Latinas/os should help to inform Critical Race (and Feminist) theorizing, but, as Professor Harris' Foreword demonstrates by example, making that happen requires mutual commitment and sustained effort. n103

Experience consequently suggests that Latina/o legal scholars also must begin to create the discourses that will help to coalesce and advance the prospects of Latinas/os *qua* Latinas/os in American society and legal culture. A self-aware and focused Latina/o legal scholarship, and the dialogs that it creates, can sharpen Latina/o political discourse and activism, both in law and throughout society. This sort of legal scholarship therefore is key to the improvement of social and legal conditions for all Latina/o groups and communities in the United States. The benefits of LatCrit theorizing can be secured only by undertaking the work of LatCrit theory because, in my view, LatCrit theory faces a specific project: the exploration of Latina/o pan-ethnicity.

The concept of pan-ethnicity, as I use it here, provides a frame for sameness/difference discourse in Latina/o contexts. It poses a threshold query: do the varied Latina/o groups of this country, including the Mexican American, Puerto Rican and Cuban American ones, perceive sufficient similarities in language, culture, history or circumstance to generate a sense of pan-group affinity? If so, to what extent--where are the limits of pan-ethnic groupness? This query of course may be applied with validity and utility in Asian American and African American contexts, but the examination of this question has remained mostly inchoate. LatCrit theory can--it should and must--open the question to examination, illuminating the issues that it raises for each of these groups. n104

Thus, the possibility of LatCrit theory is not antagonistic to the continuation of Critical Race Theory, nor to continued (and increased) Latina/o involvement in race critical scholarship. Nor is LatCrit theorizing incompatible or competitive vis-a-vis RaceCrit theorizing. Instead, LatCrit theory is supplementary, complementary, to Critical Race Theory. LatCrit theory, at its best, should operate as a close cousin--related to Critical Race Theory in real and lasting ways, but not necessarily living under the [*27*] same roof. n105 Indeed, and ideally, each would be a favorite cousin of the other--both always mutually present at least in spirit, and both always mutually welcome to be present in the flesh.

Juxtaposed against the threshold possibility of LatCrit theory is a second possibility: making the shift from the current practice of identity politics to a potential construction of politicized identities. n106 This shift, being pioneered by Professor Chang, Professor Harris, and like-minded scholars, entails recognition of the fact that alliances are best built on shared substantive commitments, perhaps stemming from similar experiences and struggles with subordination, rather than on traditional fault lines like race or ethnicity. This second possibility thus entails rejection of automatic or essentialist commonalities in the construction of coalitions and entails the post-postmodernist combination of sophistication with disenchantment, which can create a platform for the politics of difference and identification.
And, therefore, it is this move from color to consciousness that permits reconstructed modernism to refine the dynamics of post-postmodern identity politics and to chart the directions of perspective jurisprudence in the coming years. This move and its potential riches are viable both in intra-Latina/o group contexts as well as in inter-people of color group contexts. This pending move from color to consciousness, motivated by the blending of sophistication and disenchantment, is therefore a theoretical and political anti-subordination strategy for legal scholars self-identified as Latina/o, as well as other subordinated communities.

In fact, as Professor Harris has indicated, this acceptance and balancing of sophistication and disenchantment is precisely what makes it conceivable to mount critical legal movements that are race-conscious, ethnicity-conscious, gender-conscious and sexual orientation-conscious without blindly assuming, embracing, and replicating political or analytical essentialisms. This balance is what permits the tension of modernism and postmodernism to be marshaled creatively toward the remediation of common yet personal suffering. This second possibility, in sum, conjures a vision of diverse critical legal scholars emphasizing different subject positions to engage and abet each other by mutually mapping multiple "chains of equivalences," all of which accumulate to oppress women, people of color, and sexual minorities in different yet similar ways, forms, and settings.

Coupling the possibility of LatCrit theory with the possibility of a post-identity and post-postmodern era in critical legal discourse consequently recognizes that commonality is not grounded in some innate or essential universality, but that it is engineered by socially constructed experience--the infliction of suffering and the attendant struggles against even more suffering. Among Latinas/os, these experiences take place around the historical and contemporary issues of white supremacy, Eurocentrism, nativism, language, immigration, and culture. In and across these various issues, Latinas/os manifestly are both different and similar. The individual and collective suffering involved in these experiences, and the challenges posed by these issues, provide the source of a balanced and sophisticated sense of Latina/o pan-ethnicity.

This second possibility and vision thus are rooted in the personal and group experiences of subordination and suffering, which in turn are based on race, ethnicity, gender, sexual orientation, and other socio-legal fault lines; this possibility, intentionally moving away from essentialist appeals to race, ethnicity, gender or sexual orientation, anchors the potential post-identity movements of the post-postmodern era to the consciousness, struggles, and affinities produced by varied yet shared experiences of oppression and suffering based on these and similar constructs. This move is radical because it causes a shift away from the customary anchors of personal and group identity politics, but it is a key shift in basic identity paradigms because it draws strength both from modern and postmodern precepts, practices, and traditions.

The move to consciousness helps to mediate Latina/o commonalities and diversities regarding past history and present conditions because it allows us to focus on shared aspirations and common purposes. It is a vehicle for joining like-minded forces from groups or communities that otherwise may be configured along fractious and self-defeating lines. This move thereby can facilitate pan-ethnic and coalitional Latina/o agendas, projects, and efforts.

To some extent, the juxtaposition of these possibilities-LatCrit theory, Latina/o pan-ethnicity, and post-identity subjectivities--simply reflects the discursive and conceptual practices already pioneered by Critical Race Theory (and Feminist Legal Theory). Conceptual devices and analytical tools, like multiplicity, multi-dimensionality, and intersectionality permit critical legal scholars--Latina/o and otherwise--to speak from cognizable subject positions without imprisoning ourselves within any given position. Against this background, this juxtaposition effectively describes a Latina/o critical legal scholarship that is analytically insightful and functional because it is culturally inclusive and conceptually flexible.

This juxtaposition of Latina/o theory, pan-ethnicity, and post-identity politics, in turn, illuminates the third possibility: the renewal and enhancement of collaboration and coalition between and among scholars who identify with traditionally subordinated communities. Emerging from the ongoing mapping of sameness and difference, this possibility is about collective empowerment and improvement--about collaborating mutually to enhance the social and legal conditions of Latina/o and of other subordinated communities. This final possibility is about the broader alteration of individual and group power relations legally and socially. It is the promise of empowerment for self/kin/community through coalitions stemming, again, from common yet diverse experiences with oppression and suffering.

Through comprehensive examinations of bigotry and domination, LatCrit projects can help to locate the appropriate sites of coalitional cooperation, thereby deepening the law's commitment to reform on multiple fronts of oppression and broadening Latina/o
resistance to the politics of backlash and retrenchment. Furthermore, by appreciating how varied species of discrimination become systems of subordination, which then operate as inter-linked networks of oppression, all genres and subject positions of critical legal scholarship can contribute to a capacious anti-subordination project. n117 Only this sort of mutual, collaborative project, based on a clear vision of interconnected group/power relations, can counter the pervasive and insidious cross-linkages of racism, nativism, androsexism, heterosexism, and classism in law and society.

The benefits inherent in these three possibilities are crucial because they offer hope in Latina/o struggles against the misuse of law to inflict or permit human suffering, debasement, and exploitation. These benefits include the development of Latina/o self-awareness and understanding, the advancement of Latina/o civil rights, the improvement of material conditions for Latina/o people, and a broader lessening of oppression and suffering among outsider groups in American society. These benefits obviously do not preclude areas or times of divergence and contention within Latina/o communities, or even among people of color more generally, n118 but these benefits cannot be foreclosed simply because [*30] oppressed groups may disagree on any given issue or situation. As we contemplate moving from practices to possibilities, LatCrits must apply our talents and energies to securing these benefits for ourselves, our communities, and our situational kin.

This vision of balance and broadness in critical legal scholarship is perhaps optimistic, but the presentations delivered at this Colloquium provide cause for some optimism. In each instance, the presentations that follow this Foreword proceed from a decided and conscious subject position that is racialized and/or ethnicized and/or gendered. Yet, in each instance, these scholars have endeavored to elucidate the connections between each particular position and the positions of those who might, in varying degree, be regarded as the situational and intellectual kin of these scholars. In this Colloquium, we witness the balance and broadness--the politics of difference and identification--that provides cause for optimism about the discursive, theoretical, methodological, and political possibilities that await us. In this Colloquium, we see both sophistication and disenchantment put to good use in the service of reconstruction and transformation through jurisprudence.

IV.

CONCLUSION

During the past several years, traditionally subordinated voices have sought to find our selves and our kinds in American law and society. In doing so, we have sometimes supposed commonality or similarity only to discover difference and diversity. During this time, we have problematized identities and their meanings to foreclose the re-inscription of simplistic homogeneities and to engender a discourse that was both realistic and reformatory. With these efforts, we have abandoned various essentialisms; we have moved from various modernisms to various post-modernisms. Yet, we have not been entirely successful. Despite our best and continuing efforts, outsider critiques of entrenched biases and power relations in American law and society have perpetuated historic erasures or elisions based on race, ethnicity, gender, sexuality, and other features of multiplicitous, multi-dimensional, intersecting identities. Now, perhaps, outsider legal scholars are ready to take the next step in the ongoing project of liberation through critical legal scholarship and activism. Now, perhaps, we are prepared to practice sophistication and disenchantment. Now, perhaps, we are ready to usher in a post-identity politics so that we can enter and help create the post-postmodern era in critical legal scholarship. My hope is that diverse Latina/o articulations of LatCrit theory, in tandem with strong Latina/o participation in Critical Race Theory [*31] Theory, Feminist Legal Theory, and Queer Legal Theory, will advance us toward this crucial step in an ongoing, broad-based, and ultimately successful anti-subordination project.

FOOTNOTE-1:


n2 Even as recently as the mid-1980s, the status quo of American civil rights scholarship was exceedingly white and male. See Richard Delgado, The Imperial Scholar: Reflections on a Review of Civil
Rights Literature, 132 U. PA. L. REV. 561, 561-63 (1984) (arguing that an inner circle of a dozen legal scholars, all white and male, dominated American civil rights legal literature by citing to each other). Today, the various symposia cited below in note 6 include authors speaking from various racial/ethnic self-identifications, including Anglo or Euro-American. See generally infra note 6 and sources cited therein on critical race discourse.


n4 In some ways, this penetration already may be discerned. A case in point is Lam v. University of Hawaii, 40 F.3d 1551 (9th Cir. 1994) in which the Ninth Circuit adopts an "intersectional" analysis of race,
ethnicity, and gender discrimination to grant relief to an Asian woman subjected to illegal employment biases. See id. at 1561-62. Under these facts, the racialized, ethnicized, and gendered dimensions of the discrimination could have been parsed and atomized, such that no illegality would be found at the conclusion of the analysis. Resisting this formalism, the court instead focused on the ways in which multiplicitous identities form intersections of oppressions. This sort of analysis originates with the work of leading Critical Race Theorists, including Kimberle Crenshaw and Angela Harris. See, e.g., Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1990); see also Berta Esperanza Hernandez-Truyol, Building Bridges -- Latinas and Latinos at the Crossroads: Realities, Rhetoric, and Replacement, 25 COLUM. HUM. RTS. L. REV. 369 (1994) (discussing the "multi-dimensionality" of identity in the Latina/o context). See generally, Clark Freshman, Note, Beyond Atomized Discrimination: Use of Acts of Discrimination Against "Other" Minorities to Prove Discriminatory Motivation Under Federal Employment Law, 43 STAN. L. REV. 241 (1990) (advocating judicial recognition of the inter-connectedness of "different" species of discrimination).


n6 For instance, during the past few years a new set of regional conferences for legal scholars of color has come into existence, in part, as a result of the intellectual room and momentum created by critical race discourse. Today, these annual conferences cover the Northeastern region, the Mid-Atlantic Region, the Southwest/Southeast region, the Western region, and the Midwest region of the country. Though the regional conferences are not focused on Critical Race Theory as such, the annual Critical Race Theory Workshop is a nationwide gathering of scholars devoted specifically to the advancement of critical race discourse. The first of these Workshops was held in 1989 at the University of Wisconsin. For a history of critical race discourse, see generally John O. Calmore, Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World, 65 S. CAL. L. REV. 2129, 2135 (1992); see also, Harris, supra note 1, at 741 (providing another, personal account of Critical Race Theory and its origins).


n7 The term "postmodern" describes a critical approach to various assumptions about the human condition, and to their social construction through words and practices. See Harris, supra note 1, at 748. See generally Anthony E. Cook, Reflections on Postmodernism, 26 NEW ENG. L. REV. 751 (1992) (discussing postmodernism in a socio-historical context).

n8 Exemplars of this critical and progressive legal scholarship tap into history, sociology, literature, psychology, cultural studies, and other disciplines to push for social redress through theoretical insight and doctrinal reform. See, e.g., Kimberle W. Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,
n9 E.g., Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. L. FORUM 139 (exposing how women of color are marginalized under the race/whiteness essentialism of Feminist Legal Theory and the gender/maleness of Critical Race Theory); Harris, supra note 4; Cheryl I. Harris, Whiteness as Property, 106 HARV. L. REV. 1707 (1993).

n10 The term "outsider jurisprudence" was coined by Professor Mari J. Matsuda to signify the schools of legal literature and discourse that emanate from and focus on "outsider" voices, interests, and communities. See Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320, 2323 (1989); see also Mary I. Coombs, Outsider Scholarship: The Law Review Stories, 63 U. COLO. L. REV. 683, 683-84 (making a similar point with a similar term).

n11 The term "perspective jurisprudence" was proffered more recently by Professor Martha Fineman, who defines it as "a body of scholarship that is built explicitly upon the assertion of relevant differences among people, whether they be found in race, class, sexual orientation, social situation or gender." This body of scholarship thus comprises "complementary critical" viewpoints, that are brought to bear on legal doctrines and practices in order to argue for reform. MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 11-12 (1995).


n13 See generally, Charles R. Lawrence III, Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation, 47 STAN. L. REV. 819 (1995) (urging a reconceptualization of race and racism as a substantial societal condition that affects entire groups of people rather than simply individuals as such).

n14 Sometimes, the best measure of such inroads is the reactions it generates from the established quarters of the status quo. In the case of Critical Race Theory specifically, and of critical legal theorizing more generally, the reactions thus far indicate a certain unease over the methodology and influence of critical race scholarship, at least when produced by scholars of color. See supra note 3 and sources cited therein on reactions to and discussions of techniques and points associated with Critical Race Theory. This state of affairs indicates that Critical Race Theory indeed has had an impact on the status quo, but it does not mean that Critical Race Theory is comfortably ensonced within the legal Academy. On the contrary, young scholars of color continue to be undermined by a status quo that on the whole insists on questioning the
very legitimacy of Critical Race Theory, viewing the enterprise as somehow below conventional or traditional legal discourse. See generally, Baron, supra note 3, at 259 (describing the "nasty" tone of criticism leveled at Feminists and Critical Race Theorists). This self-serving value judgment, of course, has the foreseeable and inevitable result of keeping legal culture and discourse racialized in favor of persons and projects associated with whiteness. See generally Richard Delgado, The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later, 140 U. PA. L. REV. 1349 (1992) (discussing practices within the Legal Academy that continue to devalue the work of scholars associated with traditionally subordinated communities).

n15 See, e.g., Crenshaw, supra note 4, at 1244 ("Because of their intersectional identity as both women and of color within discourses that are shaped to respond to one or the other, women of color are marginalized within both" Critical Race Theory and Feminist Legal Theory).

n16 As used here, "Afrocentric" denotes a focus on black or black/white relations and not a yearning for, or a return to, Africa. The perception addressed here with this term, as discussed immediately below, is that the scholarship and discourse produced under the rubric of "Critical Race Theory" generally and effectively has equated African American "blackness" with "race" and measured that experience against Euro-American "whiteness" without examining how Asian American, Latina/o and Native American experiences or identities figure in the race/power calculus of this society and its legal culture.

n17 See, e.g., Crenshaw, supra note 4, at 1242-44 (critiquing the marginalization of women of color in Critical Race Theory and other discourses); Harris, supra note 4, at 587-89 (critiquing the failure of Feminism to expressly interweave women of color in Feminist legal theorizing). A similar critique has been leveled at Feminist Legal Theory from a sexual minority perspective. See, e.g., Elvia R. Arriola, Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory, 9 BERKELEY WOMEN'S L.J. 103 (1994) (rejecting the use of arbitrary categorization adopted in Feminist Legal Theory); Patricia A. Cain, Feminist Jurisprudence: Grounding the Theories, 4 BERKELEY WOMEN'S L.J. 191 (1989-90) (examining the marginalization and invisibility of lesbian experiences in Feminist Legal Theory).

n18 See generally Crenshaw, supra note 4.

n19 Harris notes:African American theorists have, until now, dominated [Critical Race Theory], and African American experiences have been taken as a paradigm for the experiences of all people of color.Harris, supra note 1, at 775. The "Black/White paradigm" thus signifies the reduction of race relations in American society and law to the relations between "white" Euro-Americans to "black" African Americans. Consequently, this paradigm ignores or denies the existence and relevance of persons hued with other colors, such as Asian Americans, Native Americans, and Latinas/os. In addition, this paradigm marginalizes even persons who are hued white or black but who derive from cultural or geographic destinations other than Europe or Africa, such as persons from Caribbean nations, who identify as both black and Latina/o. For a recent discussion of current issues raised by the continued operation and domination of the Black/White paradigm in American law and society, see generally William R. Tamayo, When the "Coloreds" Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration, 2 ASIAN L.J. 1 (1995) (discussing the limitations of the Black/White paradigm in light of increasingly multicultural and international events, problems, movements, and discourses).

n20 See generally Chang, supra note 3.

n21 See generally Valdes, supra note 12, at 356-60 and accompanying notes. In particular, see id. at 359, n.1266 and sources cited therein by lesbians and gays of color. In those writings, the authors decry both the racism of lesbian and gay communities as well as the demands of their communities of color that they lay aside their sexual personalities in order to
attain acceptance as "true" members of those communities. These texts, through personal testimony and analysis, show that "race" is in fundamental ways contingent on "sexual orientation" and vice versa; that is, people of color oftentimes are required to manifest heterosexuality to be accepted as authentically raced, while lesbians and gays oftentimes must be white to be authenticated and accepted by those communities. See also Valdes, infra note 29 (generally discussing the same phenomenon). These texts thus show that "race" and "sexual orientation" combine, or intersect, in the formation of individual and group identities, and that these combinations and intersections inform the way in which particular persons or groups are constructed and mistreated culturally and legally. Ultimately, the conceptual and normative background established by these texts indicates that the "race" in Critical Race Theory must be expounded -- preferably by Critical Race Theorists -- to clarify this double-edged ambiguity of the term.


n25 Latina/o law professors come in all colors, sizes, shapes, genders, sexualities, and the like. Nonetheless, those present at the Colloquium gathered there with a sense of ethnicized identity, which was a commonality that co-existed with the other diversities that our bodies, backgrounds, or minds exhibited. My collectivization of law professors who self-identify as "Latinas/os" is meant to invoke that sense of shared groupness.

n26 Consider the following observations focused specifically on the participation and representation of Latinas/os in Critical Race Theory. The first anthology devoted to Critical Race Theory was published only last year. Though edited by a Latino legal scholar of towering influence among RaceCrits -- Richard Delgado -- its authors are primarily Black, heterosexual men. For instance, of the 41 authors represented in that compilation, seven self-identify as Latinas/os. Likewise, the first full-fledged Symposium by a major law review devoted to Critical Race Theory, published in 1995 by the California Law Review, featured nine authors. See supra, note 6. Of those, one -- again, Richard Delgado -- was Latina/o. Id. Similarly, the most recent Critical Race Theory Workshop, held at Temple University School of Law in 1994, gathered about 35 individuals. Of those, two were Latinas/o (and three were openly lesbian, gay or bisexual).

It bears emphasis that, in each of these instances, the organizers of the events or programs were sensitive to issues of diversity. Nonetheless, the recurring results are relatively homogenized. These and other results therefore raise, at the very least, an appearance of underinclusiveness, which is problematic at least to those who are left with a sense of exclusion.

n27 The term "subject position" denotes the perspective, standpoint or approach of the author regarding the topic or issue being addressed. See Robert S. Chang, The End of Innocence, or, Politics After the Fall of the Essential Subject, 45 AM. U. L. REV. 687, 690-91 (1996).

n28 The Colloquium was organized by the Law Professor Section of the Hispanic National Bar Association (HNBA), and took place in conjunction with the 1995 annual meeting of the HNBA. The Colloquium was sponsored by University of Miami School of Law and co-sponsored by the La Raza Law Journal. The University of Puerto Rico sponsored
related events. The works that follow represent most, but not all, of the remarks or papers delivered at the Colloquium.

n29 This dilemma is the negotiation of sameness and difference, which in turn implicates essentialist and constructionist views of society and identity. See generally MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990). This sameness/difference dilemma is related to the critiques of Critical Race Theory and Feminist Legal Theory, which object to the apparent and exclusionary assumptions of race and gender within those discourses. See supra notes 17 and 19 and sources cited therein on critiques of Critical Race and Feminist Legal Theory. The challenge, it seems, is to recognize and accommodate differences while using commonalities to build coalitions. See generally, Francisco Valdes, Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-connectivities, 5 S. CAL. REV. L. & WOMEN’S STUD. 25 (1995) (discussing issues of sameness and difference based specifically on race and sex within lesbian and gay legal scholarship, and urging a sense of "inter-connectivity" to help traditionally subordinated communities develop more effective and enduring coalitions).


n31 See Hernandez-Truyol, supra note 4, at 383-96 (providing a demographic and historical summary of Latinas/os in American society); see also Gloria Sandrino-Glasser, Los Confundidos: De-Conflating Latinas/os’ Race and Nationality 10-54 (providing a comparative review of the Mexican American, Puerto Rican, and Cuban American histories and experiences) (unpublished manuscript on file with author).

n32 The notion of Latina/o pan-ethnicity rests on "the pan-Latina/o consciousness emerging in this country" in tandem with a recognition that "we must never obscure the uniqueness of the experiences of these various Latino groups." Angelo Falcon, NEWSDAY, Sept. 3, 1992, at 106. Pan-ethnicity in the Latina/o sameness/difference context results from the conclusion that "more brings [Latinas/os] together than separates them within the political [and legal] process" of American society. Id. The works presented in this Colloquium manifest precisely this sort of consciousness with respect to Latina/o pan-ethnic identity. See also infra notes 99 - 118 and accompanying text for a further discussion of coalitional pan-ethnicity.

n33 Harris, supra note 1, at 759-84.

n34 Id. at 759-63. This interplay entails a continuing the pursuit of modernist ideals, such as equality and dignity related to constructs such as race, sex, ethnicity or sexuality, while recognizing the instability and subjectivity that problematizes these ideals and constructs in a postmodern setting.

n35 Id. at 766-80. The balancing of sophistication and disenchantment effectively calls for a careful parsing and articulation of modernist ideals and goals from a continually critical, and postmodernist, stance.

n36 Id. at 760, 783-84. A politics that embraces both difference and identification can accommodate particularity within an overarching sense of alliance against the myriad forms of discrimination that interlock in various ways to secure the devaluation of non-male, non-white, non-heterosexual people and groups.

n37 Id. at 775.

n38 Id. at 778.

n39 Id. at 780.

n40 Id. at 759.

n41 Persons who do not self-identify as "Latina/o" may be interested in, or implicated by, this Colloquium. Indeed, as the works that follow attest, participation in this Colloquium confirms the point. See,
n42 Indeed, the "LatCrit" naming occurred during conversations that took place during the Colloquium. For a historical account of LatCrit theory's origination, see Francisco Valdes, Poised at the Cusp: LatCrit Theory, Latina/o Pan-Ethnicity and Latina/o Self-Empowerment, 1 HARV. LATINO L. REV. (forthcoming 1996-97) (Foreword to Symposium, LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship).

n43 Consequently, this further consideration and exploration is taking place in the form of the First Annual LatCrit Conference, scheduled for May 2-5, 1996 in La Jolla, California. This LatCrit Conference is sponsored by California Western School of Law and co-sponsored by the Harvard Latino Law Review, which will publish the papers and proceedings of the conference in its inaugural issue during 1996-97. See id.

n44 Preliminary planning for the Second Annual LatCrit Conference, to be held in May of 1997, already is underway. For more information, contact the author.


n49 Espinoza, supra note 45, at 34.

n50 Id. at 36-37.


n52 Id.


n54 Aoki, supra note 46, at ___.


n57 See generally Chang, supra note 3 (calling for the initiation of a consciously Asian American genre of critical legal scholarship and discourse); see also Colloquy, The Scholarship of Reconstruction and the Politics of Backlash, 81 IOWA L. REV. (forthcoming 1996) (a collection of works by Asian American scholars devoted to issues of Asian American legal scholarship).

n58 See supra note 31 and sources cited therein on Latina/o diversities, both historically and presently.

n59 Id. See also accompanying text.

n60 Oquendo, supra note 55, at 43.

n61 See, e.g., Valdes, supra note 12, at 236-42, n.873 for a similar discussion, and additional sources, focused on the Native American experience.

n62 See supra notes 33 to 40 and accompanying text.

n63 See supra note 46 and accompanying text.

n64 The fundamental nature of these stakes is what makes "rights talk" important to subordinated communities. See Harris, supra note 1, at 750-51.


n66 Id. at 49-50.

n67 Id. at 50.

n68 Id.

n69 Id.

n70 Id.

n71 See supra notes 33 to 40 and accompanying text.
For prior exhortations on interconnectivity, see Valdes, supra note 12, at 371-75; see generally Valdes, supra note 29.

Romany, supra note 65, at 50.

See Harris, supra note 1, at 760.

Chang, supra note 41.

See supra notes 55 to 64 and accompanying text.

See Chang, supra note 41, at 57.

Id.

Id. at 58.

Id. at 55.

See supra note 57 and sources cited therein on Asian American legal scholarship.

Various articles have noted in recent times that Latinas/os are poised to become a majority in California, the nation's largest state. See, e.g., Frank Sotomayor, State Shows 69.2% Rise in Latino Population, L.A. TIMES, March 28, 1991, at 1. This increase in population, in turn, can lead to increased Latina/o political activity and influence. See, e.g., Olga Briseno, Hispanics Try to Translate Numbers into Political Clout, SAN DIEGO UNION-TRIBUNE, May 28, 1990, B1; James Fay & Roy Christman, Future Looks Good for State's Latino Politicians, SACRAMENTO BEE, July 24, 1994, at F2.

News reports consequently have suggested that Latina/o communities from coast to coast appear to be stirring from social or political marginality and dormancy. See, e.g., Manuel Perez-Rivas, One Language, Many Voices, NEWSDAY, Oct. 13, 1991, at 7 (reporting that the "signs of Latino influence are everywhere" after decades as New York's "invisible minority"); Gordon Smith, How Hispanics Are Gaining in Political Influence, SAN DIEGO UNION-TRIBUNE, April 24, 1994, at A1 (describing political gains in numerous communities of California). For similar accounts focused on Asian American history and developments, see generally THE STATE OF ASIAN AMERICA: ACTIVISM AND RESISTANCE IN THE 1990S (Karin Aguilar-San Juan ed. 1994); BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990 (1993).

See Chang, supra note 41, at 55-56.


Harris writes: A jurisprudence of reconstruction cannot afford to become enchanted with either 'theory' or 'practice'; its work . . . is to refuse that dichotomy. Harris, supra note 1, at 780.

Ramirez, supra note 1, at 780.

See supra notes 33 to 40 and accompanying text.


Id.

Id.

Id.

Id.

Id.

See id. at 71.

By "post-postmodernism" I mean precisely the balancing of modernist and postmodernist concepts and tenets, as urged by Professor Harris, in the next phase of critical legal discourse. See supra notes 33 to 40 and accompanying text.

See supra note 3 and sources cited therein on issues or techniques common to outsider scholars. See generally, Harris supra note 1, at 766-80 (discussing various concepts, themes or linkages shared by different genres of critical legal theory).

See generally Harris, supra note 1; Lawrence, supra note 13.

See supra note 16.

See generally supra note 1.
n104 Appropriately, the first step in this direction is being taken at the First Annual LatCrit Conference, see supra note 43, which is designed both to explore the concept of "pan-ethnicity" among Latinas/os and to further consider the relationship of LatCrit theory to Critical Race Theory. For the published papers and proceedings of that conference, see 1 HARV. LATINO L. REV. (forthcoming 1996-97). For a brief elaboration of "pan-ethnicity" see supra note 32.

n105 Accordingly, the First Annual LatCrit Conference featured a wide range of scholars, including Critical Race theorists such as Keith Aoki, Robert Chang, Sumi Cho, Jerome Culp, Adrienne Davis, Richard Delgado, Ian Haney-Lopez, Angela Harris, Gerald Torres, Robert Westley, and Eric Yammamoto.

n106 See Chang, supra note 27, at 688.

n107 See Harris, supra note 1, at 754-66 (discussing modernism and its discontents).

n108 Chang, supra note 27, at 692-93 (using term introduced in Chantal Mouffe, Hegemony and New Political Subjects: Toward a New Concept of Democracy, in MARXISM AND THE INTERPRETATION OF CULTURE 89-90 (Cary Nelson & Lawrence Grossberg eds., 1988)).

n109 See Harris, supra note 1, at 750-54 (discussing the commitment of Critical Race Theory to ending suffering due to racism).

n110 See generally Regina Austin, "The Black Community," Its Lawbreakers, and a Politics of Identification, 65 S. CAL. L. REV. 1769 (1992) (arguing that oppression and suffering due to racism can provide the basis for solidarity in the face of differences based on class, gender, geography and other constructs that keep African Americans apart).

n111 See Harris, supra note 4, at 608 (on multiplicity).

n112 See Hernandez-Truyol, supra note 4, at 429 (on multi-dimensionality).

n113 See Crenshaw, supra note 4, at 1242-44 (on intersectionality).

n114 See also Valdes, supra note 12, at 360-61 (discussing concepts of positionality and relationality vis-a-vis concepts of multiplicity and intersectionality); see generally Valdes, supra note 29 (further discussing these concepts and extending the discussion by elaborating the concept of interconnectivity).

n115 See generally Harris, supra note 1, at 779 (discussing the role of academics and scholars in the maintenance of power relations).


n117 Matsuda writes: Working in coalition forces us to look both for the obvious and non-obvious relationships of domination, helping us to realize that no form of subordination ever stands alone. Id. at 1189.

n118 Thus, examples of divergence or disagreement abound in daily life. E.g., Nanette Asimov, A Hard Lesson in Diversity: Chinese Americans Fight Lowell’s Admissions Policy, S.F. CHRON., June 19, 1995, at A1 (reporting the still-unfolding controversy between Asian Americans and other people of color regarding admissions to a prestigious public school in San Francisco); Patrick J. McDonnell, As Change Again Overtakes Compton, So Do Tensions; Latino Plurality Seeks Power; A Generation After Winning it, Blacks Find Bias Charge a Bitter Pill, L.A. TIMES, Aug. 21, 1994, at A1 (describing political disputes between Latina/o and African American communities in one California city). Consequently, a sophisticated approach to coalitional efforts should proceed from an express understanding that sometimes one group may be justified or required to disagree with another. By expressly recognizing the inevitability of disagreement, coalitional efforts can negotiate specific instances of divergence without trivializing differences and without surrendering altogether the real, continuing, and substantial benefits of allied efforts.
LENGTHE: 2258 words

COLLOQUIUM PROCEEDING: Comments by Leslie Espinoza

Leslie Espinoza +

BIO:

+ Assistant Professor of Law, Boston College Law School. J.D., Harvard 1977; B.A., University of Redlands 1974. These remarks are based on an article, The LSAT: Narratives and Bias, 1 American U.J. of Gender and the Law 121 (1993).

SUMMARY: ... Fred is tall, dark and handsome, but not smart. ... While the case was pending administrators of other standardized tests, such as the Law School Admissions Council (LSAC) which administers the LSAT, continued to comply with the New York disclosure law. ... Negotiations continue between the State of New York and the other standardized test givers on whether or not complete or partial tests will be disclosed. ... In reviewing the testing law, the district court and the Second Circuit gave mere lip service to the significant public interest in the disclosure of actual test questions. ... I would argue that disclosure is the only effective way to monitor the bias of the testing process. ... The narrative content of the questions exposes a broader bias regarding the tenuous premise of prediction on which the LSAT relies. ... If you have children and are now taking the big step of disrupting your whole life to go to law school, what is this question explicitly telling you? Your children will suffer because you insist on pursuing your own selfish dream of success. ... Law itself is implicated in the institution of slavery. ... Which of the following of two would best explain, . . .

[+33] Fred is tall, dark and handsome, but not smart. People who are tall and handsome are popular. Popular people either have money or are smart. Joan would like to meet anyone with money. If the statements above are true, which of the following statements must also be true?

One: Fred is popular.
Two: Fred has money.
Three: Fred is someone Joan would like to meet.

This question is from the 1988 LSAT examination. The LSAT is the gatekeeper to the legal profession. The test is used by law schools in combination with undergraduate grade point averages as the prime criteria for admission. The test can keep you out of law school, it can determine which law school you attend, and it can greatly affect the way you feel about yourself and your potential for success while in law school.

I am going to use a gender/race critique to analyze and discuss a concrete legal issue. I intend to demonstrate how critical race analysis can be used in a targeted way to affect policy decisions made by the courts. The question at issue is whether the legislature can require the disclosure of actual standardized tests.

Prior to 1979 the LSAT and other standardized tests used for educational admissions purposes were shrouded in secrecy. Testing agencies refused to grant access to test takers, researchers or state governments. There was no ability to analyze the appropriateness of the questions, the correctness of answers, or even the accuracy of the scoring of individual examinations. What was known was that women and minorities had substantially lower scores. There were also many anecdotal accounts of biased and disturbing questions.

In 1979 New York passed a truth in testing law, the New York Standardized Testing Act. It required the disclosure of tests and answers to the State. The law allowed test takers to request a copy of the test they were given, the correct answers and their own score sheets. The law also required test agencies to gather statistical information on the differential performance of women and minorities. Not surprisingly, the New York law was promptly challenged by the Association of American Medical Colleges (AAMC) which administers the MCAT. In 1980 a federal district court preliminarily enjoined enforcement of the Act as to the MCAT. While the case was pending administrators of other standardized tests, such as the Law School Admissions Council (LSAC) which [+34] administers the LSAT, continued to comply with the New York disclosure law.

For ten years most standardized admissions tests were disclosed, including the text of LSAT questions. Nevertheless, the administrators of the MCAT continued to refuse to disclose. A preliminary
injunction remained in place, although the State of New York tried to negotiate compliance with the law. In 1988 the AAMC moved for summary judgment and alleged that the truth in testing law violated their copyright interests in the MCAT. The AAMC claimed an economic investment in the development of questions. To comply with the law, however, they would have to disclose their actual tests. The district court granted summary judgment in favor of the AAMC. On appeal, the Second Circuit removed the injunction and remanded the case for trial. Not surprisingly, the case is still pending in the district court. Negotiations continue between the State of New York and the other standardized test givers on whether or not complete or partial tests will be disclosed. Test disclosure, therefore, is still a very important issue.

The AAMC claimed that disclosure of the MCAT would harm its copyright interests. There is, however, a well known exception to copyright protection, the fair use doctrine. The applicability of the fair use doctrine is determined by balancing the public's interest in the free flow of information and the private interest of copyright holders in controlling and being rewarded for their work. In reviewing the testing law, the district court and the Second Circuit gave mere lip service to the significant public interest in the disclosure of actual test questions. The courts acknowledged that there was a public interest in disclosure, but spent the majority of their opinions addressing and gave significantly more weight to the perceived negative economic impact that disclosure might have on test administrators. Half of the fair use balance was missing.

I would argue that disclosure is the only effective way to monitor the bias of the testing process. The test questions create a narrative content, a discourse and a thematic force within the test. This discourse favors the dominant social force in our society, white men. It is only through disclosure of actual questions that we can begin to understand the relationship between test narratives and bias. Examination of the actual test exposes bias. The narrative content of the questions exposes a broader bias regarding the tenuous premise of prediction on which the LSAT relies. It is important to remember that the LSAT solely predicts, and only claims to predict, a general correlation between certain ranges of test scores and first year law school grades.

Several questions are raised and must be addressed. Should admissions decisions be based on first year performance? Should they be based on biased test questions? What makes for a good lawyer?

Let us examine what we know about some of these test questions and look at the narrative of some LSAT questions. The LSAT is promoted as an objective test. It is lauded as being able to predict which applicant will be a good lawyer. Refer to the question about Fred and Joan which is from the logical reasoning section of the test. What did this question make you think about? What associations came to mind? Did the story which comprises the question have any affect on your ability to discern [35] the objective steps of logic? The narrative bias of test questions is the subtle or blatant atmospheric and often pervasive bias of stories, manners, sensitivities and paradigms. Bias delegitimizationizes the admissions enterprise. Over the years I have collected hundreds of LSAT questions which I have found to be offensive. I have shared these questions with law students for their free associational responses and their perspectives. I am going to share just a few of these questions because that is all I have time for today. Even these few questions will reveal the relationship between narrative test bias and disempowerment.

First of all, remember Fred, who is tall, dark and handsome, but not smart? People who are tall and handsome are popular. Popular people either have money or are smart. Next, remember the rapacious Joan who would like to meet anyone with money. In response to this question one student commented that it clearly is critical of women and makes it seem that they pursue men with money. It also puts down men by implying that men who are tall, dark and handsome are not smart. Another student commented that the question reminded her of her mother's puzzlement over her desire to go to law school when she could otherwise marry a lawyer. Test questions are indeed stories. They can also form a subtle, subconscious psychological warfare and can create self-doubt. For example, take the following question, also from the logical reasoning section:The problem with expanding work opportunities for women is that it results in a dangerous situation for our country. Fewer children will be born and those children will be less well prepared to perform well in school and in society. Which of the following presuppositions is/are necessary for the argument above. The question then gives you some choices.

Now imagine yourself as a woman taking the LSAT. If you do not have children, but think you might at least want to leave open the possibility of having children, the question forces you to think of this very difficult and personal choice. If you have children and are now taking the big step of disrupting your whole life to go to law school, what is this question explicitly telling you? Your children will suffer because you insist on pursuing your own selfish dream of success. In any event, the question makes the test personal. It knocks the woman reader off track. The question is gender related on its face and is gender biased in a
devious way. It appears to be a neutral question about logic, but it is instead a reminder that for women, the demands that go hand in hand with expanded opportunities can leave us with a choice that is no choice at all.

What does the test tell us about the vision of what law should be? For many students, the LSAT is their first official contact with the study of law and the construction of legal professionalism. The test often presents a world view that excludes certain test takers. The context of the question distorts its actual meaning. Another example illustrates this point. In Evalsland where it is legal to hold slaves, the guests at a dinner party get into a debate. One of the guests contends [*36] that slavery is a cruel institution, but the host contends that the slaves themselves like it. To prove his point, the host called in the household slaves, all of whom affirm that they do indeed find their condition not simply tolerable but extremely pleasant.

Then the question goes on to say, "which of the following" and you have some answer choices and are to proceed with logic analysis.

As one of my African-American students expressed, first the question reminds you that you are black, then it forces you to try to divorce yourself from yourself. It requires you to pretend that you can look at the question without "you" looking at the question. Furthermore, how can this be called logical reasoning when it would be useless to make any logical arguments to our host who is obviously so blind that he will never see. Logic has no place in this situation at all. I think the student was pretty perceptive. Indeed, the question begins with the premise that it is legal to hold slaves. A vision of law is presented. Law itself is implicated in the institution of slavery. Assessment of slavery now becomes a game of rationality and logic, not a recognition of oppression. This excising of value from analysis of slavery obscures the real content and legacy of slavery. The pretense of the question, the way the question pretends that normative judgment is not relevant and that values do not matter, is the most relevant and most biased aspect of the question.

Certain test takers, such as Hispanics, are reminded that they are clearly outside and excluded. Test takers often have to psychologically justify their inclusion. A couple of other examples illustrate. In the October 1987 LSAT logical reasoning section, test takers were asked: Few U.S. high school students achieve fluency in languages other than their native English. Which of the following of two would best explain, . . . blah blah blah.

Of course, far from all high school students in the U.S. call English their native language.

Like wise, who are the players, the characters, and the people in the LSAT questions who create this narrative discourse? Most of them have white, "Angloish" names. However, the February 1988 exam did have one Hispanic name. This was the question: In a certain mythical community where there are only two social classes, people from the upper class are all highly educated and people from the lower class are all honest. Maria is poor. If one infers that Maria is honest and uneducated, one presupposes that class status in the mythical society depends on . . . blah, blah, blah.

My question is why "Maria"? Is Maria by any chance Hispanic? Remember, this is one of a handful of non-Anglo names contained in the tests. The question creates a vision of insiders and outsiders based on ethnicity.

The educational testing community has made consistent efforts in the [*37] past ten years to try to be inclusive and diverse. They have a sensitivity review process for which they should be lauded. We no longer find some of the worst kinds of questions that we were seeing in the 80s. However, we are seeing different kinds of questions in the 90s. The bias is less obvious, although it is still pervasive. Often the bias now appears in the answer choices. A question will be a "diversity question," but the correct answer will require you to take a position that is contrary to, for example, affirmative action. The correct logical choice will be the one that makes outsiders feel excluded. There is still plenty of bias and room for improving the test. The people who construct the test recognize the existence of narrative bias and are continuing to work on it.

My argument, though, is that we cannot rely on the test takers and the test givers to be the ones who monitor the test. It has not worked in the past. There is a profound public interest in taking responsibility for monitoring these tests. It is crucial that the law continues to require the disclosure of full tests, including test questions.

We need to be careful about how we use language. I know a number of the other panelists are going to talk about language. Language creates the way in which we think about ourselves and our society. Because standardized tests have become the gatekeepers of the professions, I hope that we all will continue to work and think hard about the use of language in testing. It is our obligation to root out bias rather than to perpetuate it.

Thank you.
My talk is entitled "Interpretations and Suggested Responses to Frequently Asked Questions About Hispanics, Latinos and Latinas."

Question 1: the what are you question. I'm often asked, "what is a Hispanic or Latino anyway?" This question may be asked with varying degrees of annoyance. The greater the degree of annoyance, the closer this question approaches something like "What are you doing here?"

Suggested response: The basic question is easily answered. The Hispanic, Latino, or Latina is typically someone of Latin American ancestry or birth. The questions of legitimacy latent in the question I shall address later.

Question 2: the where are you from question. I often meet people who consider themselves the real Americans. As soon as I mention my name, I'm asked, "Where are you from?" I answer, sincerely, "Washington D.C." I receive a quizzical look and I'm asked again, with growing annoyance and frustration, "No, I mean where are you really from?" I answer, sincerely, "Washington D.C., the nation's capital." My questioner may shift focus now, asking with exasperation, "Well, where are your parents from?" This is what my questioner really wanted, not my birth place, not my simple geography, but some foreign land, the exotic distant countries of my ancestry, to be able to locate me someplace outside the borders of the United States, where I'm presumed not to belong. I call this "symbolic deportation," since my identity has been swept beyond the borders.

Suggested response: To handle this sensitive social situation, I recommend asking the questioner "Where are you from? No, I mean where are your parents from?...No, I mean where are you grandparents from?" Use as many follow-up questions as necessary. You will have made two important political points. The questioner, like you, has ancestral roots in foreign lands. And you, like the questioner, belong to America.

Question 3: the you don't belong here conundrum. This is the series of questions and assumptions regarding the proper places for Hispanics, Latinos and Latinas. I will first describe 3 episodes.

Episode 1: One of my students is a brown-skinned Mexican-American woman. She arrived at the law
school a few days early to acquaint herself with the surroundings. A white Anglo woman approached her and asked "Are you lost?" "No," my student answered. The white woman persisted. "Are you looking for a cafeteria job, because the employment office is elsewhere on campus."

After recovering from her initial shock, my student responded, "No, I'm starting school here." The woman, with incredulity, asked, "In the law program?"

Episode 2: Years ago I was an editor on the law review and I had a conversation with one of my classmates. We were both third-year students and we had known each other since our second year of law school. I forget how the subject came up, but I remember telling her "I'm Hispanic." "No, you're not," my classmate responded. Mulling it over a bit, I repeated, "Well, actually, I am Hispanic."

Episode 3: One of the administrators at my law school was very impressed with my grade point average. He complimented me about what a good student I was. I was a good student. One day we met by coincidence in the locker room at the school's athletic facility. Half clothed, and completely out of context, he asked me "Are you an Argentinean Jew?" I answered, "No." He expressed no further interest in my actual ancestry.

These three episodes share a common theme: the proper place of Latino people in an Anglo-constructed society. The cognitive dissonance experienced by Anglos confronted with successful Latinos illustrates the theme. My student's proper place was to work in the cafeteria serving food, not studying law. My classmate's conception of Hispanic did not include someone as smart as her. The administrator, aware of both my academic success and my Latino name, had to invent a fantasy neo-European theory to understand my success. In others' eyes one cannot be both successful and Latino of non-European ancestry.

Suggested response: When one receives such comments, one should point out the overly narrow conception of Latino that these persons carry.

Question 4: "Is your name Maria?" Or, for men, "is your name Jose or Juan?" One of my students reports that she is asked regularly and out of the blue, "Is your name Maria?" Many Anglos think all Mexican women are named Maria. Similarly, many persons think all Latino men must be named Jose or Juan, except some of us actually named Juan.

Upon learning my name, people act funny. They hear it as Ron,...Don. Or at the law firm...Warren, Orrin. After enough repetitions, when the weight of my name has finally sunk in, I often get the response, "You don't look like a Juan."

Suggested response: I encourage them to look again, carefully this [*41] time, and to enlarge their conception of what a Latino named Juan looks like.

If you are asked the more insulting "Why haven't you changed your name?," I can recommend two responses.

Response 1: For the same reasons you haven't changed yours.

Response 2: Offer a few helpful suggestions for changing their names. For example, Brian should always be changed to Alfonso. Gregg lacks the character of Cesar or Carlos or Angel. You can feel free to experiment with your favorite name changes.

I hope I have been brief. I hope that I have been humorous, although many of the presumptions I have described are no laughing matter. It's up to each of us to correct them when they arise.

I thank you very much.
In this talk I will give a summary of the concept of what I call the Latino(a) race. In this talk I will give a summary of the concept of what I call the Latino(a) race. From the majority's perspective, the Latino(a) community is perceived subliminally, yet powerfully, as a conquered people. The other dimension that I think is central to the concept of the Latino(a) race is language. These other Latino(a) communities not only are similarly related to the Spanish language, but also have had a historical experience which in a sense parallels that of Mexicans and Puerto Ricans. Here one could draw on the historical dimension of the concept of the Latino(a) race alluded to earlier. To argue effectively against the educational segregation of Puerto Ricans in Hartford, one has to have a clear idea of what the Latino(a) race or the Latino(a) community is all about and how it distinguishes itself from other immigrant communities. Introducing the Spanish language, which lies at the core of Latino(a) identity, to our law schools could be seen as a very small part of an effort to strengthen the sense of common destiny among Latino(a)s. First in the law schools, and later as professors and students become active as Spanish-speaking lawyers, we then read a few articles about Mexican civil procedure. Because I intend to take issue with the ordinary understanding of the practical, especially in the area of law.

The concept of the "Latino(a) race"--again in quotation marks; maybe this whole talk should be in quotation marks--is a concept toward which I have moved using, in part, the philosophical writings of the Spanish philosopher Miguel de Unamuno and critical race theory's rich literature. I have in mind the work of Derrick Bell, among others, and also the work of people who probably would not consider themselves part of this movement, such as Anthony Appiah and Cornel West. I focus on two experiences, or maybe I should call them two aspects, of the Latino(a) experience in the United States. The first is the historical experience. This dimension is very important because it is here that the Latino(a) community distinguishes itself from all other immigrant communities in the United States. The Latino(a) community did not come to the United States; the United States came to the Latino(a) community. The two largest groups in this community, Mexicans and Puerto Ricans, are part of the United States territorial system due to the colonial expansion that took place last century. In the case of Mexicans, Mexican-Americans, and Chicanos, I am alluding to the expansion toward the Southwest and the annexation of large portions of Mexican territory. In the case of Puerto Rico, the process began with the 1898 invasion of the island and continued with Puerto Rico's subsequent colonization by the United States military initially, and later by civil forces. In both cases, the imperialistic onslaught immediately made a group of Latino(a)s part of the United States reality and created the necessary historical conditions for the subsequent massive Latino(a) migrations to the United States mainland. (In due course, I will submit that, though different, the historical experience of other Latino(a)s parallels that of Mexicans and Puerto Ricans in relevant ways. My contention will be that the concept of the Latino(a) race, which is originally founded in the Mexican and the Puerto Rican experience, becomes more complex, but does not change in essence as it expands to incorporate Cubans, Dominicans, Guatemalans, Salvadorans, and other Latino(a)s.)
I am convinced that this experience has colored the way the Latino(a) community is perceived in the United States and the way the Latino(a) community perceives itself. From the majority’s perspective, the Latino(a) community is perceived subliminally, yet powerfully, as a conquered people. The Latino(a) community perceives itself, also perhaps in a subliminal and powerful way, as a people struggling against colonial domination. I think that this aspect of the Latino(a) experience is important because, as stated earlier, it separates the experience of the Latino(a) people from that of other immigrants. After explaining the concept of the Latino(a) race, I will illustrate why this concept may be relevant for "practice".

The other dimension that I think is central to the concept of the Latino(a) race is language. Before describing my meaning, I should offer some caveats. I do not intend to suggest that there should be a prerequisite for being a member of the Latino(a) race, i.e., that a particular language has to be spoken. I do not mean that all Latino(a)s speak a particular language; we know that is not true. But Latino(a)s typically have some kind of relationship with the Spanish language, often a mythical or an emotional relationship. If not their own language, it is the language of their parents or their grandparents. It is the language in which they heard "La nana" sung when they were kids. This is a dimension of the Latino(a) experience that is key in terms of the way this community perceives itself, on the one hand, and the way it is perceived by the majority on the other hand.

I feel that even for third, fourth, or fifth generation Latino(a)s in the United States, it is a symbol of pride to be able to salt some Spanish into our conversation. Even if we speak mostly English, every once in a while we stop to say "Ave Maria" or "Ay bendito" and then continue. This may be a release psychologically, but it also constitutes a fundamental sign of identity. With respect to the perception that the white majority has of the Latino(a) community, language has no doubt played a crucial role. It is no coincidence that the derogatory term that cuts across Latino(a) communities is "spik" which focuses on the way Latino(a)s "spik," I mean speak, rather than the way they look. It is telling that the anti-Latino(a) movement has coalesced politically in the English-only movement. This movement is an attack on the Latino(a) identity and an attempt to destroy the Latino(a) community.

Only by coming to terms with these two dimensions, the historical and the linguistic, is it possible to understand the Latino(a) experience in the United States and what I call the Latino(a) race. This concept, which is partly built upon the experience of Mexicans and Puerto Ricans with and in the United States, has grown and continues to expand as Latino(a)s from other countries have joined the Latino(a) community within the United States territory. That community, which was once composed mainly of Mexican-Americans and Puerto Ricans, now includes Cubans, Dominicans, Guatemalans, and Salvadorans, among others. These other Latino(a) communities not only are similarly related to the Spanish language, but also have had a historical experience which in a sense parallels that of Mexicans and Puerto Ricans. Their homelands, though not taken over in the aforementioned Nineteenth Century colonial expansion, have been impoverished to some extent by an analogous Twentieth Century neo-colonial enterprise. This enterprise has contributed to the emergence of the political, social, and economic circumstances that brought these Latino(a)s to the United States.

Now to the practical consequences of all this. The first thing I want to mention involves litigation, in the context not just of arguing cases, but imagining and dreaming them. I was enlightened of the possibility of practical application by a conversation I had with a colleague, John Brittain, an African-American law professor and distinguished civil rights litigator in Connecticut. As attorney for the plaintiffs in Sheff v. O'Neill, 609 A.2d 1072, he argued that de facto segregation in the Hartford schools violates the Connecticut Constitution. The Hartford schools are 96% Latino(a) and African-American. The State argued that such segregation was a consequence of segregation in housing and that the children's inferior performance could be attributed to poverty. The State insisted that to the extent that there was no intentional racial discrimination, the Constitution of Connecticut did not cover the case.

The trial court found for the defendants and the plaintiffs appealed to the Connecticut Supreme Court. In the proceedings before the Supreme Court, one of the justices pointed out that the group that was growing the most in the Hartford community was the Puerto Rican or Latino(a) group which might eventually constitute 60-70% of all students. The justice asked whether this, in and of itself, would be a problem from the perspective of the constitution. He went on to say that he could imagine a school in the wealthier town of West Hartford with 60-70% Jewish or Italian students and that he could not see why that situation would necessarily be a violation of the Connecticut Constitution.

In my opinion, one should respond to this question with full knowledge of the difference between the Latino(a) community and other immigrant groups. Here one could draw on the historical dimension of the
concept of the Latino(a) race alluded to earlier. This dimension focuses on the Latino(a) historical experience and on the fact that, as previously stated, Latino(a)s did not come to the United States, but the United States came to them. Therefore, the way in which they are perceived and how they perceive themselves is fundamentally different from the way in which Italian-Americans or Jewish-Americans are perceived. To argue effectively against the educational segregation of Puerto Ricans in Hartford, one has to have a clear idea of what the Latino(a) race or the Latino(a) community is all about and how it distinguishes itself from other immigrant communities.

Discrimination against Latino(a)s is unique in that it is tied to a long-standing and deep-rooted U.S. campaign of hegemonic domination in Latin America. Constitutional principles, therefore, should be less tolerant of segregation when it affects Latino(a)s than when it involves other immigrant groups. Latino(a) segregation (to some extent like African-American segregation) differs in nature from the segregation of other groups.

Earlier I hinted at the second convergence point between theory and practice when I talked about the English-only movement. This is a very dangerous political movement. Some major political figures have embraced the concept of an official language recently, but this political operation has been in place for a long time. We can see its consequences not just in the political arena, but also in the legal arena. With a concept of the Latino(a) community along the lines suggested here, one is able to see very clearly that this movement is not just an attempt to protect cultural integrity in the United States. It is actually an attack on a particular community. The code language is "English-only". I think that the powerful, though subliminal, message is that there is no place for a Latino(a) community in the United States.

The third and last convergence point between theory and practice comes up in the context of law schools. I consider teaching law part of the legal practice. At any rate, the concept of the Latino(a) race that I have suggested could have an impact on our legal pedagogical endeavors.

This semester I have been teaching a seminar on comparative law. The course is entitled "Issues in Latin American Law" and is taught in Spanish. The administration's complete support of this course was wonderful. I think it is very important that it is taught in Spanish and that it is open to all students, regardless of their level of Spanish. We are pretty flexible in allowing some English to sprinkle into our discussion. For this kind of project to continue, it is essential that all students (particularly Latino(a) students) interested in taking Spanish get law school credit.

My previous reflections on the Latino(a) race point to a particular understanding of the meaning of teaching law in Spanish. Introducing the Spanish language, which lies at the core of Latino(a) identity, to our law schools could be seen as a very small part of an effort to strengthen the sense of common destiny among Latino(a)s. First in the law schools, and later as professors and students become active as Spanish-speaking lawyers,. In the community at large, the Spanish language will find social affirmation and validation. The Latino(a) community, through its language, will be able to move closer to self-realization and self-empowerment in society at large. Further, encouraging non-Latino(a)s to become more familiar with the Spanish language might help Anglos appreciate our culture and help us Latino(a) overcome our "otherness".

In addition, I think that my seminar is related to the concept that I have been trying to develop because the course is not just a random discussion of different topics in Latin American law. We focus on particular contexts where there is a concrete conflict between two legal traditions. The seminar affords us an opportunity to grasp the historical and intellectual clash between the United States and Latin America, which is essential to the emergence of the Latino(a) race.

In the seminar we first discuss the Puerto Rican civil code. This code and its interpretation were traumatized after the United States invaded Puerto Rico. The United States attempted to impose its own common law system on Puerto Rico and created a supreme court first manned (and I underscore this) by U.S. English-only judges who did not speak a word of Spanish. We also discuss the effort by Puerto Ricans to recapture the civil law tradition and the Latin American legal legacy.

Another part of this course involves NAFTA, the North American Free Trade Agreement. I argue that, from the perspective of procedural law, this agreement is dominated by the United States common law perspective. My focus in the course is on the dispute resolution mechanisms. I try to show that these mechanisms are essentially a creature of U.S. common law. The extent to which NAFTA's procedural provisions simply reproduce the U.S. Federal Rules of Civil Procedure and the Rules of Appellate Procedure is astonishing. We then read a few articles about Mexican civil procedure. We see how it involves a different conception of procedure and how this conception could have enriched the debate on dispute resolution. In many respects, Mexican civil procedure is part of the civil law tradition. It is similar to German...
civil procedure, at least in terms of the underlying picture of procedure. German civil procedure, however, has never been treated as backward by scholars in the United States and is often proposed as a model. Mexican civil procedure, on the other hand, is seen as the epitome of backwardness. The aim in this section of the course is to realize how a comparative perspective can bring new insights to the international law debate and to discuss why such a perspective was never taken seriously in NAFTA negotiations.

As I said at the beginning, I am interested in starting to think about the ways in which these concepts of race and identity can be introduced into practice in order to make it more invigorating and illuminating. The point is not simply to make the practice more interesting. I am convinced that in many respects the practice becomes more effective if merged with theory in an enlightened way.

Thank you.
Buenos dias. Welcome to the island.

Last night, with co-panelist and friend Professor Angel Oquendo, I was discussing the "different" perspective of Critical Race Theory acquired after having spent a year back in Puerto Rico. This is a homecoming of sorts since many of us, through the alchemy of a three hour plane ride, maintain our professional and existential ties with the Island while residing in the US. Through the air bus we change cultural stations. In the Island we acquire "majority" status--at least numerically--and speak Espanol.

Professor Oquendo and I shared our perspectives on Critical Race Theory and recognized the importance of its much needed critical approach to civil rights law. It has given a voice to our stories and our challenges of racial subordination. At the same time, it has exposed the limitations of liberal legalism by opening up spaces for critiques which center on structural rather than individual components.

As Critical Race Theory has concentrated on white-black racism, we discussed how to apply its methodology to other non-white groups. Can we "export-import" Critical Race Theory insights to groups that are similar yet different to African Americans in their experiences of race subordination? I am thinking particularly of Latinos, whose experiences of migration and cultural difference shape their notions of race and subordination, how those that "enter" the US must grapple with the interplay of racial-ethnic subordination and rhetorical notions of citizenship.

Puerto Rican colleagues have pointed out how North-American I sound when I talk about Critical Race Theory. Critical Race Theory, by virtue of its geopolitical base, the cross-cultural character of its primary insights, and the social construction of race, is primarily of a "local character." This localism is potentially diminished by its North American face, a face that--in tune with its historical genesis--underscores a US centered version of white supremacy.

My own situation illustrates what I mean when I say "North American Face." When I explain in Puerto Rico that I am a "woman of color," my perplexed interlocutors ask me, "Of color? What color?," thus raising my awareness as to the complexities of positionality. I suppose that for my Puerto Rican friends and colleagues I am offering a "gringa" version of race hierarchies. When I try to explain to my North American friends of color about being a mulatta, an accurate description of at least 90% of the Puerto Rican population, again I swim the murky waters that require translation, given the US historical meaning of mulataje.
Critical Race Theory must not only go "international," but should also expand its discourse to properly address the multifacetedness of racism. My affinities with Critical Race Theory do not prevent me from recognizing its relative detachment from the multicultural realities of a diverse nation. A critical perspective must be sufficiently open so as to make room for the multiple ways through which white supremacy shows its "whiteness." Moving beyond the black and white framework in an effort to articulate a more comprehensive theoretical and political account is an important first step. The study of how race, ethnicity, and culture join ranks with gender and sexual orientation to erect hierarchical social barriers must be central to Critical Race Theory scholarship if inclusiveness is to be achieved in its project of social transformation.

I have raised the "ethnic-race-cultural" banner in some Critical Race Theory seminars I have attended and have realized that there is not enough knowledge about otherness. Sharing Latino stories has been illuminating and enriching. Issues of language and stereotypes as well as reflections on the construction of divisions brought about by a "shrinking economic pie" have been put on the table in a constructive manner. The experience has been positive. Critical Race Theory gatherings have been safe spaces for me, where I can have these conversations.

Such conversations have stimulated my current work in progress. In tune with my interest in feminist theory, I am interested in moving the intersection approach and methodology into a "positive" insights mode. In moving it beyond the "negative" critique which has exposed the essentialism of a significant body of feminist theory, I am attempting to develop theoretical ways of thinking about race, ethnicity, and gender for Latinas. I am doing it from the perspective of a Puertorriquena (a clear recognition of the heterogeneity of the Latino community and hence of Latinas) who wishes to seize commonalties among Latinas while respecting the differences.

Identity, language, and culture form the tripod on which my analysis rests. After examining how the civil rights struggle waged by Latinos has centered around language rights and cultural resistance to Anglo assimilation, I critique its male dominant character. I then proceed to examine the ways in which victimization and resistance to Anglo-assimilating forces is gendered; the gender specific character of racial, ethnic and cultural devaluation.

Through the use of literary voices, I am attempting to document the particular ways in which patriarchy's construction of the public and the private intersects with white supremacist forces to devalue Latino culture and language. The workings of the welfare state and the power disparities which fan the debate around its elimination have manifested themselves along gender lines. In the context of domestic violence, how are Latinas muted by shelters which do not respond--even minimally--to their cultural and language needs? How do male Latino batterers negotiate the public and private world of Latinas who don't speak the English language. How do bilingual women who are forced to speak English feel cultural devaluation through monolingual rules, or how these women, as [*51] assimilation forces gain strength, experience Spanish as the language of the "private," the very gendered "private."

Motherhood is also constructed through the monolingual English narrative. The public narrative of inferiorization infiltrates home and impacts the interaction between mother and child, as when the child becomes her mother's translator in the public world. Children, educationally exposed to the dominant culture and with little or no access to Spanish, come home everyday with a monolingual world-view. This monolingualism inserts a narrative of inferiorization in the mother-child interaction, creating an identity that is taught to be despised. Consider the embarrassment a child often experiences when she presents to the public world a mother who cannot speak English or who speaks it with a heavy accent. Language gets to be a central piece of the male-female dynamic of a couple, as observed by the child. The Spanish-speaking subject of Pat Mora's poem, "Elena," can relate to such complex intersection when her oldest son reminds her of a husband that wants to keep her monolingual. "Mama he doesn't want you to be smarter than he is." n1 Elena speaks:...embarrassed at mispronouncing words, embarrassed at the laughter of my children, the grocer, the mailman. Sometimes I take my English book and lock myself in the bathroom, say the thick words softly, for if I stop trying, I will be deaf when my children need my help. n2

The work of Richard Rodriguez provides yet another example of a gendered construction of identity, filtered through language. In his reading of assimilation, Richard Rodriguez offers a contrasting perspective of the construction of the public and the private. He presents a Chicano perspective on the politics of assimilation and its impact on the "public and private self." The private is the realm where the Spanish language can flourish while English is the language of public or full individuality, the world of "those who are able to consider themselves members of the crowd." Rodriguez became a member of the crowd at an early age when he dropped Spanish from his education. Only then, he claims, was he able to think of himself as an
In an attempt to see the commonalities with the work of Chicana [*53] feminist theorists such as Gloria Anzaldúa I relate the parallel roads that the mestiza consciousness and the Puertorriquena of the floating island share, particularly when traveling the spaces of language and mulataje.

The floating island is las fronteras de la mestiza which Gloria Anzaldúa describes: because I, a mestiza, continually walk out one culture and into another because I am all cultures at the same time, alma entre dos mundos, tres, cuatro, me zumba la cabeza con lo contradictorio, Estoy norteada por todas las voces que me hablan simultaneamente.

Finally, I also attempt to show how in the realm of legal discourse a gendered critical race discourse helps to illustrate the links between identity, language, culture and national origin discrimination.

The private world of family life, women's locus of victimization and resistance confirms the ravages of assimilation. In a manifesto of denial and obliteration, Rodriguez buries those ravages in his psyche; ravages whose origins lie in the "betrayal" of parents who strictly followed the instructions of his Catholic teachers to speak English at home. The nuns were "unsentimental about their responsibility": Is it possible for you and your husband to encourage your children to practice their English when they are home? Of course, my parents complied. What would they not do for their children's well-being? And how could they have questioned the Church's authority which those women represented? In an instant, they agreed to give up the language (the sounds) that had revealed and accentuated our family's closeness... "Ahora, speak to us en ingles," my father and mother united to tell us. n4

Although Rodriguez narrates how his mother grew more publicly confident, there was a "new quiet at home": The family's quiet was partly due to the fact that, as we children learned more and more English, we shared fewer and fewer words with our parents. Sentences needed to be spoken slowly when a child addressed his mother or father. Often the parent wouldn't understand. The young voice, frustrated, would end up saying, "Never mind"--the subject was closed. After English became my primary language, I no longer knew what words to use in addressing my parents. The old Spanish words (those tender accents of sound) I had used earlier--Mama and Papa--I couldn't use anymore. They would have been too painful reminders of how much had changed in my life. n5 As a revealing non sequitur, Rodriguez states how his awkward childhood does not prove the necessity of bilingual education, how his story "discloses instead an essential myth of childhood--inevitable pain." n6

``American," no longer an alien in gringo society, where he sought the rights and opportunities necessary for full public individuality: The social and political advantages I enjoy as a man result from the day that I came to believe that my name, indeed, is Rich-heard Road-ree-guess. It is true that my public society today is often impersonal... Yet despite the anonymity of the crowd and despite the fact that the individuality I achieve in public is often tenuous--because it depends on my being one in a crowd--I celebrate the day I acquired my new name. Those middle-class ethnics [*52] who scorn assimilation seem to be filled with decadent self-pity, obsessed by the burden of public life. Dangerously, they romanticize public separateness and they trivialize the dilemma of the socially disadvantaged. n3

Angel y yo estamos de acuerdo en que las diferencias no pueden ser obstaculo para un trabajo politico que requiere coaliciones. n7 Telling each other our respective stories especially in the "intra-world" is as important as telling the stories to the 'external' world.

I hope you enjoy my island, la isla flotante/the floating island.

Gracias.

FOOTNOTE-1:

n1 PAT MORA, WOMEN OF THE WORLD 61 (19__).
n2 Id.
n3 RICHARD RODRIGUEZ HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ 27 (1982).
n5 Id. at 315.
n6 Id. at 318
n7 Angel and I agree that differences should not impair the political work which precedes coalition-building.
To acknowledge this loss, let me introduce myself as a recovering Oriental. One might ask, what is it that I'm recovering from? What am I trying to recover. I hope that some of the meanings come through in my talk.

America dreams of race in black and white. By this, I mean that the current racial paradigm has become naturalized so that race in America is generally understood to mean black and white. This notion of race limits people's understanding and willingness to engage with the history and current state of Asian Americans and Latinos in the United States. Instead of being interested participants, we are seen as interlopers. Yet this status as interloper is precisely why Asian Americans and Latinos are important in discussions of race--our existence disrupts the comfortable binary of the black/white racial paradigm in which the black racial subject is produced by and through its opposition to the white racial subject, and vice versa. The presence of other racialized bodies problematizes this notion of the construction of both black and white racial subjects. Inclusion of Asian Americans and Latinos operates to denature--denaturalize--the current paradigm.

The stubbornness of the current racial paradigm may be seen in a book published by the Harvard University Press in 1985, *Racial Attitudes in America*, which "trace[s] the changes in... attitudes [toward racial...
Racial Attitudes in America can limit their vision and black and white issue. A racial paradigm that makes race appear naturally as a black/white issue, but rather "the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea." n2 But Du Bois, writing in 1903, understood "the problem of the color line" as not simply a black/white issue, but rather "the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea." n3 Du Bois makes this point more forcefully in "The Color Line Belts the World" n4 which appeared a few years later in Collier's Weekly. Yet the fact that the authors of Racial Attitudes in America can limit their vision and cite Du Bois for support demonstrates the operation of a racial paradigm that makes race appear naturally as a black and white issue.

Adrienne Davis in a recent essay challenges the naturalness of this paradigm. n5 She begins with a story ironically entitled "Dreaming in Black and White in Nicaragua" in which she describes the dissonance she feels, as a Black American, in a country that doesn't view race in terms of black and white. Throughout her journey, she encounters people who question her racial background; no one asks if she is black. She ends her story by describing the comfort she feels when she boards a plane for the United States, back to the familiarity of the "looming category of blackness." n6

I find this to be a wonderful play on and reversal of certain motifs in Joseph Conrad's Heart of Darkness. Conrad's darkness, found on another continent, is projected back onto America in Davis' version. This reversal is powerful because it not only reveals the role blackness (and its racial opposite, whiteness) plays in structuring identities in America; it also reveals the limitations of a racial imagination that only dreams in black and white. While she finds a certain comfort in her return to the familiar, one cannot miss her sense of impending doom.

Davis' story opens up space for an account of race in which racial categories are understood as contingent, i.e. dependent on the context. Her black racial identity, generally secure in the context of the United States, became destabilized when she journeyed to Nicaragua. But in the same way that she journeyed to Nicaragua, Nicaraguans can (and do) journey to the United States. With the increasing presence of persons from the Caribbean and Central and South America, the U.S. racial context is changing at a rate that is outpacing the efforts of official identity producers such as the United States Census. Michael Omi and Howard Winant argue that the changes in the Census category--"Persons of Spanish Mother Tongue" in 1950 and 1960 became "Persons of Both Spanish Surname and Spanish Mother Tongue" in 1970, which then evolved into "Hispanic" in 1980 and 1990--"suggest the state's inability to 'racialize' a particular group--to institutionalize it in a politically organized racial system." n7

On the other hand, the state has had less trouble racializing persons of Asian ancestry. The United States Supreme Court's decision in United States v. Third and United States v. Ozawa, established with finality the racial bar on naturalization for Asians, holding that persons of Asian ancestry could not become naturalized citizens. n8 These cases were followed shortly by the 1924 Immigration Act that consolidated the racial bar on immigration by prohibiting immigration by those ineligible for citizenship, i.e. persons of Asian ancestry. n9 Yet, despite the ease with which persons of Asian ancestry were racialized by the state, Asian Americans never really became part of the racial landscape of America.

Although there is tremendous diversity within and between Asian Americans and Latinos, one common theme running through our experiences is the attribution of foreignness. n10 Attribution of foreignness allows for what Juan Perea has described as "symbolic deportation." n11 Foreignness is inscribed upon our bodies in such a way that Asian Americans and Latinos carry a figurative border with us. This figurative border operates to confirm the belonging-ness of "real" Americans, and marks Asian Americans and Latinos as un-American.

This negative identity connotes that our true home lies elsewhere, that there is some other place where we belong. But for many of us, that place or homeland is largely an imaginary one. n12 This is not to say that imaginary homelands are not important to how we constitute our own identities; but our relation to a homeland is ambivalent at best. Oscar Hijuelos captures this sense of ambivalence in his novel, Our House in the Last World, which is about a family of Cuban exiles and their dream of return to their homeland. n13

[58] The dream of return is not the sole province of the immigrant. I am reminded of the many times that my "accent-less" English brings the question: "Where did you learn to speak so well?" This question is often followed by, "Where are you from?" which E. San Juan, Jr., identifies as not so far from the unmasked but often present, "When are you going back?" n14
progression signals the questioner's dream of my return. The questioner's dream of return extends beyond wishing the return or exclusion of people who look like me. Having no external homeland, the nativist is left to construct a homeland out of an imagined past. Unlike immigrants who are separated physically from their homeland, the nativist is separated temporally (and perhaps only temporarily) from his. But a return to the past is possible only in the future. The nostalgic recollection of an America past (or Paradise lost) is projected forward as an "America" that again might be. Perhaps this provides the contextual framework for the struggle over English-only movements, multiculturalism, and immigration.

A photo in the newspaper AsianWeek highlights the struggle that lies ahead. The photo is of a demonstrator at a protest in San Francisco against proposed immigration legislation. The demonstrator, an elderly man with Asian features holds a large placard stating: "I AM AN AMERICAN." n15 This photo reminded me of newsreels of civil rights marches of the 60s in which Black American men held placards stating: "I AM A MAN." In both cases, the demonstrators were asserting a claim to dignity that American society had denied them by refusing to recognize and treat them as fellow Americans and fellow human beings.

* * *

I began by introducing myself as a recovering Oriental. At the close of my talk, I ask again, what is it that I am recovering from? What am I trying to recover? This phrase recognizes that I exist in the American imaginary as an Oriental, as the object of American Orientalism. As a recovering Oriental, I am in transit. I am between places: my imaginary homeland and the mythic America; between identities, Oriental and Asian American. Although my work focuses on Asian Americans, I believe that there are commonalities between Asian Americans and Latinos. This belief was reinforced two weeks ago when I learned of a performance group in Southern California called Latinos Anonymous. They begin performances by standing up and introducing themselves: "Hi. My name is so-and-so. I am a Latino." They confess to various things that they have done to remain anonymous, such as wearing blue contact lenses and so on.

Perhaps all those who are treated as outsiders exist in a state of recovery. The question then is how to negotiate this recovery. In another [*59] context, Felix Padilla coined the phrase Latinismo, which Suzanne Oboler describes as "the forging of unity among Latinos in the struggle for full citizenship rights and social justice in the United States." n16 We need to imagine a phrase to help us forge a coalition to work toward achieving justice. Instead of dreaming of a return to an imaginary homeland or to a mythic past, let us engage in this hard work, remembering that it is through solidarity that we will one day recover ourselves. Thank you.

FOOTNOTE-1:

n1 HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS vii (2nd ed. 1988).

n2 Id. at 2 (quoting W.E.B. Du Bois).


n6 Id. at 701.


n9 Immigration Act of 1924, ch. 190, 43 Stat. 153 § 13(c).

n10 In pursuing this line of inquiry, I follow Neil Gotunda whose work on non-Black minorities first explored "foreignness" as a "previously unexamined dimension of the relationship between race and law." Neil Gotunda, "Other Non-Whites" in American Legal History: A Review of Justice at War, 85 COLUM. L. REV. 1186, 1188 (1985) (reviewing PETER IRONS, JUSTICE AT WAR (1983)).


n14 E. San Juan, Jr., The Predicament of Filipinos in the United States: "Where are you from? When are you going back?," in THE STATE OF ASIAN AMERICA: ACTIVISM AND RESISTANCE IN THE UNITED STATES 205 (Karin Aguillar-San Juan ed., 1994).


n16 Oboler, supra note 7, at xix (citing FELIX PADILLA, LATINO ETHNIC CONSCIOUSNESS: THE CASE OF MEXICAN AMERICANS AND PUERTO RICANS IN CHICAGO (1985)).
COLLOQUIUM PROCEEDING: Forging a Latino Identity

Deborah Ramirez +

BIO:


I would like to dedicate this article to my son, Michael and my daughter Rachel.

SUMMARY: ... For instance, in Chicago, African-Americans live on the south side, and Latinos live on the west side. ... Latinos constitute the largest minority population within Massachusetts, almost 5% of the population, and yet we are invisible. ... For example, although Blacks compromise 40% of the minority population in Massachusetts, Latinos and Asians combined make up the remainder: that is, 60% of the minority population is either Latino or Asian. ... In California, 43% of the population are people of color and by the year 2000, non-Latino Whites will be a minority. ... In order to be admitted, an Asian applicant must score between 59-66. ... The court had to decide whether to make the new Senate district predominately African-American, predominately Latino, or predominately minority, but with neither group having control. ... Basically, the court said that the Voting Rights Act, and practically every affirmative action statute on the books, proceeds from the premise that there is one majority group and one minority group. ... The Asian community, meanwhile, is arguing that the consent decree as instituted denies Asian children equal access to education and that this denial is on the basis of race, a protective characteristic. ...

My name is Debra Ramirez. I would like to thank Frank Valdes and Michael Olivas for their work in organizing this symposium. I also wish to explain why, on a personal level, forums like this one today have been so important to me and my personal development. As I was listening to the previous speakers, I noticed some common themes in their presentations. One of the most common of these themes has focused on our struggle for self-identification: who are we? Where and how do we fit within the larger society? Michael Olivas began the discussion by talking about his childhood in the 1950s and how embracing of his ethnic identity was viewed as something bad, something the white majority would not accept. Others talked about recovering their ethnic identity and discovering where their heart lies. But are we all really talking about the same thing? Again I ask, who are we?

I find panels such as the one here today extremely important because they remind me of my own personal experiences. I am a Latina. I am a Mexican-American. I grew up in the Midwest, in Glenview, Illinois. Glenview, Illinois, at least when I was growing up, and as far as I know now, is the home of the John Birch society. I did not grow up in a community in which there were a lot of people who resembled either me or my family. We were different. Being different became part of my identity. Although I am Latina, I grew up in an English-speaking home. I still struggle to accept the fact that in our home we were only permitted to speak English. Even as a child, I knew on an intellectual, as well as on an emotional level, the origins behind our speaking only English.

At the time that my mother attended school, there were no bilingual education programs. As some of you may know, the Midwest is known for its segregated communities. For instance, in Chicago, African-Americans live on the south side, and Latinos live on the west side. My mother grew up on the west side of Chicago in a Spanish-speaking community. When she went to school for the first time, she spoke only Spanish, no English. That first day of school was a big deal for my mother. She got up especially early to make sure she was not late and she wore her best clothes. Although the neighborhood schools had some Spanish-speaking children, my mother was going to be attending a Catholic school. None of the teachers at that school spoke Spanish, nor did any of the other students. My mother was isolated.

My mother tells this story about what was supposed to be a milestone [*62] in her life. My mother told me that on that first day of school, she went to her classroom and sat quietly at her desk. Her teacher approached her and said something in English to my
mother. Not understanding what the teacher said, my mother just smiled in response. And then, in front of the rest of my mother's classmates, this teacher raised her arm and slapped my mother across her face. My mother was simply a child, she did not know what she had done. She did not understand why this teacher had slapped her. Of all of the stories my mother has told me over the years, this story remains one of the most vivid for me.

When I talk to my mother about why our family did not speak Spanish at home, she would tell me stories like the one I just told you. She would tell me about what it was like to grow up speaking only Spanish in a country where those in charge spoke only English. And, of course, she would joke with me and say, "Honey, I have raised five kids. They all got through college, four of them got through law school. When you have done the same, then you can come and tell me how to raise kids. I did the best I could." But her real message was that she grew up in a community and in a time and place where she did not believe that her children could go out into the world and succeed if we embraced what she embodied. Undoubtedly, this was a very difficult decision but my mother truly believed that by only permitting English to be spoken at home, she was saving us from having to experience for ourselves the confusion and humiliation she felt on that first day of school.

My mother always remembered what it felt like to be poor and different. Though she never taught me Spanish, she taught me something more important: that those of us lucky enough to shatter the bondages of poverty and discrimination must reach back to help those who have been less fortunate.

It was in that spirit that I became a Latina activist in my own community. This is a local story about Massachusetts, where I am now living. Although a lot of people are familiar with, or at least have heard about, the large Cuban population in Florida, or the Puerto Rican population in New York, or the increasing Mexican-American population in the West, very few people are familiar with the Latino population in Massachusetts. Yet, Massachusetts has the tenth largest Latino community in the country. Unfortunately, we also have the poorest Latino community in the country. For example, Massachusetts ranks fifty out of fifty in terms of unemployment rates for Latinos and fifty out of fifty in terms of poverty rates.

One of the struggles that I have faced has been trying to understand my community. Latinos constitute the largest minority population within Massachusetts, almost 5% of the population, and yet we are invisible. If one were to visit Massachusetts or read the Boston Globe one might never know that there is a significant population of Latinos living there. Neither the local newspapers nor the local media reflects this reality. In fact, there is not a single elected Latino who holds an official position within our State Legislature.

One of the first bridge building exercises I engaged in here in Massachusetts was to try to bridge the great chasm that existed between the world of lawyers that I now inhabit and the world of the poorest of the poor, the Latino community. I struggled to understand why Latinos in Massachusetts were doing so poorly. Part of the problem, as I saw it, was that the decision makers, the people in power, largely saw the Massachusetts community as simply being made up of Blacks and Whites. They would tell me that there were a lot of existing programs designed to advance minority concerns. My response was to agree, but to also point out that existing programs were based on a Black/White paradigm. These programs were staffed by, and served members of the African-American community. Furthermore, it is the African-American population that the white community of Massachusetts think of as the minority population. For the most part, Latinos and Asians are ignored. I told these decision makers that they needed to be more inclusive, that they needed to expand their view of "minority." For example, although Blacks compromise 40% of the minority population in Massachusetts, Latinos and Asians combined make up the remainder: that is, 60% of the minority population is either Latino or Asian. Yet, the concerns of these communities were not being addressed.

To remedy this situation, Governor William Weld asked me to head the Hispanic Advisory Commission which held a series of public hearings in communities with significant Latino populations. The commission heard testimony in Spanish and English about the problems of Latino residents and their proposed solutions. I asked community members what they needed to be empowered. I wanted to know if they believed that the governor and/or the legislature needed to do something to enable them to succeed. The response I received from these communities was that the government needs to recognize that while there are a lot of similarities between the African-American community and the Latino community in terms of poverty and economic development, there are also some fundamental differences, such as linguistic and cultural barriers, that Latinos must also face. They wanted the government to recognize not just that these differences exist, but that we as a community also exist. Basically, they asked for recognition of Latinos.

During one of these hearings, a man from Chelsea, one of the poorest communities in Boston with a Latino
population of 40%, stood up and, in broken English, said to me, "Madam Chairperson, I want you to know something. All of what you are talking about in terms of the Latino community comes down to one word, and one word only: jobs, jobs, jobs. The rest is all bull-shit." I had to admit that there was some truth in what he said. His comments emphasized the fact that we need to focus on economics. We, us Latinos, must empower our own community. We have to make sure that there are business opportunities and good jobs with benefits for everyone.

After I submitted that report, the governor did agree to a series of measures that I believe will ultimately help the community. He established a Latino Economic Development Center and a Latino Economic Development Fund. We received a guarantee that more Latinos would be placed in judicial and political positions. We were also able to make an agreement with the Boston Globe to provide front page coverage of the hearings and the report on the findings. Front page coverage was important to me because as a mentor and tutor to Latino children in the inner city, I have heard these children speak of feeling invisible. They talk about how the only faces they ever see in the media that resemble [*64] their own usually belong to gang-members or other persons accused of committing crimes. These children do not believe that their community is recognized or that their issues are discussed.

The second part of this talk is about building bridges in a different way. Shortly after I finished my work with the Hispanic Advisory Commission, Stanford Law School invited me to participate in a symposium on multiculturalism. I accepted with the condition that I could ground my discussion in my experience with the Latino community in Massachusetts. Stanford agreed. That symposium was the beginning of my examination of the Black/White paradigm. The title of my article from that symposium is "Multicultural Empowerment, It's Not Just Black and White Anymore." n1 Michael Olivas, among others, has asked, was it ever just Black and White? Historically, America has never been simply Black and White. In that article, I examined three demographic trends that are essential to creating a multicultural mechanism that includes everyone. These trends are: 1) the increase in the number of people who are not Black; 2) the increase in the percentage of people of color; and 3) the increase in the number of persons who have self-identified as multiracial. These trends are important because as the number of subgroups within the moniker "people of color" grows, the risk of conflict among and between those groups escalates. For example, if your employer wants to engage in affirmative action, may that employer meet that goal simply by hiring Latinos, or must the hiring be allocated among Latinos, Asians, and African-Americans?

Although its true that America has never been simply Black and White, just 35 years ago, in 1960, approximately 10% of the population was African-American, and the remaining 90% of the population was seen as White. n2 According to the U.S. Census, Blacks constituted 96 percent of the minority population in 1960. n3 Obviously there were Latinos and Asians in the country. However, in 1960, Latinos were not counted as Latinos. n4 There was supposedly no mechanism, no methodology for counting our population. The census count of Asians was .5, that means 0.5%. n5 For Latinos, the best that we could do was to say that we existed in larger numbers. It was not until the 1970 census, that we were finally counted as a group. It is clear that at this time the country certainly perceived itself and counted itself as if it were simply Black and White. It was in this context that color conscious remedies emerged and it is within this context that these remedies have been implemented. Today African-Americans make up only about 50 percent of the population of people of [*65] color. n6 Moreover, current projections indicate that early in the twenty-first century, Latinos will be the largest group of color in the United States. n7

The second trend involves the increase in the number of people of color. In 1960, approximately 10, 12, perhaps 15% of the population were people of color. n8 Yet that percentage is changing dramatically. In 1990, one out of four Americans viewed himself or herself as a person of color. n9 In New Mexico, for example, the percentage of people of color exceeds 50%. n10 In California, 43% of the population are people of color and by the year 2000, non-Latino Whites will be a minority. n11

The third demographic trend is the increase in the number of multiracial people, that is in people who do not self-identify as being wholly Black, White, or Latino, but instead, as a combination of these groups. This third trend leads us towards erasing the premise of a single racial identity. Between 1970 and 1990, the number of children living in families where one parent is white and the other a person of color has tripled. n12 Clearly there is an increasing number of children who are not of one race, but of several. Should that matter?

In California, there is currently a controversy surrounding Lowell High School in San Francisco. Several school systems in California are under a desegregation order which came out of a case brought by the NAACP. n13 This desegregation order placed strict racial quotas upon the composition of every school, including magnet schools. Specifically, the
consent decree provided that no single group could constitute more than 40 percent of a school population. Admission to the Lowell magnet school is based on a combination of grade point average and standardized test score, so basically, admission is granted just on the numbers. In order to be admitted, an Asian applicant must score between 59-66. 

For an African-American applicant to be admitted, he or she must score an 56. Latino applicants must also score a 56. So what about the applicant who is half Asian and half African-American and whose score is 86? How that person self-identifies will determine whether or not he or she is admitted to that school. If that person identifies as Asian, then a score of 86 would not be high enough for admission. On the other hand, if the applicant identifies as African-American, then a score of 86 exceeds that which is necessary for admission. Under these circumstances, race becomes a mutable characteristic rather than an immutable one. This allows one to, in effect, change one's race according to the situation at hand. Ironically, the underlying reality is that we are all really multiracial. One estimate indicates that from 75% to 90% of all African-Americans are, in fact, multiracial. What does this mean in terms of traditional color-conscious remedies? I think it means that courts have trouble when they apply traditional remedies to disputes among and between minority groups. For example, in Johnson v. DeGrandy, a case from Florida that went before the Supreme Court, a group of Latinos, predominately Cuban, and a group of Blacks alleged violations of the Voting Rights Act. Both groups were able to prove that their rights had been violated. However, when it came time for the court to fashion a remedy, the court faced a serious problem. The remedy, creating another Senate district, could only accommodate one of the groups. The court had to decide whether to make the new Senate district predominately African-American, predominately Latino, or predominately minority, but with neither group having control.

There was also another problem. Although both groups are viewed as minorities, the Cuban population in Florida, is really very different from the African-American population in Florida. The Cubans in that State generally tend to be conservative and Republican; whereas, the African-Americans generally tend to be liberal and Democratic. Faced with these differences, the court just threw up its hands. Basically, the court said that the Voting Rights Act, and practically every affirmative action statute on the books, proceeds from the premise that there is one majority group and one minority group. When the majority group claims reverse discrimination under any of these acts, we (the court) can handle that. We simply say that the majority group person does not have protective status since the protective status belongs to members of minority groups. But nothing in the Voting Rights Act, or for that matter in any of the other affirmative action statutes, tells the courts how to resolve disputes among and between minority groups. There is simply no jurisprudence on that subject. There is no controlling law. In fact, there is nothing to guide the court. So what did the court do when faced with this problem? The court dismissed it as a political question and therefore, relegated it to the political branches of the government to resolve. But do we really want the legislature to be resolving disputes between Asians, Blacks, and Latinos? In Massachusetts, for instance, there are no elected Latinos in the State; house and we are also the poorest minority group within the State. As a result, we have no chance winning in the legislature. If Latinos could win in the legislature, we would not need a Voting Rights Act in the first place. We would have the ability to elect our own persons sensitive to our issues to the legislature.

In the Lowell school situation, the Asian community is now suing the NAACP. The NAACP, who had previously won the consent decree, wants to see the consent decree remain in place. The Asian community, meanwhile, is arguing that the consent decree as instituted denies Asian children equal access to education and that this denial is on the basis of race, a protective characteristic. Their position is that while the quotas ordered by the consent decree may be an inclusive remedy designed to ensure other minority groups access to the school, the quotas act as a restrictive ceiling for Asians and are exclusionary. So what does all this mean for affirmative action? The paper that I wrote for Stanford is just preliminary musing about how we can create multicultural empowerment models that do not pit one group against another. Minority groups have more similarities than differences. While the census may try to categorize us by color and race according to how many drops of blood we may have or by how far back we can trace any particular heritage, we do not categorize easily. The issue is much more complicated. When I look at Roxbury, one of the poorest communities in Massachusetts, I don't see a Latino neighborhood, I don't see an African-American neighborhood, nor do I see an Asian neighborhood; instead, I see the poorest of the poor, Latinos, African-Americans, and Asians, all grouped together. And so I wonder whether the Latino interest in Roxbury is really very different from the interests of African-Americans or Asians. Is there some model for development in which we join hands and employ some kind of mechanism that allows us to...
empower ourselves without creating barriers among and between groups?

One possible solution would be cumulative voting. This solution does not require that Latinos separate from Blacks, or that Asians separate from Blacks and Latinos. It does not argue for a predominately Black district or a predominately Latino district. Instead, where there are multiple seats, all voters, not just Black voters, Asian voters, or Latino voters, receive as many votes as there are seats up for election. A person can cast her vote as she wishes and she can cumulate her votes for a single candidate. The advantage of this is simple: if the issue in your district is really language discrimination, then the Asians and the Latinos, maybe even the Haitians, could all band together and cumulate their votes to their benefit. Such a coalition would not be along racial lines, but along lines of common interests. That, at least, is the theory. Cumulative voting empowers individual decision making and facilitates transracial alliances.

I will leave you with this thought. I am optimistic that we, as a society, are going to come up with multicultural solutions and mechanisms because it is in the long-term economic interests of this country. Although it may not look that encouraging right now, the demographics will ultimately turn in our favor. California cannot continue to ignore the fact that we are now 43% of its population, and we are growing. What will our numbers be in the future? We are the future. The question then is what steps will this country take to build bridges rather than walls?

FOOTNOTE-1:


n3 See 1960 CENSUS, supra note 2, at 145 tbl. 44.

n4 "Prior to the 1970 census, the concept of Hispanics as a group barely existed... [None of the identifiers used prior to 1970 could satisfy the need for a definition that could be applied nationwide...."] Cary Davis, Carl Haub & JoAnne Willette, Population Reference Bureau, Incl., U.S. Hispanics: Changing the face of America,, 38 POPULATION BULL. 3, 5 (1983).

n5 1960 CENSUS, supra note 2, at 145 tbl. 44.


n8 1960 CENSUS, supra note 2, at 145 tbl. 44.

n9 1990 CENSUS, supra note 6, at 323 tbl. 253.


n11 Id.

n12 Cf. Lawrence Wright, One Drop of blood, NEW YORKER, July 25, 1994, at 46, 49.


n15 Noguchi, supra note 14, at B7; Siskind, supra note 14, at B7.

n16 Noguchi, supra note 14, at B7; Siskind, supra note 14, at B7.

n17 Cf. Wright, supra note 42, at 46, 48.

LENGTH: 6060 words

COLLOQUIUM PROCEEDING: Building Bridges: Bringing International Human Rights Home

Berta Esperanza Hernandez-Truyol +

BIO:
+ Professor of Law, St. John's University School of Law. Many thanks to Alison N. Stewart (St. John's Law '96) for her research assistance.

SUMMARY: ... It urges that we globalize our domestic legal practice by integrating international human rights norms as a means of developing, expanding and transforming the content and meaning of our human/civil rights jurisprudence. ... Other protected rights pertinent to the issues in this essay are the rights to privacy, education, health, life, impart and receive information and association, to name a few. ... However, when President Bush resubmitted the ICCPR to Congress in 1991, the reservation against the prohibition of imposition of the death penalty applied only to the execution of minors, not to the execution of pregnant women. This U.S. acceptance of the ICCPR's prohibition against the imposition of the death penalty on pregnant women raises an intriguing question about the relationship of the international norm to U.S. domestic law. ... And, as this essay proceeds to review certain laws such as the so-called "Save Our State" California proposition, it is evident that international human rights laws, such as the ICCPR, grant individuals access to substantial protections not available under U.S. domestic jurisprudence. ...

[*69] This commentary on "Building Bridges" was prepared in connection with a panel presentation addressing the same theme by Latina/o law professors during the 1995 Hispanic National Bar Association's annual meeting in San Juan, Puerto Rico. It urges that we globalize our domestic legal practice by integrating international human rights norms as a means of developing, expanding and transforming the content and meaning of our human/civil rights jurisprudence. This piece contends that we have a wealth of human rights laws to which we have denied ourselves access in the past and of which we should make greater and better use in the future. To be sure, the current political-social climate favors isolationism and Congress has loudly articulated its misdirected "stay within the lines" (i.e., borders) policy which is not likely to comport with the perspective of this piece. Nonetheless, the benefits to be reaped from the incorporation of accepted human rights principles into our domestic rights discourse merits careful attention.

The aim of this bridge-building proposal is to provide a blueprint for co-existence in this diverse world of ours, comprised of myriad boiling, not melting pots. Although a diversity perspective certainly informs that there are many bridges to build, this essay concentrates on joining philosophical and international forces to build one grand structure--a bridge that can transport all individuals regardless of sex, race, national or social origin, class, religion, sexuality, color or political beliefs comfortably into the twenty-first century.

The first portion of the bridge that requires attention is our comunidad latina. Before this community can participate in building coalitions with other so-called "outsider" communities and groups, we must build bridges within our own peoples. This internal coalescing compels first and foremost a recognition of the diversity of our own Latina/o community.

In legal academic circles, many of us were friends as we commenced our professional journey and we could be counted on as two sets of hands. Imagine, when I started teaching in 1982 there were merely twenty-two Latinas/os in full-time, tenure-track positions in only fifteen of the approximately one hundred and seventy U.S. law schools--only two of us were Latinas.

Our numbers have grown, we total over one hundred now, but there [*70] are still more law schools than we would like to admit without a single Latina/o on their faculties, including many schools in urban centers with large and diverse Latina/o communities. Our small numbers have allowed us to get to know each other and create an academic legal community generous with its time and support. We find each other with ease and excitement when we meet in San Francisco, San Antonio, New York, Washington, Miami, Provo, Albuquerque, Chicago, Vienna, Cairo, Copenhagen, Ciudad Mejico, Beijing, Rio and San Juan. Our origins can be traced to all of those sites and many more which is why we must celebrate the complexity and diversity of our Latina/o roots.
My personal experience is not unlike that of many Latinas/os. I was born in Cuba and grew up in Puerto Rico. Unbeknownst to me until quite recently, the environment in which I lived my formative years has made a dramatic difference in my life and how I see the world. If you contemplate a global melange you might have a glimpse of the diversity with which I lived every day of my life until I went to college in the states. We were big and small, brown-eyed and blue-eyed, blondes and brunettes, but one significant factor we shared was that we were all de Borinquen. Sure, we were a diverse peoples, but we were all united--we were all boricua. Little did I know that being boricua makes you somehow "diferente"--an outsider--in the U.S. Being "diferente," however does not, and should not mean we cannot be unified; indeed we all were as boricua.

The second piece of the bridge I would like to suggest we build is one that will at least start to address the alleged "great racial divide," meaning black-white, that exists in this country. In order to have the solid bridge I envision, the divide needs to be exposed and healed. For one, the racial divide must be recognized as having a lot more that two color components. Essayist Richard Rodriguez's October 3, 1995 commentary during the McNeil-Lehrer News Hour eloquently unmasked the fallacy of underinclusiveness endemic to contemporary race discourse. His observations concerned the O.J. Simpson trial on the heels of the announcement of the jury's verdict. Mr. Rodriguez pondered, as he followed the trial and the opinion polls that inevitably accompanied it, why he never saw himself or his opinions reflected or acknowledged. Where, he asked, were the opinions of Latinas/os and Asians in all those telling polls which, according to their own terms, were based on race and gender? That simple question underscores the Shakespearean flaw heralded as infallible truth in our society, including the law: everything appears to be based upon a black/white dichotomy, or what the media portrays as a black/white divide, which, by its nature excludes entire segments of this country's population.

There is a lot more to being American than being black or white or brown. Recognition of the multidimensionality of all peoples should be acknowledged as a way to describe, though not define, the citizens and residents of the United States. Certainly for Latinas/os and Asians to be excluded from (and therefore rendered invisible by) polling in Los Angeles defies credibility. On the other hand, if these groups were in fact included in the polling, collapsing them into the black/white dichotomy, it would deny their separate identities and silence their possibly different voices thus revealing the imperfection of a binary classification scheme. [*71] Such a black/white dichotomy might have been (and may still be) an appropriate focus in our justice system when addressing the institution of slavery and its hideous, long-lasting legacy--although even in this respect there are historical issues concerning Chinese exclusion, Japanese internment, American Indian massacre and Mexican peonage. In all events, modern reality presents a dramatically different and much more complex demography. Significantly (and sadly) history is replete with examples of how differences are used to divide rather than to learn and conquer challenges. Thus, we must build bridges that allow all people to adjust to the realities of the present world and facilitate our communications across whatever racial barriers exist--not only to bring the barriers down but also to seek solutions to our all-too-common problems such as housing, crime, education and welfare, to name a few. Moreover, any view of the world as a simple race/ethnicity dichotomy is tragically flawed at other levels as there is much more than race that defines each and every one of us as precious, unique individuals. For example, we are male and female; we are gay and lesbian and non-gay and non-lesbian; we enjoy different levels of education; we span a broad range of social and economic classifications and of mental and physical abilities; we speak many tongues; and we are Catholic, Protestant, Santera/o, Buddhist, Muslim, Hindu and Jew. Thus in looking at the world and in building bridges to traverse it, we have to look at the people, not some singular characteristic that can be isolated and manipulated to effect a myth of insurmountable racial or ethnic or sex-based or sexuality-based or religious-based divisions.

This multidimensional perspective leads to the last part of the bridge: the segment connecting our domestic practice to International Law. This essay develops this proposal n1 by establishing that International Human Rights Law is U.S. law and describing some of the rights protected by International Human Rights Law that when incorporated into our jurisprudence can develop, expand and transform our domestic concept of civil rights. This piece then focuses on three particular issues that are of critical importance to us as diverse peoples of color--Penalties (as in death), Privacy (as in personal), and Indecent Propositions (as in 187) n2 to provide concrete examples of how international norms can protect fundamental human rights.

THE RELEVANT INTERNATIONAL HUMAN RIGHTS NORMS

There can be no question that international human rights norms are legally enforceable rights, not merely aspirational statements of moral goals. To be sure, one of the problems in accepting this conclusion is that the
acknowledgement of the existence of legally enforceable human rights results in the concession that there exist limitations on the power of [*72] governments, i.e., the obligation of States to respect inalienable human rights is a limitation on States' sovereignty--supposedly a "supreme, absolute power [of an] independent State to govern." n3 Thus, recognition of legally enforceable international human rights makes States accountable to individuals and to other States for any violation of recognized rights, even those of a State's own citizens. This, of course, is the lesson learned by the international community of nations from the Trials at Nuremberg, a tragedy in world history that effectively placed the protections of individuals and their rights as human beings at the heart of international law.

That international norms are legally binding is consonant with U.S. domestic law which itself recognizes the existence of international law. For example, Article I, § 8, clause 10 of the Constitution, gives Congress the power to "define and punish . . . offenses against the Law of Nations." Moreover, Article VI clause 6, defines the relationship between international law and domestic law by designating treaties as "the supreme law of the land." In addition, case law recognizes that customary international law--law that emerges from practices of States that is deemed to be obligatory--is U.S. law. n4 Thus, adopted treaties or recognized customary principles are binding domestic law.

The concept of reservations--unilateral statements by States that can limit their international obligations--is particularly relevant when contained in human rights treaties. Although the notion of reservations is accepted in international law, the Vienna Convention on the Law of Treaties prohibits reservations that are "incompatible with the object and purpose of the treaty." n5 Moreover, reservations designed to excuse parties from commitments made with respect to non-derogable rights will fail and the reserving state will be bound to such obligations. In all events, a reservation designed to enable a state to suspend a non-derogable fundamental right will most likely be deemed incompatible with the object and purpose of the treaty. Consequently, prohibitions against racial discrimination and genocide, and perhaps even sex discrimination, will be invalid.

Binding international human rights norms provide significant protections beyond our "domestic" civil rights laws. For example, Article 2 of the International Covenant on Civil and Political Rights n6 (hereinafter, "ICCPR") and Article 2 of the Universal Declaration of Human Rights n7 (hereinafter, "Universal Declaration") protect individuals from discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Other protected rights pertinent to the issues in this essay are the rights to privacy, education, health, life, impart and receive [*73] information and association, to name a few.

While the international legal system affords many opportunities to expand the reach of domestic protections of individual rights, it is not perfect. One weakness of the system is the immense gap between women's legal status as equal to men and their real world/life status as not. n8 Significantly both the U.N. and the U.S. Dept. of State, neither a bastion of gender equality, have recognized that women's true position around the world is one of Inequality. Consequently, although this essay advocates bringing human rights home, it also exhorts transforming the system that gives life to those rights so that some are not more equal than others. With these considerations in mind, this essay scrutinizes the possible impact of an international human rights analysis on three specific matters of concern to communities of color.

THE DEATH PENALTY, PERSONAL PRIVACY AND PROPOSITION 187

The U.S. is the only industrial state that still imposes the death penalty and, it appears, not without causing legal professionals, including Supreme Court Justices, much alarm. A jarring example of such trepidation surfaced recently when Supreme Court Justice Blackmun, a Nixon appointee who is not to be mistaken for a liberal in criminal cases, stepped down with the public pronouncement that, after years of voting to sustain capital sentences, he had concluded that the death penalty is unconstitutional. Just prior to stepping down, Justice Blackmun, in his dissent in Collins v. Collins, n9 recognized the disparate application of the death penalty:Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and, despite the effort of the states and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. n10

Justice Blackmun's words are chilling in light of the facts:

. Between 1973 and 1992, a total of 4,704 convicted murderers were sentenced to death, but only 188 of them, or 4 percent, were executed;
. 1,815 of those death row prisoners, or 39 percent, succeeded in having their death sentences lifted by judicial review or executive clemency;
international treaty law, the supreme law of the land. Domestic remedy by virtue of the application of international treaty law, the supreme law of the land.

One U.S. death penalty case, Stanford v. Kentucky, n12 is particularly pertinent to this essay as it declares the constitutionality of the imposition of the death penalty on a minor. In this light, the U.S. finds itself in notable (if not noteworthy) company. Aside from the embarrassing fact that the U.S. leads the world in the execution of juveniles, there are only six other countries worldwide known to have executed juveniles in the last decade: Barbados (which has since raised the age to 18), Iran, Iraq, Nigeria, Pakistan and Bangladesh.

In contrast to U.S. law, Article 6.5 of the ICCPR prohibits the imposition of the death penalty on juveniles and on pregnant women. n13 It is historically germane to note that when President Carter first submitted the ICCPR to Congress for its constitutionally mandated advice and consent, the executive transmittal of the treaty included a blanket reservation against Article 6.5. Effectively, the reservation as submitted by President Carter provided that the U.S. retained its sovereign right to execute persons under 18 as well as pregnant women.

However, when President Bush resubmitted the ICCPR to Congress in 1991, the reservation against the prohibition of imposition of the death penalty applied only to the execution of minors, not to the execution of pregnant women. This U.S. acceptance of the ICCPR's prohibition against the imposition of the death penalty on pregnant women raises an intriguing question about the relationship of the international norm to U.S. domestic law. Has the U.S., by ratifying this human rights treaty constitutionally prohibited the imposition of the death penalty on a certain class of persons, to wit, pregnant women (or as it is a constitutional question one should say, per Justice Rhenquist, pregnant persons)? n14 It seems that the answer is a clear yes: the United States, by treaty, has agreed to limit its sovereign right to impose the death penalty in certain cases. This creates an interesting constitutional analytical construct because that prohibition would not be based upon Eighth Amendment jurisprudence—the basis for the U.S. death penalty jurisprudence. Rather, the prohibition would be constitutionally mandated by the Supremacy Clause.

Although the withdrawal of the reservation with respect to pregnant women was more likely than not the result of the Reagan/Bush Administrations' "choice" politics, the rationale is of no moment. The significance of the action lies in the prohibition of a domestic remedy by virtue of the application of international treaty law, the supreme law of the land. This consequence is concrete evidence of the possible domestic impact of international human rights norms: the expansion, development and transformation of U.S. rights jurisprudence.

Such analysis raises an interesting question with respect to the U.S. reservation against the prohibition on the execution of minors based upon the Supreme Court's Stanford decision. Could an international tribunal deem a reservation whereby a party seeks to retain the right to execute minors to be against the object and purpose of the ICCPR and, consequently, render it invalid—particularly in light of that treaty's Article 24 mandate that the State, among others, protect minors? In this respect it is significant that in March of 1995 the U.S. made its first ever appearance before the U.N. Human Rights Committee (hereinafter, "UNHRC"), following its 1992 ratification of the ICCPR, marking the first time in history that the U.S. government had to answer to an international body about its civil and political rights. Not surprisingly, the U.S. was grilled by 6 of the 18 committee members on this country's continuing policy of allowing the imposition of the death penalty on children who commit crimes when they are under the age of 18. The UNHRC asked the U.S. to explain its juvenile death penalty reservations, especially as the convention considers the ban on juvenile death sentences so important that countries can not violate it even during national emergencies. Under severe criticism, Conrad Harper, legal advisor for the U.S. State Department said "we recognize that very deep and very powerful arguments have been heard about the juvenile death penalty . . . This is under review, and we do not exclude the possibility of a change." n15

Similarly, various other questions arise. What if the U.S. had reserved against the prohibition of imposing the death penalty on pregnant women? Could such a reservation nonetheless have been construed as incompatible with the object and purpose of the treaty and thus, in all events, be deemed invalid? In addition, if the reservation regarding minors is deemed to be invalid as against the object and purpose of the treaty, are there any viable international or domestic fora available to prevent the U.S. from carrying out such executions?

Likewise, in light of ICCPR's Article 2 and Article 26 prohibitions against racial discrimination, if it is established that the United States' imposition of the death penalty disproportionately affects a protected racial group, does the imposition of such penalty place the U.S. in violation of its international obligations not to discriminate on the basis of race? n16 It is important in this context to note that introducing the U.S.'s initial report to the UNHRC, John Shattuck,
Assistant U.S. Secretary of State for Democracy, Human Rights and Labor acknowledged "that the United States' history of racism, slavery and racial segregation had among other factors posed obstacles to the full and optimal enjoyment by all Americans of the rights reflected in the Covenant. . . ." n17

Significantly, [*76] nearly 40% of those executed since 1976 have been black, although blacks constitute only 12% of the population. n18

This same question needs to be underscored with regard to execution of juveniles as existing data shows that 69% of all juveniles executed since 1600 whose race is known have been black; after 1900 75% of all executed juveniles have been black. n19 And, in spite of criticism on the practice of executing juveniles, Human Rights Watch indicated to the UNHRC that four of the nine juveniles executed in the U.S. since 1973 were killed in 1993. n20

Privacy and Proposition 187 are two other excellent examples of ways international human rights norms can expand, develop and transform U.S. law. In addition to the non-discrimination protections, international law, unlike our own constitution, expressly protects individuals’ right to privacy. Article 17 of the ICCPR states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." n21 Not only does the U.S. constitution not expressly protect privacy rights, although such rights have been found to exist in the "penumbra" of articulated rights, the penumbra does not protect all U.S. citizens alike. In Bowers v. Hardwick the United States Supreme Court concluded that adult, consensual homosexual conduct in the privacy of an individual's home was not to be afforded the same privacy protections that adult, consensual heterosexual conduct was granted. n22 In sharp contrast, the ICCPR's Article 17 privacy provision has been interpreted to include protection of sexual conduct between consenting adults--homosexual and heterosexual conduct alike. n23 Thus, contrary to the U.S. trend of demonizing or alienating gays and lesbians as a class, and in contrast to one court's holding that it is illegal even to legislate against discrimination against gays and lesbians--as Coloradans know--other members of the international community are going in the opposite direction. Indeed, discrimination against gays and lesbians has been the topic of discussion at numerous international conferences with measures being taken in the Conference on Security and Cooperation in Europe and the Council of Europe to help eliminate discrimination against gays and lesbians in the areas of health care, education, work, housing, stigmatization of youth, criminal laws, and freedom of movement, to name a few. To this end, the European Parliament passed a resolution on equal rights for homosexuals and lesbians in the European Community.

So clearly, it is not quite accurate to say, as the U.S. did in its report to the UNHRC, that no new protections come from the ICCPR and thus the U.S. has no need to pass enabling legislation that would make the treaty enforceable in domestic courts. n24 Perhaps what the U.S. government means is that it does not want to afford certain of its citizens myriad protections to which they are entitled under international human rights norms. And, as this essay proceeds to review certain laws such as the so-called "Save Our State" California proposition, it is evident that international human rights laws, such as the ICCPR, grant individuals access to substantial protections not available under U.S. domestic jurisprudence.

Various international human rights provisions afford grounds upon which to challenge the legality of Proposition 187 and its clone legislation. By agreeing to be bound to the non-discrimination provisions of ICCPR Article 2, every State party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." n25 Thus, Article 2 alone provides six bases of protection on equality grounds with four--language, social origin, birth or "other status"--not being part of the U.S.' Equal Protection safety net. Further, the ICCPR protects against "arbitrary or unlawful interference with . . . privacy, family, home or correspondence, [and] unlawful attacks on . . . honour and reputation;" n26 and provides that "every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the State." n27 Moreover, additional provisions protect [*78] the rights to life, n28 health, n29 education, n30 right to receive and impart information, n31 and of association. n32

With these international norms in mind, it is instructive to review Proposition 187. Its purpose is clearly articulated in its findings and declaration that the people of California have suffered and are suffering personal injury, damages and economic hardship because of the presence of "illegal aliens" in the state. It is significant, that there is no empirical
substantiation for the very _raison d'être_ of the legislative initiative.

Certainly, the choice of language itself is deeply troubling. Contrary to the sense created by the words--"illegal alien"--used to define the objects at whom the law is aimed, the legislation is not intended to reach unlawful, extra-terrestrial beings. Rather, its design is to identify a discrete group: immigrants, real people, whose nefarious criminality is simply their entry into the territorial jurisdiction of the U.S. without proper documentation. In fact, these people, who more often than not come to work to be able to support and provide for their families--an exemplary showing of family values--fill low-skilled, low-cost jobs that U.S. citizens will not contemplate accepting.

An initial focus on the concept of equality/non-discrimination, reveals that the Proposition's very definition of who is eligible to receive the social benefits addressed by the law--public education, health care, welfare benefits or social services--is disheartening, if not perverted. Certainly, two of the three eligibility classifications--those stating that U.S. citizens and aliens lawfully admitted as permanent residents are eligible to receive the specific benefits addressed--are plainly acceptable. The third category, however, is troubling. It provides for the grant of benefits to an alien lawfully admitted for a temporary period of time without regard to that alien's status at the time benefits are sought. By focusing on time of entry rather than when the application for benefits is made, such provision may be discriminatory. For example, Proposition 187 does not limit eligibility to receive benefits based upon a person's _illegal presence_ in the jurisdiction. Rather, the provision simply bases eligibility on a person's legal entry. In this regard, it is significant to underscore the undisputed fact that over 50% of the illegal presence of foreigners in this country is comprised of persons who overstay their visa, _i.e._, who enter legally but whose continued presence is illegal, or those who are from visa waiver states who only need a round trip ticket to enter the jurisdiction, but then do not return and thus also may be illegally present. Significantly, the demographics of those who overstay--Western and Eastern Europeans and other Non-Latina/o Whites--are such that they might not be identified as "diferente" and thus not given the dubious label "illegal aliens."

To be sure, the ICCPR's non-discrimination framework, and even our own narrower laws, suggest a grave equal protection problem. If indeed the concern is for the scarcity of economic resources, should we not be [*79] concerned about illegal _presence_ as well as entry? In this regard it is noteworthy that all the enhanced enforcement efforts currently afoot are aimed at border crossings, as evidenced by border patrol increases, whereas enforcement efforts to curb the other illegal presence are virtually non-existent.

There are also myriad human rights problems with the investigatory techniques set out in Proposition 187. The law mandates untrained administrative personnel, such as teachers and welfare or hospital intake clerks, to report persons whom they "suspect" are "illegal aliens" seeking to obtain the covered services. Human rights issues arise, among other places, in the information or "data" such administrators must use to establish their "suspicion": the person's appearance, meaning complexion, hair color and texture, and manner of dress--thinly veiled substitutes for national or social origin, color, race and ethnicity--all classifications protected under the ICCPR. A separate basis for suspicion can be a person's manner of talking, such as speaking "foreign-accented" or "broken" English, or speaking Spanish--all matters falling within the ICCPR's language protection.

Moreover, the refusal to provide primary and secondary education, even higher education, directly interferes with the right to an education and violates the right of association and the right to impart and receive information. In this regard, the persons whose rights are hindered are not only the children (and parents of the children) being denied access to schools, but also those children (and parents of those children) who are allowed to stay in school but whose instruction is going forward without the presence or participation of those excluded.

Similarly, the denial of medical services effects a denial not only of the right to health but also of other protected rights. For example, if one considers maternal and infant health issues, Proposition 187 interferes with women's right to equality on the basis of sex. The related concerns of maternal and infant mortality effect a possible denial of the protected right to life both of the mothers who die while pregnant, in childbirth or thereafter from complications and of the infants who die in childbirth or during infancy because of the denial of services.

These examples of the intersection of domestic and international human rights norms serve to underscore the thesis of this essay: a wealth of international human rights norms exist that can and will serve to develop, expand and transform our domestic rights jurisprudence. By bringing such norms home and using them diligently in our courts, we can bring their protection a little closer to being a reality. At the very least we can engage in discourse that will facilitate our bridge-building to a better place in the new century.

**FOOTNOTE-1:**


n4 See *The Paquete Habana*, 175 U.S. 677, 700 (1899).


n10 *Id. at 1130.*


n13 ICCPR, *supra* note 6, art. 6.5.


n16 This question, of course, needs to be contextualized: as of October 1994 the total number of death row inmates (known to LDF) was 2,948 with 1,446 (49.05%) being white, 1,180 (40.03%) being black, 205 (6.95%) Latina/o, 49 (1.66%) Native American, 22 (0.75%) Asian, 46 (1.56%) unknown, 2,907 were men; only 41 were women. Of the 253 executions one was a woman; the rest were men. Of those executed, 140 (55.33%) were white; 97 (38.34%) black; 15 (5.93%) Latina/o; 1 (0.39%) Native American.


n18 140 CONG. REC. S5340 (daily ed. May 2, 1994).

n19 NAACP LEGAL DEFENSE FUND, Paper on the death penalty and juveniles (on file with LA RAZA LAW JOURNAL).


n21 ICCPR, *supra* note 6, art. 17.


protection. These decisions are diametrically opposed to the U.S. Supreme Court's conclusion in Bowers.

n24 The U.S. declared the ICCPR to be a non-self-executing treaty, making it necessary for Congress to pass enabling legislation for the covenant to become domestically enforceable U.S. law. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992). Of course, some of the provisions may be domestically enforceable notwithstanding the absence of enabling legislation if the same provisions are contained in the Universal Declaration which could then be considered customary law.

n25 ICCPR, supra note 6, art. 2. See also Article 26 which provides that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Id. art. 26.

n26 Id. art. 17.

n27 Id. art. 24.

n28 Id. art. 6.1

n29 Universal Declaration, supra note 8, art. 25(1).

n30 Id. art. 26.

n31 ICCPR, supra note 6, art. 19.

n32 Id. art. 22.
INTRODUCTION

Affirmative action is under renewed attack. Students, university administrators, academics, politicians, workers, and business owners are asking whether affirmative action is still a viable way of pursuing integration, job opportunity, and social stability. Critics argue that affirmative action is a form of reverse discrimination and that it leads to stigmatization of its beneficiaries. Supporters respond that affirmative action is still an effective means of combating deeply ingrained racism. In the midst of the debate stand people of color who are looked upon as role models, people who supposedly have "made it" based on their talent and the opportunities made available to them through the civil rights movement and affirmative action.

These role models are manifestations of diversity -- the ultimate product of affirmative action's efforts to eradicate discrimination against and exclusion of minorities and women in public and private institutions. However, diversity is more than a mere afterthought in the liberal state. It merits the state's recognition and support because liberalism would be an empty concept without proof that the equal opportunity principle really works. The equal opportunity principle, however, rewards hardworking and meritorious individuals, not groups. When these previously excluded individuals "make it," they are called role models and offered as proof that liberalism is alive and well.

Professor Delgado, a Critical Race Theorist, doubts that writers of color should support affirmative action. Nor, says Delgado, should professionals of color accept the "role model" job that accompanies affirmative action. In a well-known essay, Delgado argues that a racist majority uses both concepts to exploit and demean the few of us who have made it and to otherwise pacify the rest of the minority population.

This essay responds to Delgado's piece by arguing that his criticism of the role model is based on an unduly narrow conception of that term, one that is model to which I correspond may not be a viable interpretation of the facts they have come to know about people of color like me. ...
based on role models as mere "exemplars of success" n8 for the purposes of affirmative action. A more accurate conception of the role model is based on a complex and multidimensional phenomenon that is both rooted in the community and critical to reform. Those of us who are committed to diversity must be role models. Serious, committed role models are not flunkies for liberalism. On the contrary, role models are in the best position to question affirmative action and its liberal premise, and to press for a communal and inclusive vision of diversity, which I call "collective recognition."

My argument will be based on the following cuento, a special type of narrative in Latino culture. Cuentos capture themes ranging from the hilarious to the fantastic. I have constructed a cuento that my father often used, one that uses a collage of intersubjective life experiences (neither the speaker nor the listener cares whether the experiences are the speaker's own) to relate the storyteller's perspectives on the human condition. n9 The narrative focuses on a Latino, Paco Oleas, who becomes a law professor and a role model.

We first encounter Paco in his office. Something is wrong. Someone has just left his office. The phone rings, making Paco jump slightly. On the other end is a law student who is participating in a mentor program Paco established years ago at his former law firm. "Good afternoon, professor!" said the student. "The Latino law students in the city have decided to plan a special program to recognize the Latino legal community here. Since you helped establish the mentor program for Latino law students, we would like you to present a talk on our theme, 'Celebrating Our Latino Role Models.' Would you like to participate?"

A wave of nausea slams into Paco. The receiver falls to the floor. After regaining his composure, Paco says, "Sure. Thanks for thinking of me. It's a good time for me to say a few things about role models."

What's wrong with Professor Oleas? Why did the phone call precipitate nausea? Why the cryptic reference to role models? His research in preparation for the talk might give us a clue.

II.

PACO'S RESEARCH

Paco decides to concentrate on Professor Delgado's critique of role models. Delgado's essay begins with a critical analysis of affirmative action. Affirmative action, Delgado says, ignores the history of the majority's exploitation of minorities and adopts instead a "forward-looking." [*84] teleological approach that seeks to achieve policy goals such as integration, social stability, and increased employment. n11 Since the majority decides when those goals have been reached or when they must be abandoned, affirmative action really is an "homeostatic device," ensuring that only a small number of people of color and women are hired and promoted within the world of the majority. n12

Affirmative action also enables the majority group to cast minorities in a demeaning light by requiring one to ask whether it is fair to hire a less-qualified person of color over a more-qualified white person. n13 The question is both absurd and superbly crafted, Delgado says, for it has allowed "the beneficiaries of history's largest affirmative action program," the majority, to divert attention away from unjust historical preferences in favor of the majority. n14 Moreover, the question reflects the dominant group's ability to establish and control the standards that are used to hire and promote the few minorities that have been "magically raised by affirmative action's unseen hand." n15 Minorities who have benefitted from affirmative action are thus made to feel "guilty, undeserving, and stigmatized." n16 It follows, says Delgado, that "affirmative action . . . is something no self-respecting attorney of color ought to support." n17 He calls upon us to "demystify, interrogate, and destabilize affirmative action." n18

Delgado then casts his critical eye on the related role model argument, which he describes as follows:The role model argument, in simplest form, holds that affirmative action is justified in order to provide communities of color with exemplars of success, without which they might conclude that certain social roles and professional opportunities are closed to them. Role models are expected to communicate to their communities of color with exemplars of success, "collective recognition." n19

In his view, the role-model argument further demeans people of color. [*85] The white-dominated institution does not hire the person of color because she deserves the job or because it is trying to rectify past discrimination. n20 Given the "instrumental and forward-looking" aspect of the argument, you, the person of color, are hired "because of what others think you will do for them. If they hire you now and you are a good role model, things will be better in the next generation." n21 The role model argument is also extremely useful to the majority because it ensures the development of a docile minority population that will outnumber--and have to support--an aging white population after the turn of the century. n22 Delgado articulates five reasons for rejecting the job of role model. First, uplifting "your entire people" is "tough," "sweaty work." n23 Second, you are treated as a means to an end, even by your own people. For
example, everybody expects the role model to give this speech or serve on that panel. n24 Third, the "job description is unclear." Role models are not sure whether they must perform the same tasks as their white counterparts in addition to their work with the community. n25 Fourth, a role model must be "assimilationist, never a cultural or economic nationalist, separatist, [or] radical reformer." n26 In other words, role models must adhere to "majoritarian social mores." n27 Finally, and most important to Delgado, role models are forced to lie to the extent that they prop up liberalism's equal-opportunity principle. We lie, for example, when we tell our children of color that they can be like us if they work and study hard and stay out of trouble. n28 The numbers of minorities that have "made it" in the white world tell a far different story. But if we were to tell the truth, majoritarians would label us "poor role model[s]." n29

For all these reasons, Delgado urges us not to apply for the job. You can do other more honorable, authentic things. You can be a mentor. You can be an "organic intellectual," offering analysis and action programs for our people. You can be a matriarch, a patriarch, a legend, or a provocateur. You can be a socially committed professional who marches to your own drummer. You can even be yourself. n30

[*86] Paco pauses on the last sentence--be yourself. What does that mean? Paco wonders whether there is a link between the concept of a role model and the meaning of "yourself." He thinks and writes.

III.

PACO TALKS

Having completed his research and written a paper, Paco welcomes the opportunity to share his thoughts on role models with the students who invited him to celebrate the solidarity and achievements of the Latino community.

"I am very pleased to be here with you this afternoon. We will be celebrating Latino role models tonight. Some of us are justifiably ambivalent about that concept. We may not know how to define a role model or we may not agree on a definition. Even if most of us can agree on some very general definition of the concept, we may disagree about its utility in general or about its particular applicability to each of us.

"Today, though, I would like to focus on Professor Delgado's thoughtful conception and critique of role models in a racist society. Delgado urges professionals of color to reject the 'role model' job in the context of affirmative action as it is defined by racist majoritarians. In his view, affirmative action and its corollary concept of role model are used to exploit and
demean the few of us who have 'made it' in the professions.

"I have been called a role model and I have called others the same. Never have I explicitly rejected the concept. But in light of Delgado's criticisms, I should re-examine parts of it accordingly."

A. Paco's Story

"I was born in Chicago. My father was Bolivian; he made a living making harps. My mother is North American, a 'gringa.' She has always been proud of her German heritage--I still remember wearing 'lederhosen' on occasion! She was also very proud to have married a Latin American. In fact, she raised me and my eight brothers and sisters in the Latin American tradition, which was very thick in Chicago. My parents' hard work kept us on the edge of middle class life--a modest apartment in the city, simple but good food on the table, clothes on our backs. I lived happily there.

"Life, of course, brings pain as well as happiness. I experienced the pain of being different and the shame of stigma. I knew the psychological pain of being called a 'spik' and a 'wetback.' I felt the physical pain of being beaten-up merely because I was the only Latino on a street-hockey team. I also felt the burning shame of being caught speaking Spanish on the city bus. I could feel others, including Latinos, staring at me, their faces filled with anger and shame. The bus is a ['melting pot zone,' like school. Speak English, you idiot!] I would say to myself.

"Shame and stigma followed me to a Southern city, where I completed high school. All of the high school students and teachers at my high school were black, except for a few white teachers who didn't last very long. I was the only non-black student there. Because of my skin color, I was called 'white boy,' 'honky,' 'cracker' and other wounding names. I nevertheless stayed at the school. I lived in blackness, n31 during and after school. Eventually, I earned the respect of my fellow human beings. Friends and enemies called me a 'reverse oreo,' meaning that I was white on the outside but black on the inside.

"I went to college in the North after graduating from high school. College was both exhilarating and frightening for me. Despite the friends I made at college, I often felt like a fish out of water. I found few Latinos or blacks on campus, either as students or professors. During the latter part of my undergraduate studies, I became interested in law and in particular the relationship between law and society.

"I applied to several law schools after graduating from college. I recall placing a check in the box marked 'Other Hispanic.' One day I received a letter of
acceptance from a prominent law school. The letter touted the diversity of its student body; twenty-five percent was comprised of racial and ethnic minorities, and women accounted for fifty percent of the entering class. I eagerly enrolled in that law school.

"After joining the Latino student group at the law school, I learned that Latino students sitting on the Admissions Committee had been fighting hard to increase the number of Latino students in the law school. I was a beneficiary of the battle. I still recall attending a reception that the Latino group held early in the first semester of my first year. We were celebrating the large first-year class of Latinos. Wanting to look professional, I dressed up in a (cheap) charcoal grey suit. The upper-class students in the group welcomed me and assigned me a 'mentor,' that is, a third-year Latino student who could show me the ropes. Being a terrified first-year law student at that point, I found great comfort in the smiling face of my mentor. Her smile seemed to say, 'I've survived and so will you!'

"That smile helped me survive hard times in law school. The curriculum was tough. So, too, was my experience with yet another form of stigma. Word got around that a good number of white students--maybe some of the students who sat next to me in class--thought that I and other minority students did not deserve to be in the law school. I recall reading racist graffiti in the bathrooms. A white student wrote an expose in the student newspaper, revealing that minority students with lower LSAT scores were admitted to the law school over more 'qualified' non-minority students. I also heard talk about how the 'special support services program' was filled with minority students who were 'clueless' in class. Even the few professors of color at the school were disparaged.

"But I am a survivor and an optimist. I worked hard in law school, learned how to play the game, and, after graduation, joined a large law firm. The firm had no people of color as partners. I knew of a few black associates at the firm, but there were no Latinos. I was the first. During my job interviews with various partners, they all seemed genuinely excited about having me 'come on board.' Many of them complimented me on my credentials. They talked about the importance of diversifying the profession. They also spoke of meritocracy. In the firm, 'you make it' strictly on your merits.'

"Soon after joining the firm, some of the partners encouraged me to attend the bar's activities, including job fairs, on behalf of the firm. I felt good about representing the firm. It troubled me, though, when both students and lawyers of color told me that my law firm, like most other major firms, was not truly interested in diversifying the profession. A Latino law student once told me, 'You know, Mr. Oleas, your law firm sent our Latino organization a letter, indicating that it wanted to consider minority applicants. The firm encouraged us to send resumes of interested students. We sent the firm a thick stack of resumes. None of us got an interview!'

"I eventually thought of an idea that might encourage diversity in both my law firm and other firms. Why not have the firm sponsor a 'mentor' program? 'We could start with a program for Latino law students in the local schools,' I suggested this to other Latino lawyers who were equally committed to their community. 'We could match Latino lawyers in the area with the students. The program's purpose would be to inspire and support Latino law students, particularly in the first year. The firm could sponsor events for the mentors and mentees. A dialogue could develop among Latinos, and between Latinos and firms like mine. A dynamic might develop, a dynamic that might promote diversity.'

"I suggested the program to several partners at the firm. They thought it was a good idea. 'You're a good role model, Paco. And there are others like you in this town. We do want to see a more diversified bar and this program might help.'

"Nearly one hundred lawyers and students attended the first meeting. Several prominent Latino lawyers spoke; they said they were gratified to see so many Latino law students. They told the students that when they went to law school, there were only a handful of Latino students. The students, too, were happy to meet and listen to the lawyers.

"The mentor program wasn't the only thing in my life, of course. I had begun a family and my other responsibilities at the law firm increased geometrically. Before I knew it, I was a couple of years away from being considered for partnership.

"About that time, a local paper wrote a lengthy article about my work at the firm. The article emphasized the popularity of my mentor program and the substantial pro bono work I had performed for 'marginalized people' in the city. A photo showed me, as you can see, a short man with short, jet black hair, shaking the hand of a much taller white man with perfectly combed greying hair. Both of us were smiling radiantly. The caption read: 'Managing partner describes Oleas as a perfect role model.'

"I resigned from the firm a few months after the publication of that article. I had grown uncomfortable with the perception that I was a minority 'superstar' at the firm. I was also frustrated that there were so few minorities either as partners or on the firm's
partnership track. n32 Moreover, I received mixed signals regarding the partnership decision and life thereafter. I was told by confidants that some influential members of the firm were concerned about the emphasis I had been placing on pro bono activities, especially the mentor program. "Will he be able to generate business for the firm--do the real work?" they asked. I also started asking myself what life would be like as the sole Latino partner at the firm. Would I be marginalized, trotted out for special occasions to demonstrate the firm's commitment to diversity? I could try to abandon my identity and think of myself as a businessman first and foremost--who just happens to be called Paco Oleas. But this possibility seemed very alien to me and frightened me to the core."

B. The Multidimensional Role Model

"Given what I've just told you about my life, Delgado's criticism of the role model seems to be right on the mark! Should I now hate myself for being, in Delgado's view, a 'flunky for the man,' a 'Tio Taco?' n33 According to Delgado, I should, at the very least, think of another term that can apply to me and others like me who seek greater diversity in the professions. Perhaps I should walk away from the job altogether."

"Then again, maybe I shouldn't. The more I think about it, the more I believe that a role model is a more complex and multidimensional concept than Delgado's description suggests. Under the more complex conception of the role model, I have no choice. If I continue to pursue my belief in diversity, I must inevitably play various roles and others will inevitably view me as a model."

1. The Justificatory Model

"Let's address the latter proposition first--the inevitability of being a model. As Delgado observes, the word 'model' in the term 'role model' [*90] suggests an exemplar of success which should be imitated. n34 The word, as thus defined, provides us with a widely recognized reference point, one which is used in one form or another in sociology. n35 However, the more complex meaning of the concept, examined in the context of affirmative action and race relations, can be understood by determining how and why well-intentioned liberals create what I will call the justificatory model."

"The justificatory model of a person, say a Latino like myself, is based upon facts that have been gathered by those wishing to create the model, in this case the liberal majoritarians in whose midst I now supposedly stand. n36 The facts are interpreted on the basis of the creator's background and experiences. Some of the facts, which may be based on 'stories' of people like myself, may or may not be accurate. Once the facts are gathered, they are organized in a coherent and stylized fashion."

"Thus, a model in these circumstances may be articulated as follows: 'We, the majoritarians, have some understanding of Latinos. Many of us have seen them (and even known them) in school, on the bus, or in the grocery store. Many of them have brown skin and dark hair. Many of them speak Spanish. Many of them believe in a strong family. Many, but not all, Latinos are born into poverty. Hardship and struggle have strengthened their character and their loyalty to the 'barrio'--the community. Their background also makes them tenacious survivors. Many of the Latinos who have been processed through law school will in all likelihood be able to work with us. They can be thoughtful and responsible, and, importantly, many of them believe in, and support, individual achievement. Since they played the game in law school, they will likely play the game in the profession.'"

"The model is useful because most majoritarians, given their backgrounds and experiences, can agree that it is a viable interpretation of the facts they have come to know about a minority group and that the model effectively advances the universality of liberalism's equal opportunity principle. The model, therefore, reaffirms majoritarian membership (we, in the majority, want those individuals of color to join us) while it simultaneously provides a self-perpetuating method of justifying the equal opportunity principle. n37

[*91] "The use of a justificatory model is rational and inevitable. Majoritarian partners use the model to recruit people of color for their law firms. Law schools use the model to recruit faculty of color, something I'll talk about in a moment. So even if we destabilize the current form of affirmative action in favor of some other approach, majoritarians and minorities would still interface through models. However, destabilization may change the models' content." n38

2. Human Beings Must Fulfill Roles

"At this point in my analysis I should carefully distinguish between a model and a human being. Others will view me as corresponding to a model. The model is only a general, abstract representation of me, the human being. In many cases, the representation is inaccurate, n39 though not radically. n40 Thus, a blurred image would result if we were to superimpose the model I have just described over Paco Oleas, the human being informed by the narrative of his life. n41

"In my day-to-day living, I don't perceive myself as acting as a model. Instead, I perceive myself as acting as a human being fulfilling various roles in various communities; my actions governed and defined by my
The term 'role' relates to role fulfillment by human beings; role fulfillment is an inevitable and useful means of perpetuating culture. A definition of role model that captures these concepts seems unobjectionable.  

The models I speak of here are important teaching tools within the community. As Delgado's description suggests, models in this context are exemplars of success that should be imitated, for through such imitation we confirm our individual and communal identities and provide for ourselves a reference point for making sense of the world around us. Throughout the narrative that is my life I have used such models, ranging from my teachers and parents to Atahualpa, Simon Bolivar, Cesar Chavez, Rigoberta Menchu, Rosa Parks, Malcolm X, Martin Luther King, Jr., Judge Cardozo, Justice Thurgood Marshall, and others. We can call these 'exemplar models.' Here, too, we must recognize that there is a difference between the passive exemplar model and the human being.

"Let's summarize at this point. My analysis thus far suggests that the word 'model' in the term 'role model' is a passive device that must be used in a multicultural society. The model can be justificatory or exemplar. The term 'role' relates to role fulfillment by human beings; role fulfillment is an inevitable and useful means of perpetuating culture. A definition of role model that captures these concepts seems unobjectionable."

1. Paco's Story Continued

"I would like to place these criticisms in context by describing what happened to me after I left the law firm. Thanks to a friend, who is popularly known as the 'crusader,' I was persuaded that I could bring a new dimension to my commitment to diversity by moving to academia. With the crusader's help, I secured a tenure-track position at a prominent law school. I later learned that the Latino students had been pressing the administration for some time to add a Latino to the faculty. The school stated publicly, however, that it did not hire me because of the crusader's pressure or the students' activism.

"I plunged into my academic work and soon found myself overwhelmed. My teaching, writing, committee work, and speeches easily filled my days and nights. I also worked closely with the Latino students at the school, trying to continue the role I played in the private sector."

"Time flew by. Before I knew it, I was in my final year before the tenure decision. I worked hard, trying to be the good teacher, the good writer/thinker, the good colleague, and the good mentor. I was so committed to the latter role, that I scheduled a property law review session for first year Latino students. Although I scheduled the review at the request of the Latino student group, only a few students attended the session. I later found out that a group of Latino students questioned my motives: 'He's been doing these things for us only because he's up for tenure. As soon as he gets it, we'll never see him. He's not one of us anyway--he's Bolivian!' To make matters worse, the signs announcing the session caused an uproar among the rest of the student body and the faculty: 'How dare he schedule a review exclusively for the benefit of one minority group!'"

"A few days after the incident, I sat dazed in my office. One of my colleagues knocked on the door and entered. 'You know, Paco, you don't have to do any of the things you've been doing with the Latino students. It's not part of your job description. In fact, some of these activities may offend some of your colleagues who will vote on your tenure.'"

"I don't understand,' I responded. The work I do with Latinos is part of who I am. Surely, the faculty understood this when they hired me and expected that I would perform that function. In fact, during my initial interview with the faculty, we talked about my work at the law firm on behalf of Latinos and how I might be
able to transfer my skills and commitment in that regard to the academic community.'

"Relax,' my colleague said as he walked out of the office, 'just be yourself.' Ironically, I then received the call from your organization, asking me to help you celebrate Latino role models!

"This account suggests, once again, that Delgado's criticisms are valid. But if we look at his reasons in light of the inevitability of the justificatory and exemplar models I've described and the importance of role fulfillment, we shall see that much of his criticism is unwarranted."

2. The Reasons

"Tough, Sweaty Work for Assimilationists. Focusing on his first and fourth reasons, Delgado argues that we should reject the job because assimilation is not worth the toil. The argument does not survive close analysis. Being a passive justificatory or exemplar model requires no work. Role fulfillment is tough, though. It is a struggle for all human beings. Learning through practice and teaching through example make all of us sweat. Perhaps Delgado is saying, 'We in the minority wouldn't mind sweating if we could define our own projects--if our sweat would serve our own purposes.'

[^95] "Of course, Delgado understands that to talk of 'our own' projects and 'our own' purposes is to recognize that there are other competing projects and purposes in our multicultural society. To be more precise, Delgado might add, 'Sweating is worth it only to the extent that the marginalized can effectively challenge the power of the dominant group and the projects it seeks to impose on the marginalized through supposedly universal principles. Because role models are assimilationists, they are not capable of performing that task. Therefore, their hard work and sweat would be in vain or they would serve the wrong purpose.'

"I disagree. In fact, the opposite is true. The role model is critical to radical reform. She can be what Michael Walzer has described as a 'connected critic' in the context of social criticism. The connected critic lives in a thick moral world, and her job is to generate a critical interpretation of that world. Social criticism, however, requires 'critical distance.' Although the conventional view of critical distance requires the critic to be a detached 'outsider,' Walzer believes that interpretive moral argument is better understood through an insider, one who lives by the 'practices and arrangements' of the moral world that is the object of the criticism. The insider's criticism is legitimate and effective because critical distance is 'measured in inches' and because members of a community, through their conversations with each other, seek to justify their actions to each other through high standards. These high standards can be interpreted critically."

"By virtue of her commitment to diversity, the role model is 'connected' to her fellow human beings both in the majority and the minority. She can also be a 'critic' because of her critical distance--the disjunction between the justificatory/exemplar model and the human being: The human being is not a model; she merely corresponds to it. The disjunction enables the human being to interpret the majoritarians' standards critically. She can destabilize the justificatory model by exposing the weaknesses and contradictions in the dominant class' universal principles. In the words of Italian Marxist Antonio Gramsci, she can initiate 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.'

"Thus, the students who fought to get me and other Latinos into law school were role models exercising their power as connected critics when they argued to the administration that the school had to admit more Latino students if they were truly committed to diversity. The crusader, another role model, used his power as a connected critic when he placed pressure on law schools to increase their hiring of Latino faculty. The students at my current law school were role models acting as connected critics when they threatened to accuse the law school publicly of duplicity if the school did not hire me. I used my powers as a connected critic when I scheduled a property law review session not long ago for Latino law students, despite objections that I was wrongly catering exclusively to one group.

"Our jobs as role models may be tough and sweaty but they are undoubtedly worth the toil. Indeed, the Critical Race Theory movement would not be possible without the voices of role models!

"Means to an End. Even if the job is worth it, says Delgado, one should not be treated as means to an end. So what if the model is treated as a means to an end? Models are supposed to serve this function. What may trouble Delgado is the possibility that a human being would be hired for reasons other than merit. But before determining whether a person deserves the job, one must be clear about the criteria that will be applied to each candidate--the job qualifications. Let's suppose that an institution, say a law firm, wants more Latinos, Blacks, Native Americans, and Asian Americans as associates and partners. Thus, one of the firm's criteria,
one of the job qualifications, focuses on whether the candidate is a member of [*97] that group. If the firm takes its criteria seriously and hires people of color, it *is* hiring these individuals because, among other factors, they *deserve* the job over their white counterparts. n60 Moreover, if they are hired on this basis, their 'own people' may legitimately expect these people to address their interests and concerns, just as any constituency may look upon their 'experts' for advice and guidance.

"Delgado correctly characterizes as absurd the question whether, in the context of affirmative action it is fair to hire a 'less-qualified' person of color over a 'more-qualified' white person. The question is absurd because we are more qualified than our white counterparts in the sense I've just described. Consequently, we should rid ourselves of guilt and break free of stigma, particularly in light of the moral imperative I will mention in a moment.

"Unclear Job Description. Delgado's complaint in this regard reflects the conflict between equal opportunity's emphasis on the individual and the communitarian nature of our roles. Predictably, we receive mixed signals. When we are hired in the name of diversity, our employers recognize us for our solidarity with our communities of color and they expect us to bring this 'expertise' to the job. Yet, as we climb the ladder towards job security and fulfillment, we are told that we ultimately must 'make it' on our 'individual' merit. Our colleagues stop by our offices and tell us that we don't have to demonstrate solidarity with our communities in order to gain job security. In fact, we are told to do less of that type of work and to concentrate instead on the stuff that really counts.

"The solution, it seems to me, is not to walk away or to insist on a different label for ourselves. There are other alternatives. Professionals of color should force the question: 'What do you want from us, really?' If our employers' response is that they want us to do everything that our majoritarian counterparts do--and this is the response we should seek--as well as perform our functions with our communities, we should insist on additional compensation for our expertise. However, the better approach would be to insist on many more professionals of color to share the responsibilities for our community work.

"Lying. Delgado's assertion that role models are *required* to tell big, [*98] whopping lies' n61 is misleading. The justificatory model I've described may become radically inaccurate and defective (and therefore less useful to majoritarians), but it cannot lie. Nor can exemplar models lie. Human beings lie. If I go to a gathering of inner city Latino youth and tell them that they too could become a law professor if they simply work hard and stay out of trouble, n62 I could be called a liar or a fool, just like any other person could be called a liar or a fool for negligently or recklessly misrepresenting facts. But I am not forced to make that statement because I am a role model.

"What explains, then, Delgado's observation that I would be labeled a 'poor role model' if I were to tell these inner city youth that they have very little chance of becoming law professors? The explanation focuses on the justificatory model: it is not functioning well. When a majoritarian says that I am a poor role model, she is saying that the *model* to which I correspond may not be a viable interpretation of the facts they have come to know about people of color like me. Nor is the model effectively advancing the universal principle of equal opportunity. In other words, if this majoritarian were to superimpose the model over me at this point, the image would be radically blurred. n63

"A similar phenomenon explains the terms 'Tio Taco,' 'Uncle Tom,' and 'Oreo.' As people of color, we use these terms to declare that one of our exemplar models has lost his utility, i.e., that he should no longer be imitated in order to confirm our individual and communal identities or to provide us with a reference point for making sense of the world. In other words, an Oreo can't be trusted because although he is black on the outside, he is really white on the inside. This usually means that the Oreo unrealistically projects the majoritarians' equal opportunity principle, a principle which makes no sense to the marginalized. n64 Understandably, then, Delgado calls upon us to be 'mentors' rather than role models because a mentor n65 is 'one who tells aspiring young persons of color truthfully what it is like to practice your profession in a society dominated by race.' n66

"Notice the dilemma. Majoritarians are likely to agree with Delgado that human beings who correspond to models should be truthful. After [*99] all, a liar or fool (a Tio Taco or Oreo) is counterproductive because he breeds resentment among people of color. If, however, majoritarians want these human beings to be truthful, they increase the risk that the justificatory model they have adopted will lose its viability."

D. Of Course We Want to Be Role Models!

"This observation brings me to my conclusion this afternoon. All of us *should apply for the job of role model!* All people of color who are seriously committed to diversity should fulfill the role of the connected critic. As role models, we can press the majoritarians' dilemma. When we tell the truth, they may resist changing the justificatory model n67 and instead try to replace us on the grounds that we are poor role models. But what if the replacement presses
the dilemma? What if the replacement's replacement presses the dilemma? Perhaps the content and the purpose of the justificatory model will change? n68

"By pressing the dilemma, role models can 'demystify, interrogate, and destabilize' current notions of affirmative action, which seek to advance individuals of color into the world of the majority through the equal opportunity principle. We should reject the term affirmative action altogether and adopt instead the term 'collective recognition.' 'Collective' refers not only to the communities that live within us and give meaning to our lives as people of color but also to our solidarity with all human beings engaged in the struggle of life. 'Recognition' refers to our moral obligation to recognize and manifest this collectivity in our public and private lives. n69 Role models can constantly remind us that forward-looking-but-ephemeral [*100] policy goals articulated by a dominant group (Delgado's 'homeostatic device') cannot trump the moral obligation.

"'Not so fast,' you say. 'Do I have to be a role model?' This question raises what Professor David Wilkins has called the 'obligation thesis,' which posits that professionals of color have moral obligations towards their communities that must be balanced against other legitimate professional duties and personal commitments when deciding on particular actions and, more generally, when constructing a morally acceptable life plan.' n70 The answer to the question is 'You ought to be a role model, especially if you "checked the box" on the law school application indicating your racial or ethnic identity.' For by checking the box you implicitly, if not explicitly (when combined with other statements in your application), accepted the importance of diversity to the law school, to the legal profession, and to society. And the moral imperative of diversity cannot be sustained without your participation. As Wilkins has pointed out, even if you didn't check the box, you should not be permitted to be a free rider with respect to a public good--the diversity that has come about through the struggle of others. n71

"Maybe the sense of obligation is not the problem, though. Many of us might feel obligated to be role models but nevertheless be reluctant to take this job because the communitarian vision I have just outlined forces us to relinquish ownership of our individual identity--it endangers the self. Without such ownership, role modeling seems to expose the self to the pernicious effects of essentialism--the assumption that Latinos (and [*101] other minority groups) all think alike. n72 The self is also apparently attacked by the 'you're not ____ enough because you're Bolivian' or 'you're not Black enough because you're of black Cuban lineage' or 'you're not a good enough role model because you're a political conservative.' n73 The predictable and understandable reaction is to reject role modeling and march to your own drummer--even be yourself! n74

"No one would seriously dispute the proposition that protection of the self is essential. The communitarian ethic recognizes this need, for communities could not exist without individuals--with a sense of self--to animate them. n75 However, one's identity, one's sense of self is shaped by others in the community. n76 Thus, to claim a protective ownership of our individual identities is to claim ownership of the communities that constitute each of us.

Rather than rejecting the job of role model, people of color should instead empower themselves through strong criticisms of their own communities, criticisms which flow from their positions as connected critics. By doing so, collective recognition becomes a prismatic consensus that is fluid, inclusionary, and liberating."

IV.

PACO SMILES

As he gathers his notes, Paco realizes that his back is wet with sweat. He reaches for a glass of water to relieve his dry, scratchy throat. As he places the glass back on the lectern, he notices that a student is standing just behind him. He turns around and sees an individual dressed in a charcoal grey suit, immaculate white shirt, and carefully polished shoes. Despite this otherwise crisp appearance, the student seems ill at ease. Splotches cover a face that on any other given day would have proudly displayed healthy, handsome brown skin. The student's blood-shot eyes add to the unmistakable signs of a terrified 1L. The student shakes Paco's hand vigorously. Paco is tired, his soul weary. But he smiles. And the student smiles back.

FOOTNOTE-1:

n1 The intensity of the affirmative action debate increased dramatically after Adarand v. Pena, 115 S. Ct. 2097 (1995), where the U.S. Supreme Court held that the strict scrutiny standard is applicable to federal affirmative action programs that use racial or ethnic classifications as the basis for decision making. Id. at 2113. The Court thus overruled Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), to the extent that it prescribed a more lenient standard of review--"intermediate scrutiny"--for federal affirmative action
programs. **Adarand, 115 S. Ct. at 2113.** For a Justice Department analysis of the case, see Justice Department Memorandum on Supreme Court's Adarand Decision, 1995 D.L.R. 125 d33 (June 29, 1995). Relying heavily on Adarand, the U.S. Court of Appeals for the Fifth Circuit recently ruled that the University of Texas School of Law could not "use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school." **Hopwood v. Texas, 78 F.3d 932,962 (5th Cir. 1996).** For newspaper articles on affirmative action, see Nicholas Lemann, *What Happened to the Case for Affirmative Action*, N.Y. Times, July 11, 1995 § 6 (Magazine), at 36; Karen Brandon, *Affirmative Action Smoldering in '96: Efforts to Repeal Race and Sex-Based Hiring Practices Remain a Volatile Issue*, Orlando Sentinel, Jan. 21, 1996, at G1 (describing efforts in California and other states to repeal affirmative action measures); Amy Wallace, *UC Regents Refuse to Yield on Affirmative Action Ban*, L.A. Times, Jan. 19, 1996, at A1 (reporting current developments in the University of California's ban on affirmative action). For an assessment of affirmative action in the context of multiculturalism, see generally Symposium, *Race and Remedy in A Multicultural Society*, 47 STAN. L. REV. 819 (1995).

n2 See infra text accompanying note 16.


n5 See **University of California v. Bakke, 438 U.S. 265, 315 (1978) (plurality opinion)(increasing racial and ethnic diversity of university student body constitutes compelling government interest because it enriches academic experience).** But see **Hopwood v. Texas, 78 F.3d 932, 948 (5th Cir. 1996)** (increasing racial and ethnic diversity of student body at University of Texas School of Law "cannot be a state interest compelling enough to meet the steep standard of strict scrutiny.").

n6 See **JOHN RAWLS, A THEORY OF JUSTICE 302 (1971)** (principles of justice require in part that social and economic equalities be arranged so that (i) they provide greatest benefit to the least advantaged and (ii) they are "attached to offices and positions open to all under conditions of fair equality and equal opportunity"); Michael K. Braswell et al., *Affirmative Action: An Assessment of its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 367-69 (quoting President Kennedy's executive order articulating government policy to "promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin").

n7 See Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model?, 89 MICH. L. REV. 1222 (1991). For other critical assessments of role models, see also Anita L. Allen, *On Being A Role Model, 6 BERKELEY WOMEN'S L.J. 22 (1990-91); Taunya Lovell Banks, Two Life Stories: Reflections of One Black Woman Law Professor, 6 BERKELEY WOMEN'S L.J. 46 (1990-91); Lani Guinier, Of Gentlemen and Role Models, 6
BERKELEY WOMEN'S L.J. 93 (1990-91).

n8 Delgado, supra note 7, at 1223 n.5.


n10 The term "Hispanic" may be preferred to "Latino," depending on the region of the country and the groups within that region. See EARL SHORRIS, LATINOS: A BIOGRAPHY OF THE PEOPLE xvi-xvii (1992).

n11 Delgado, supra note 7, at 1223.

n12 Id. at 1224.

n13 Id.

n14 Id. at 1224-25.

n15 Id. at 1225.

n16 Id. (emphasis in original); see STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 12 (1991) ("So many Americans seem to treat receipt of the benefits of affirmative action as a badge of shame."); SHELBY STEELE, THE CONTENT OF OUR CHARACTER 116 (1990) ("One of the most troubling effects of racial preferences for blacks is a kind of demoralization, or put another way, an enlargement of self-doubt.").

n17 Delgado, supra note 7, at 1225-26.

n18 Id. at 1226.

n19 Id. at 1223 n.5.

n20 Id. at 1226.

n21 Id.

n22 Id. at 1230.

n23 Id. at 1226-27. Delgado notes elsewhere that storytelling is "frequently ironic or satiric." Delgado, supra note 9, at 2414.

n24 Delgado, supra note 7, at 1227.

n25 Id.

n26 Id.

n27 Id. at 1228.

n28 Id.

n29 Id. at 1229.

n30 Id. at 1230-31 (footnotes omitted).

n31 Cornell West has stated: [Blackness] assume[s] neither a black essence that all black people share nor one black perspective to which all black people should adhere. . . . Instead, blackness is understood to be either the perennial possibility of white supremacist abuse or the distinct styles and dominant modes of expression found in black cultures and communities. These styles and modes are diverse--yet they do stand apart from those of other groups (even as they are shaped by and shape those of other groups). CORNEL WEST, RACE MATTERS 28 (1993).

n32 See Berta Esperanza Hernandez Truyol, Building Bridges--Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement, 25 COLUM. RTS. L. REV. 369, 401-02 (1994) (discussing 1992 survey of 251 largest law firms and noting that Latinos/as constituted only 1.2% of total lawyers, 0.6% of total partners, and 1.6% of total associates).

n33 The term is the Latino equivalent of an 'Uncle Tom' in Black culture.

n34 See supra text accompanying note 19.

n35 See, e.g., ALBERT BANDURA, AGGRESSION: A SOCIAL LEARNING ANALYSIS 68-90(1973)(discussing the modeling process as it relates to aggression); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987) (arguing that mainstream role models in poor sectors serve important functions); Elizabeth B. Bolton, A Conceptual Analysis of the Mentor Relationship in the Career Development of Women, 30 ADULT EDUC. 195, 196-98 (1980) ("In our society it is normal for young people to model their future role after their parents and other adult members in the community through imitation."); Theodore D. Kemper, Reference Groups, Socialization and Achievement, 33 AM. SOC. REV. 31 (1968)(describing model as individual who demonstrates how something is done).

n37 According to Kuhn, the study of paradigms . . . is what mainly prepares the student for membership in the particular scientific community with which he will later practice. Because he there joins men who learned the bases of their field from the same concrete models, his subsequent practice will seldom evoke overt disagreement over fundamentals. Men whose research is based on shared paradigms are committed to the same rules and standards for scientific practice. That commitment and the apparent consensus it produces are prerequisites for normal science, i.e., for the genesis and continuation of a particular research tradition. Id. at 11; see also Delgado, supra note 9, at 2412 ("The stories or narratives told by the ingroup [dominant group] remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.").

n38 See KUHN, supra note 36, at 122-23, 150-55 (explaining process of paradigm shifts).

n39 The disjunction I describe is familiar in law. Professor Kessler wrote, "Anglo-American law never became the perfect mirror image of free enterprise capitalism, but always retained a measure of independence from the underlying market relations it was helping to rationalize, a characteristic that neo-Marxist writers describe as 'relative autonomy.'" Friedrich Kessler, Introduction: Contract as a Principle of Order, in CONTRACTS 8 (Friedrich Kessler et al. eds., 3d ed. 1986) (quoting Mark Tushnet).

n40 A liberal majoritarian who believes in the equal opportunity principle would find little utility in a radically inaccurate model. He would call such a model a stereotype. See generally Kimberle Williams Crenshaw, Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1370-76 (1988) (noting that white supremacists have used stereotypes to rationalize oppression of blacks; stereotypes serve hegemonic function by perpetuating mythology of both blacks and whites).

n41 In this sense, the alternative characters Delgado would have us adopt--mentor, organic intellectual, matriarch, patriarch, legend, provocateur, and socially committed professional--are susceptible to the same analysis. These characters can be viewed as stylized images that may or may not correspond to real people.


n43 See supra text accompanying note 30.


n45 See generally Gerald P. Lopez, The Idea of a Constitution in the Chicano Tradition, 37 J. LEG. EDUC. 162 (1987) (describing "the tradition of East L.A."). See also GREGORY HOWARD WILLIAMS, LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK (1995). In this autobiography, Gregory Williams, Dean of the Ohio State University College of Law, writes about his experiences as a "white boy who discovered he was black." The child of a white mother and a light-skinned African American, Williams passed for a white boy in Virginia. He then moved to Muncie, Indiana, where he first learned of his African American heritage and lived in an African American community. Years later, his father told him he had to be white to "make it out of this hellhole." Id. at 156. But Williams did not "want to be white." Id. at 157. "I hadn't wanted to be colored, but too much had happened to me in Muncie to be a part of the white world that rejected me so completely." Id. at 156.
Recalling NAACP's executive director Walter White, who was blond, blue-eyed, and white-skinned but nevertheless part African American, Williams states: "If Walter White could choose to remain in the black community and make a difference, so could I. No matter what . . . anyone else said or thought. I knew who I was and what I wanted to be." Id. Despite his white skin, Williams knew who he was--an African American--because of the narrative he had lived in Muncie.

Years later, Williams' white mother came to Muncie. She had married a white man, who offered to adopt Williams and his brother in order to rescue them from the prejudice of Muncie. Williams writes: The conditions for becoming part of her life became very clear to me. We could reenter her world if we rejected the one in which we had lived for the past ten years. . . . Gaining acceptance to her world required that we deny our black heritage and pretend that the people and circumstances of our life in Muncie did not exist. . . . She expected us to move back into her life without a past, without roots. . . I knew this was something we could never do. Id. at 281.

n46 See Kemper, supra note 35 (describing sociological definitions of role models).

n47 David B. Wilkins, Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers, 45 STAN. L. REV. 1981, 1991 (1993) (suggesting that "the achievements of black corporate lawyers [as "passive role models"] might inspire other young black women and men to strive harder to become successful in their own right.").

n48 See generally Delgado, supra note 7, at 1226 ("We could, of course, take our own program, with our own goals, our own theoretical grounding, and our own managers and call it 'Affirmative Action.'").

n49 See Richard Delgado, Brewer's Plea: Critical Thoughts on Common Cause, 44 VAND. L. REV. 1, 14 (1991) ("Conflict and vigorous competition thus may be more in order today" in context of theoretical approach to affirmative action).

n50 See Richard Delgado, When A Story Is Just a Story: Does Voice Really Matter, 76 VA. L. REV. 95, 103 (1990) (defining dominant discourse as "the collection of ideas, concepts, presuppositions, and arguments that make up liberal legalism" and asserting that "one of its principal functions is to make reform difficult to achieve or even imagine"); see generally Delgado, supra note 7, at 1226 (favoring particularist over dominant group's universalist approach to civil rights analysis).


n52 Id. at 18-32.

n53 Id. at 36.

n54 Id. at 36-38. In a recent article, Delgado suggests that, in light of racism and other "systemic social ills," civic republicans should stop talking to each other and instead talk to "outsiders." Richard Delgado, Rodrigo's Fifth Chronicles: Civitas, Civil Wrongs, and the Politics of Denial, 45 STAN. L. REV. 1581, 1604 (1993). Through an exchange between Delgado's fictional Professor and Rodrigo (Delgado's alter ego), Delgado states:[Delgado] And do you think that's true in general--that social reform relies on the perspective of the outsider, the heretic who lives outside the culture and thus sees and is in position to articulate its defects?

[Rodrigo] Yes. Id. at 1602. But see infra note 56 (noting that Delgado's outsider is not too removed from society).

n55 WALZER, supra note 51, at 39.

n56 The social critic steps away from power relationships in society--the "ambition to whisper in the ear of the prince"--but not from society itself. She is thus "[a] little to the side, but not outside." Id. at 60-61. Delgado seems to describe the same distance when he characterizes people of color, such as the fictional professor in his chronicles, as "outsiders." Delgado, supra note 54, at 1598.

n57 WALZER, supra note 51, at 47-48.

n58 See Delgado, supra note 7, at 1230 n.50 (attributing the term 'organic
intellectual,' a people's intellectual, to Antonio Gramsci).

n59 ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 195 (Quintin Hoare & Geoffrey Nowell Smith trans. & eds., International Publishers 1971)(1985). The concept of the connected critic is similar to professor Mari Matsuda's concept of "multiple consciousness," which focuses on the ability to shift back and forth between the consciousness of a person of color and white consciousness. Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 WOMEN'S RTS. L. RPTR. 1 (1992). Black women teaching in predominantly white law schools have referred to Matsuda's concept in the context of role modeling. See Guinier, supra note 7; Adrien Katherine Wing, Brief Reflections Toward a Multiplicative Theory and Praxis of Being, 6 BERKELEY WOMEN'S L.J. 181 (1990-91).

n60 Patricia Williams' view of affirmative action as "structured preferences" is instructive in this regard: Standards are nothing more than structured preferences. Preferential treatment isn't inherently dirty; seeing its ubiquity, within and without racial politics, is the key to the underground vaults of freedom locked up in the idea of whom one likes. The whole historical object of equal opportunity, formal or informal, is to structure preferences for rather than against--to like rather than dislike--the participation of black people. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 103 (1991). Dworkin has similarly defended affirmative action on the grounds that "there is no combination of abilities and skills and traits that constitutes 'merit' in the abstract." RONALD DWORCKIN, A MATTER OF PRINCIPLE 299 (1985). He argues that black skin is a "merit" in the context of a quota system to admit more blacks to medical school and in light of society's need for medical service. Id. One might ask, however, "How can skin color be viewed as merit when one has no control over that attribute?" From a moral point of view, we cannot say that we deserve to be born with any attributes, be they skin color, intelligence, physical ability, or any number of talents. See Carrasco, supra note 44, at 279 (discussing Rawls' veil of ignorance).

n61 Delgado, supra note 7, at 1228.

n62 See id.

n63 See WILLIAMS, supra note 60, at 116 ("Blacks who refuse the protective shell of white goodness and insist that they are black are inconsistent with the paradigm of goodness, and therefore they are bad.").

n64 The marginalized person asks, "What equality? What opportunity?" See Richard Delgado, Rodrigo's Third Chronicle: Care, Competition and the Redemptive Tragedy of Race, 81 CAL. L. REV. 387, 405-06 (1993) (describing Black/Brown underclass and noting that the "average young Black gang member, if he watched TV at all, would be amazed at the number of cardigan-wearing Black doctors and lawyers that appear there--all out of proportion to their numbers in real life") (citing ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992)).

n65 A mentor "personalizes the modeling influences for the individual by a direct involvement not necessarily implied by a role model. Thus in addition to being a role model, the mentor acts as a guide, a tutor or coach, and a confidant." Bolton, supra note 35, at 198. A mentor thus corresponds only to the exemplar model; the term does not embrace the justificatory model I have described.

n66 Delgado, supra note 7, at 1230 n.49.

n67 See KUHN, supra note 36, at 151 (describing resistance to paradigm shifts "particularly from those whose productive careers have committed them to an older tradition of normal science. . . . The source of resistance is the assurance that the older paradigm will ultimately solve its problems."); Delgado, supra note 7, at 1595-98 (arguing that normative discourse deflects attention away from declining society infected by racism, sexism, and other ills and instead we talk to each other in inscribed, circular terms).
See THOMAS S. KUHN, THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND USAGE 234(1977) (arguing that "well-defined and deeply ingrained" scientific tradition "seems more productive of tradition-shattering novelties . . . . because no other sort of work is so well suited to isolate . . . those loci of trouble or causes of crisis upon whose recognition the most fundamental advances in basic sciences depend.").

The ultimate success of the civic republican revival (led by Cass Sunstein, Bruce Ackerman, and Frank Michelman) depends critically on diversity. While emphasizing political dialogue based on both public values and a common good, the new civic republicanism stresses the importance including previously excluded groups in the dialogue. See generally Stephen M. Feldman, Whose Common Good? Racism in the Political Community, 80 GEO. L.J. 1835, 1849-55 (1992) (discussing the new civic republicanism); Stephen M. Feldman, The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism, 81 GEO. L.J. 2243 (1993) (critically assessing Michelman's dialogic view of politics); Cynthia V. Ward, The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix, 91 COLUM. L. REV. 581 (1991) (discussing aspects of civic republicanism and critically assessing claim that republicanism can incorporate organized disadvantaged groups as separate political entities into a polity based on deliberation and citizenship).

Critical race theorists have questioned civic republicanism's ability to overcome racism and radical inequality. See Derrick Bell & Preeta Bansal, The Republican Revival and Race, 97 YALE L.J. 1609, 1610-12 (1988) (republicanism is based on racist consensus); Richard Delgado, Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments On Behalf of the Nonwhite Underclass, 78 GEO. L.J. 1929, 1939-40 (1990) (dialogic communitarianism is "weak spur to action" because dialog takes place under circumstances of radical inequality). Although these criticisms are warranted, the ability to stress inclusion and diversity in dialogue gives the connected critic an opportunity to stress diversity as a moral imperative. See also Feldman, Persistence of Power, supra note 69, at 2278 (under post-modern interpretivist approach to republicanism "the vitality of communal diversity emerges quite clearly" and "difference is as central as consensus to building community.").

Wilkins, supra note 47, at 1984 (focusing on the obligations of black corporate lawyers to the black community).

Wilkins states:Like clean air, a less racist and hostile environment is a "public good" that black corporate lawyers cannot do without. Basic principles of fair play, reciprocity, and gratitude counsel in favor of recognizing an obligation to repay this benefit with actions that support the continued production of the public good. Id. at 2006-07.

Id. at 1993-95.

See generally Irene Sege, Not Black Enough?, Boston Globe, Feb. 9, 1995, at 63 (describing Northwestern University Law School's refusal to hire Maria Hylton, a law professor of black Cuban and Irish-Australian heritage); Charles R. Lawrence III, supra note 1, at 819, 841 ("Attacks on coalition efforts from inside communities of color usually assume a nationalist stance, accusing coalitionists of being insufficiently identified with their own race, as in 'not black enough,' or of collaborating with the enemy.").

See supra note 30 and accompanying text.

See generally Carrasco, supra note 44, at 292-96.
n76 See id. at 291 (discussing Charles Taylor's view of human beings as self-interpreting animals whose identity depends on language generated in the community).